



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Dan C. Sandoval - Backpay Computation - Federal  
and State Taxes - Waiver

**File:** B-244082

**Date:** December 16, 1991

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### DIGEST

1. In making deductions from an employee's backpay award, pursuant to the Office of Personnel Management regulations and instructions, "net backpay" for the purpose of calculating federal, state, and Medicare taxes is the balance of gross backpay less only interim net outside earnings. Interim net earnings are gross earnings less losses and certain expenses incurred in connection with the interim employment or business, but before income tax withholdings.

2. Where a backpay computation results in a net indebtedness of the employee, the debt may be considered for waiver. While amounts due for taxes and health benefits premiums are not subject to waiver under 5 U.S.C. § 5584, repayment of a lump-sum leave payment is subject to waiver under that authority. Therefore, it is waived to the extent of the employee's net indebtedness in this case.

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### DECISION

This decision is in response to a request from the Department of Veterans Affairs (VA) for clarification as to the meaning of "net backpay" in calculating taxes to be withheld from a backpay award. For the following reasons, we hold that "net backpay" for the purpose of calculating federal, state, and Medicare taxes is gross backpay less only interim outside earnings.

The record shows that effective June 18, 1988, Mr. Dan C. Sandoval was retroactively reinstated after successfully appealing an involuntary separation from the VA. Upon reinstatement Mr. Sandoval was entitled to backpay pursuant to the Back Pay Act, 5 U.S.C. § 5596 (1988). In accordance with our decision in Angel F. Rivera, 64 Comp. Gen. 86 (1984), the VA reduced Mr. Sandoval's gross backpay by refunded retirement contributions, a lump sum leave payment, and deductions for retirement contributions, federal and state taxes, Medicare, and health benefits. The VA

calculated federal, state and Medicare taxes on the balance of gross backpay minus outside earnings, which in this case were zero.<sup>1</sup> This resulted in a net indebtedness of \$1,609.18 which Mr. Sandoval requested be waived. Our Claims Group recalculated Mr. Sandoval's backpay and determined that his backpay was sufficient to cover all authorized deductions and thus there was no overpayment to be waived.<sup>2</sup> Our Claims Group computed net backpay by deducting from gross backpay refunded retirement contributions, the lump-sum payment, and deductions for retirement contributions and health insurance, and computed taxes based on the resulting amount. The Claims Group contended that the VA had computed taxes on gross instead of net backpay. The VA questions our Claims Group's calculation and requests clarification of the term "net backpay" in determining the amount of taxes to be deducted from backpay.

The Office of Personnel Management (OPM) has issued instructions pertaining to deductions from backpay. According to these instructions, computing net backpay is a three-step process. First, the agency must deduct any outside earnings received by the employee during the period of unjustified or unwarranted personnel action. Second, the agency must deduct erroneous payments the employee received as a result of the unjustified or unwarranted personnel action. Third, the agency may deduct "other authorized deductions, such as retirement deductions computed on gross backpay for the period of separation, Federal and State taxes computed on net backpay after deductions for interim net earnings, and health premiums, if any . . . ." Federal Personnel Manual (FPM) Supp. No. 990-2, bk. 550, S8-7 (Inst. 73, Apr. 20, 1984; revised in part Aug. 18, 1988) (emphasis added). Interim net earnings are defined as gross earnings less losses and certain expenses incurred in connection with the interim employment or business, but before income tax withholdings. FPM Supp. No. 990-2, bk. 550, S8-7e. We recognized and applied these requirements in Angel F. Rivera, 64 Comp. Gen. 86 (1984).

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<sup>1</sup>The only outside earnings Mr. Sandoval received were unemployment benefits and, consistent with our decision in Jeffrey Kassel, 65 Comp. Gen. 865 (1986), these were not deducted from his backpay. In Jeffrey Kassel we held that state unemployment benefits must be offset from backpay where there is evidence that the appropriate state agency has determined that an overpayment has occurred and has notified the federal agency and state law requires the employer to refund overpayments. This was not the case here.

<sup>2</sup>Z-2902904-056, October 15, 1990.

As emphasized above, the FPM states that federal and state income tax withholdings are to be computed on gross earnings less interim net earnings. Furthermore, the FPM provides two examples of backpay computations which clearly illustrate that federal and state taxes are computed on gross backpay minus only interim net outside earnings. FPM Supp. No. 990-2, bk. 550, S8-7f.

Although the FPM does not specify Medicare as an authorized deduction from back pay, the enumerated deductions are only examples of authorized deductions. Indeed, we have consistently sustained the reduction of backpay by deductions for Medicare tax. Chung Yang Kido, B-235638, Dec. 4, 1990, 70 Comp. Gen. \_\_\_; Jeffrey Kassel, 65 Comp. Gen. 865 (1986). Moreover, as the employer must deduct both Medicare and income tax from wages (26 U.S.C. § 3102 (1988); 26 U.S.C. § 3402), we conclude that Medicare taxes should be calculated on the same amount as income taxes, namely gross backpay less only interim net outside earnings.

In accordance with the instructions in the FPM, discussed above, the agency calculated Mr. Sandoval's backpay as follows:

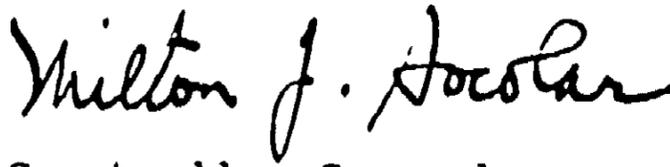
Description	Amount	Balance
Backpay	\$ 36,628.00	\$ 36,628.00
Interest	1,563.93	38,191.93
Refund of Ret. Contribution (1st Priority)	- 25,705.50	12,486.43
Lump Sum Leave (2nd Priority)	- 4,382.52	8,103.91
Authorized Deductions (3rd Priority)		
Retirement Contributions	- 2,563.98	5,539.93
Federal Tax computed on net backpay (\$36,628.00)	- 5,170.12	369.81
State Tax computed on net backpay (\$36,628.00)	- 1,217.09	( 847.28)
Medicare computed on net backpay (\$36,628.00)	- 531.14	( 1,378.42)
Health Benefits	- 230.76	( 1,609.18)

As a result of this computation, Mr. Sandoval is indebted in the amount of \$1,609.18, and it is this amount which Mr. Sandoval requests be waived.

Our waiver authority in 5 U.S.C. § 5584 (1988) relates to overpayments of pay and allowances and not to the tax or Medicare liability that is the secondary result of compensation under the Back Pay Act. Therefore, we are without authority to waive the deductions taken for state

taxes and Medicare. See generally 57 Comp. Gen. 554, at 562 (1978). Similarly, the health benefits payment is one which the employee has elected to make to continue coverage in a government-wide health plan under authority of the Office of Personnel Management, and therefore is not an overpayment by the government of pay and allowances over which our waiver authority could be exercised.

However, in our decisions involving employees who are improperly separated and who receive a lump-sum leave payment, we have held that upon restoration and the award of backpay, the lump-sum leave payment may be considered for waiver under 5 U.S.C. § 5584, but only to the extent that there remains a net indebtedness after deductions are made from the backpay award. Richard B. Pilgren, B-238243, July 20, 1990, and cases cited. On that basis, we hereby waive repayment of the lump-sum leave payment to the extent of Mr. Sandoval's net indebtedness after all the deductions have been taken, in this case \$1,609.18.

*for*   
Comptroller General  
of the United States