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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

IN REPLY
REFER TO: B-197792 (MRV)

OFFICE OF GENERAL COUNSEL

April 01, 1980

Mr. Craig B. Pettibone
Director, Office of Pay and
Benefits Policy
Compensation Group
Office of Personnel Management
Washington, D.C. 20415

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Dear Mr. Pettibone:

We have reviewed the proposed regulations published in 45 Fed. Reg. 7263 (1980) which would implement the Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of 1978, and we offer the following comments on those proposed regulations.

Section 550.801(b) of the proposed regulations sets forth the statement of applicability of the Back Pay Act and these regulations. We note that the Back Pay Act, as amended, refers to an employee who is found to have been "affected by" an unjustified or unwarranted personnel action. However, the proposed regulations still refer to an employee who is found to have "undergone" an unjustified or unwarranted personnel action. We recommend in the interest of uniformity with the statute that the proposed regulations use the term "affected by."

We also note that in section 550.802 the definitions of the terms "pay, allowances, and differentials" have been shortened considerably from the current version of the Back Pay Act regulations. For the guidance of all who might be considered an "appropriate authority", we urge that you retain the previous definitions of these terms. In order to avoid unintended exclusion of any particular item, the definition could be restated as "including without limitation" the described items.

There is a significant change in the proposed regulations appearing in section 550.803(a) where the prior "but for" test has been eliminated. In the past employees were required to prove that the withdrawal, reduction, or denial of pay or allowances was the clear and direct result of and would not have occurred "but for" the unjustified or unwarranted personnel action. Under the proposed regulations, once the appropriate

B-197792

authority has found that such an action took place, the burden of proof would shift to the employing agency to prove by clear and convincing evidence that the employee would not have received the pay or allowances in question. We note that this more liberal standard is the same as applied in equal employment opportunity cases (see 29 C. F. R. § 1613.271 (1979)). We have no objection to the proposed change in the burden of proof.

Although no substantive changes are proposed for the section 550.804 dealing with backpay computations, we recommend that subsection (d) be clarified with respect to those employees who earn more from other Federal employment during the period covered by the corrected personnel action. As we recently held, where the employee's total interim earnings exceed the total amount of backpay, the excess amount may be retained by the employee but no backpay may be paid. See Steve Coleman, Jr., B-196053, February 29, 1980; and Warren H. Kummer, B-194777, October 30, 1979 (copies enclosed). We suggest that these proposed regulations state that other earnings include Federal earnings and that excess interim earnings from other Federal employment may be retained by the employee.

The other significant change in the proposed regulations is contained in section 550.805 providing for the payment of reasonable attorney fees in connection with an award of backpay. Subsection (a) states that an employee or the employee's personal representative may file a request with the appropriate authority for payment of attorney fees. We believe this provision should be clarified to indicate that the request may be filed only with the same appropriate authority that corrected or directed correction of the unjustified or unwarranted personnel action. This clarification would preclude the possibility of "forum shopping" where an employee receives a favorable administrative determination from one appropriate authority and then files a request with another appropriate authority for payment of attorney fees.

Subsection (b) of proposed section 550.805 states that the appropriate authority shall provide an "appropriate official" of the employing agency with an opportunity to respond to the request for payment of attorney fees. We believe that in order to assure adequate notice to the employing agency and to avoid an administrative burden on the appropriate authority, the party

B-197792

making the request for payment should be required to forward a copy of the request to the employing agency and to notify the appropriate authority considering the request that service has been made. See, for example, 4 C. F. R. § 21.5 and the procedures established by the Federal Labor Relations Authority for service of copies (45 Fed. Reg. 3481 (1980)). On the other hand, we note that the Merit Systems Protection Board does not require service on the agency but does place a strict 10-day time limit for filing the request for attorney fees. See 5 C. F. R. § 1201.37 (1979). We also recommend deleting the term "appropriate official" as unnecessary and possibly confusing.

Subsection 550.805(c) sets forth as the standard for the award of attorney fees that the award must be "in the interest of justice." We view this standard as being too vague to be of any real value to an appropriate authority considering a request for payment of attorney fees. We believe OPM should give further guidance in the proposed regulations not only as to what is intended by "in the interest of justice" but also as to what constitutes "reasonable" attorney fees. Such guidance is necessary in view of the number of those considered to be appropriate authorities.

The proposal would limit attorney fees to those who are "entitled to backpay" under the Act and regulations. We believe this provision should be clarified since it could inadvertently preclude an award of attorney fees to an employee who is found to have suffered an improper personnel action, but who is not entitled to any backpay such as where interim earnings exceed the amount of the backpay otherwise due.

We note that section 550.805(f) permits the review or appeal of a determination on attorney fees "when provided for" by the appropriate authority. We agree that each appropriate authority should have discretion whether or not to consider a request for review of its own determination. However, the statute does not provide for the finality of such a determination, and we think that the determination on attorney fees should be subject to appeal in the same manner as other aspects of the proceeding. Thus, if an appropriate authority's decision is subject to appeal to a higher authority, its determination on legal fees should also be appealable to the same body.

B-197792

The proposed regulations concerning the payment of attorney fees do not address the question of what, if any, retroactive effect will be given to this provision. We note that the Reform Act did not become effective until January 11, 1970, and that under section 902(b) of the Reform Act administrative proceedings and appeals pending on the effective date of the Act are handled as if the Act had not been enacted. It is not clear whether an employee who was affected by an unjustified or unwarranted personnel action that occurred prior to enactment of the Civil Service Reform Act but who filed a timely appeal after enactment of the Act would be entitled to request payment of reasonable attorney fees. We believe the issue of the retroactive effect of this provision regarding attorney fees should be addressed in these regulations. Our preference would be to state that the provision for attorney fees is inapplicable to any unjustified or unwarranted personnel action that occurred prior to the effective date of the Reform Act regardless of whether an administrative proceeding or appeal was pending at that time.

Finally, we wish to point out several typographical errors which came to our attention. In the quotation of the Back Pay Act, section 5596(b)(1)(A)(i), the first line should read "an amount equal to all or any part of the pay". We note that this same error appears in House Committee Print No. 95-22 of title 5, United States Code. In section 550.802, under the definition of "appropriate authority", item (d), the word "merit" in Merit Systems Protection Board should be capitalized. Finally, under the definition of "unjustified or unwarranted personnel action" the word "the" appearing on line two of the definition should be deleted.

We hope these comments are of assistance to you in the final preparation of these regulations. Any questions you may have on this matter may be directed to Mr. Michael R. Volpe, telephone 275-6410.

Sincerely yours,

Harry D. Can Cline
for Milton J. Socolar
General Counsel

Enclosures