

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-178551

DATE: JAN 2 1976

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MATTER OF: Sammy H. Marr - Severance Pay, Attorney's Fees, Court Costs, and Real Estate Expenses Incident to an Erroneous Separation

- DIGEST:
1. Retroactive reinstatement and award of backpay under 5 U. S. C. § 5596 (1970) incident to erroneous separation precludes award of severance pay for same period since reinstated employee is deemed, for all purposes, as having performed services during period covered by erroneous personnel action.
 2. Claims for real estate and moving expenses incident to erroneous separation are disallowed because employee, under 5 U. S. C. § 5596, is entitled to those payments or allowances which he normally would have received if the unwarranted personnel action had not occurred. Consequential real estate and moving expenses are not such allowances.
 3. Claims for attorney's fees and costs of litigation cannot be reimbursed in absence of express statutory authority. Although 42 U. S. C. § 2000e-5(k) (1970) authorizes a court to award attorney's fees in certain types of actions, judgment of District Court neither awarded costs nor attorney's fees.

This action is in response to a request for reconsideration of our Claims Division Settlement Certificate No. Z-2459808, dated August 28, 1975, which disallowed the claim of Mr. Sammy H. Marr, an employee of the Department of the Air Force for (1) backpay in connection with his separation from the Air Force; (2) severance pay in connection with his separation from the Air Force; (3) attorney's fees, court, and transportation expenses incurred in connection with reinstatement litigation; and (4) real estate and relocation expenses incurred as a result of his separation from the Air Force.

The facts in this case are not in dispute. The claimant was a Department of the Air Force civil service employee at Holloman Air Force Base, New Mexico, when he was ordered terminated from his position on September 28, 1970. The termination was effected by the Civil Service Commission based on the provisions of a regulation requiring competitive civil service employees to be

citizens of the United States. The claimant, at that time, was not a citizen. An action was filed in the District Court for the Western District of Oklahoma seeking review of the agency action. Marr v. Lyons, et al., Civil No. 72-286 (W.D. Okla., filed January 18, 1974). On January 18, 1974, judgment was entered ordering Mr. Marr's retroactive reinstatement and the computation of all backpay and allowances otherwise due. On July 18, 1974, the Tenth Circuit Court of Appeals dismissed an appeal therefrom and the judgment of the District Court became final. On August 14, 1974, Mr. Marr was retroactively reinstated to his former position and on December 27, 1974, he was awarded the gross sum of \$68,834.24 in backpay and allowances. After deductions for State and Federal taxes and retirement Mr. Marr was paid \$54,318.99.

By letter of August 18, 1975, Mr. Marr stated that his case was still in litigation and requested, inter alia, that he be paid severance pay, attorney's fees, and "*** other direct and indirect economic losses ***." Since Mr. Marr had advised that his case was still in litigation, the Claims Division issued a Settlement Certificate, dated August 28, 1975, which declined to act on the claim for severance pay and backpay, but disallowed the claim for attorney's fees and court related expenses. It now appears, however, that the judgment of the District Court became final on July 18, 1974.

Since Mr. Marr has been retroactively reinstated to the position he occupied on September 28, 1970, and has received backpay and allowances pursuant to the District Court's judgment, his entitlement to backpay and reinstatement is no longer in dispute.

However, as a matter apart from the judgment directing reinstatement and backpay, Mr. Marr now seeks a ruling on his entitlement to severance pay. By title 5, U.S.C., section 5595(b)(2) (1970), Congress has authorized severance pay for employees who were involuntarily separated from the civil service and not removed for cause. However, title 5, U.S.C., section 5596 (b) (1970), entitles an employee to backpay when he undergoes an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or a part of his pay. If, as a result of the applicability of section 5596, an employee is entitled to backpay, he is, "*** for all purposes, *** deemed to have performed service for the agency ***" during the period of wrongful separation. 5 U.S.C. § 5596(b)(2) (1970) (emphasis added).

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In the present case, the District Court determined that Mr. Marr was wrongfully separated on September 28, 1970. He was, therefore, retroactively reinstated to the date of his separation and received backpay for the same period. Thus, Mr. Marr has received the amount he normally would have received if the unwarranted personnel action had not occurred. As such, the separation is regarded as if it had never occurred and Mr. Marr is deemed, for all purposes, to have rendered service during the period covered by the corrective personnel action. 5 C. F. R. § 550.804(a) (1975); B-167875, October 31, 1969.

An employee's entitlement to severance pay, however, is conditioned upon actual separation from the civil service. 5 U. S. C. § 5595(b)(2) (1970). Since Mr. Marr is regarded, for all purposes, as having performed services during the period of wrongful separation, he may not simultaneously claim the status of a "separated" employee during the same period. See Ainsworth v. United States, 399 F.2d 176, 185 (1968). Accordingly, Mr. Marr's claim for severance pay is not for allowance.

Additionally, Mr. Marr seeks reimbursement for various real estate and moving expenses. The District Court did not award the claimed expenses as part of its judgment directing reinstatement and backpay. Marr v. United States, Civil No. 72-286 (W. D. Okla., filed January 13, 1974).

Moreover, neither the backpay law, 5 U. S. C. § 5596 (1970), which prescribes allowable payments when an employee undergoes an unwarranted personnel action, nor the regulations implementing section 5596, authorize consequential relocation and moving expenses when an employee is erroneously separated. 5 C. F. R. § 550.804(a) (1975). It is well established that the Back Pay Act authorizes only those payments which the employee " * * * normally would have earned * * *" if the erroneous personnel action had not occurred. 5 U. S. C. § 5596(b)(1) (1970). Although the claimed real estate and moving expenses may be a consequence of the erroneous separation, they are not allowances that Mr. Marr would have received if he had not undergone the improper personnel action. See B-182282, May 28, 1975; B-181514, May 9, 1975. In view thereof, we find no legal basis for allowing the real estate and moving expenses allegedly incurred as a consequence of Mr. Marr's erroneous separation.

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Mr. Marr also claims reimbursement for attorney's fees, travel, and miscellaneous expenses incurred in connection with the litigation which led to his reinstatement and award of backpay. All of these items are properly denominated as a "cost" of litigation. See B-163717, April 16, 1968. In this regard, it is well established that, in the absence of express statutory authority authorizing an allowance for attorney's fees and costs, reimbursement is not permissible. 52 Comp. Gen. 859 (1973); B-156482, June 23, 1975.

In the present case, Mr. Marr apparently is making claim for attorney's fees and costs under 42 U. S. C. § 2000e-5(k) (1970), which reads in pertinent part as follows:

"(k) Attorney's fee: Liability of commission and United States for costs.

"In any action or proceeding under this subchapter the Court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs, and * * * the United States shall be liable for costs the same as a private person." (Emphasis added.)

The judgment of the District Court neither awarded costs nor attorney fees to the claimant. Marr v. United States, Civil No. 72-286 (W. D. Okla., filed January 18, 1974). Since we are unaware of any other statutory authority under which Mr. Marr's claim for attorney's fees and costs is cognizable, the claim therefor is disallowed and that part of the settlement of the Claims Division is sustained.

Frank C. Fustling

Comptroller General
of the United States