

# The Back Pay Act

## Introduction

The Back Pay Act of 1966 permitted federal employees to be reimbursed for wrongful deprivation of pay under certain circumstances.

## Objectives

At the conclusion of this module, you will be able to accomplish the following:

- Identify the three determinations an arbitrator must make in order to award back pay.
- Examine additional requirements forced upon the arbitrator when dealing with an overtime case.
- Identify the role of the Comptroller General in back pay claims by federal employees.

# Outline

- Introduction
- The Back Pay Act
- Arbitrator's Findings
- Overtime Cases
- Role of the Comptroller General
- Statute of Limitations

# BACK PAY ACT

## 1. INTRODUCTION

In the resolution of grievances, parties frequently request the arbitrator to consider and grant a financial remedy to make the grievant “whole.” The most significant and most requested remedy is back pay. When an arbitrator awards back pay in federal sector arbitration cases, the award must conform to the requirements of the Back Pay Act<sup>1</sup> (also referred to in this text as “the Act”) so that award can survive an appeal to the Federal Labor Relations Authority (“FLRA”).

The Back Pay Act of 1966 created a limited waiver of the Federal Government’s sovereign immunity. Consequently, federal employees were permitted to be reimbursed for “wrongful deprivation of pay under certain circumstances.”<sup>2</sup> The Act was amended in 1978 to adopt not only the case law that evolved since its inception, but also to conform to the provisions of the Civil Service Reform Act. Specifically, the amended Act provides that an “administrative determination” supporting a monetary award may include “decisions relating to an unfair labor practice or grievance.”<sup>3</sup> In addition, the amended Act provides for the payment of interest on awards of back pay and attorney fees. The intent of the Act is to make the grievant whole – nothing less, but also nothing more.

This Guide is designed to assist the reader in understanding the general provisions of the Back Pay Act, understanding how the provisions are interpreted in case law and applying these principles in processing grievances and arbitration cases. The pertinent provisions of the law and regulations have been supplied. However, the case law is constantly evolving. Therefore, this Guide is not intended to be used as a legal advice or as a substitute for adequate preparation and research.

## 2. THE BACK PAY ACT

### 5 U.S.C. §5596

#### § 5596. Back pay due to unjustified personnel action

- (a) For the purpose of this section, “agency” means—
- (1) an executive agency;
  - (2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;
  - (3) the Library of Congress;
  - (4) the Government Printing Office; and
  - (5) the government of the District of Columbia.
- (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
- (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
    - (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
    - (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

- (B) for all purposes, is deemed to have performed service for the agency during that period, except that—
  - (i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and
  - (ii) annual leave credited under clause (I) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.
- (2) (A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.
- (B) Such interest—
  - (i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;
  - (ii) shall be computed at the rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and
  - (iii) shall be compounded daily
- (C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.
- (3) This subsection does not apply to any reclassification action nor authorize setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

- (4) For the purpose of this subsection, “grievance” and “collective bargaining agreement” have the meanings set forth in section 7103 of this title (with respect to members of the foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, “unfair labor practice” means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and “personnel action” includes the omission or failure to take an action or confer a benefit.
- (c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the Regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.

### **3. ARBITRATOR’S FINDINGS**

An arbitrator is authorized to award back pay only when he/she makes three determinations. The arbitrator must find that:

1. An agency personnel action, with respect to the grievant, was unjustified or unwarranted;
2. Such unjustified or unwarranted personnel action resulted in the withdrawal or reduction of all or part of the grievant’s pay, allowances, or differentials; and
3. But for such action, the grievant otherwise would not have suffered such withdrawal or reduction in pay, allowances, or differentials.<sup>4</sup>

Although the Back Pay Act dictates that certain determinations must be made, the Act does not dictate the manner in which these findings are made. Consequently, the arbitrator is given broad discretion in the way he/she makes the necessary determinations.

#### **A. UNJUSTIFIED OR UNWARRANTED PERSONNEL ACTION**

An unjustified or unwarranted agency action is defined as a violation of applicable law, rule, regulation or collective bargaining agreement. The personnel action may include an act of commission or an act of omission, i.e., failure to take an action or confer a benefit by the agency. “Personnel action” is defined in the Back Pay Act<sup>5</sup> and 5 C.F.R. §550.803<sup>6</sup>.

## **B. CAUSAL CONNECTION**

The most significant requirement is the “but for” finding, i.e., but for the agency’s unjustified or unwarranted personnel action, the employee would not have suffered a loss of pay, allowances, or differentials. The arbitrator need not use magic words, such as :but for,: however, he/she is required to articulate a causal link between the agency’s actions and the loss of pay justifying a back pay award. The evidence must support the arbitrator’s findings.

## **C. NONDISCRETIONARY POLICIES**

A nondiscretionary policy may confine the agency in specific circumstances. A provision or policy is considered nondiscretionary when the collective bargaining agreement, agency regulation or policy clearly outlines what action the agency should nor should not take, including the conditions and criteria under which the action should or should not be taken.<sup>7</sup>

Although an arbitrator may find the agency’s action unfair or inequitable, he/she may not award back pay if he/she determines that no limit on the agency’s discretion has been imposed by the collective bargaining agreement or agency policy/regulation the FLRA provides the arbitrator broad discretion in determining whether or not a provision in the collective bargaining agreement is nondiscretionary.<sup>8</sup>

Past practice may constitute a nondiscretionary policy, prompting the arbitrator to award back pay.<sup>9</sup> A past practice must be consistently exercised for an extended period of time and followed by both parties.<sup>10</sup> Therefore, the party asserting a past practice argument must prove it by the preponderance of the evidence.

## **D. GROUP VIOLATIONS**

When a grievance claims that a group of employees were injured by the agency’s unwarranted personnel action, the arbitrator must identify each individual affected and make the necessary findings for each individual in order for a back pay award to be valid.

#### **4. OVERTIME CASES**

The FLRA has ruled that an award of back pay is appropriate for an employee who was entitled to perform overtime but was denied the right to do so. Moreover, the FLRA has concluded that a back pay award does not violate management's statutory rights to direct employees and assign work.<sup>11</sup> However, the analysis in cases dealing with the issue of lost opportunity for overtime is more extensive.

The arbitrator must not only find the initial requirements for back pay awards, but he/she must make three additional determinations:

1. Was the grievant deprived of the opportunity to work overtime?
2. Was the grievant ready, willing and able to work the overtime?
3. Would the grievant have worked the overtime but for the unwarranted violation?

Once the arbitrator has identified the lost overtime opportunity, he/she may only award the amount of back pay sufficient to make the grievant whole.<sup>12</sup> The arbitrator may not substitute his judgment for that of the agency with regard to whether work shall be performed on an overtime basis or whether the grievant was qualified to work the overtime. Those determinations are inherent in management's statutory right to assign work.<sup>13</sup>

It is important to note that arbitrators are not required to award back pay for lost overtime opportunities. In some cases, the arbitrator may award the grievant "make-up overtime" or priority consideration the next time management assigns overtime.

#### **5. COMPTROLLER GENERAL**

The U.S. Comptroller General ("CG") is the head of the General Accounting Office ("GAO"). The CG has the statutory authority to settle claims of the United States and approve or disapprove disbursements in accordance with the law.<sup>14</sup> This responsibility included back pay claims by federal employees. However, the Comptroller General's role in the federal sector arbitration has dramatically changed.

Since the Civil Service Reform Act of 1978 was enacted, the Comptroller General has deferred to the procedures as outlined in 5 U.S.C., Chapter 71. More recently, the CG has concluded that it will NOT entertain a claim that has not been specifically excluded from the negotiated grievance procedure.<sup>15</sup> In other words, the CG will NOT take jurisdiction over federal employee claims which are subject to a negotiated grievance procedure when there is a claimed violation of law, regulation or the collective bargaining agreement. However, if both parties agree to submit the matter to the CG, then the CG will render a decision.

The CG continues to consider federal employee claims who are not covered by a collective bargaining agreement and claims from employees covered by a collective bargaining agreement which excludes specific subject matters from the grievance procedure.<sup>16</sup>

## **6. STATUTE OF LIMITATIONS**

Statutes of limitation require that a claim or action be commenced within a certain time period from the date the cause of action accrues. However, the time period varies depending upon the issue in controversy. One example of the statute of limitations is found in the Barring Act. The Barring Act states that claims against the United States “must be received by the Comptroller General within six years after the claim accrues.”<sup>17</sup>

In federal sector arbitration, agencies have interpreted the statute of limitations to include a limitation on back pay awards. An agency will contend that the grievant is only entitled to back pay for a certain period of time from the date the grievance was filed, namely, the period of the statute of limitations. To illustrate this point, suppose a grievance is filed on April 1, 1994 which claims an agency violation since April 1, 1987, and the remedy requested is back pay for the entire seven (7) year period. Assuming all the requirements for a back pay remedy have been met, the agency may argue that back pay is only warranted from April 1, 1988, the six year statute of limitations under the Barring Act. The arbitrator is not required to accept the agency’s argument.

The Back Pay Act does NOT limit the retroactivity of the back pay award. The FLRA has ruled that “[n]othing in the Back Pay Act limits the period of time for which an award of back pay can be made.”<sup>18</sup> The FLRA continued by stating that:

We have consistently held that the Barring Act applies only to claims brought before the Comptroller General and there is no requirement for arbitrators to apply the Barring Act in fashioning awards of back pay under the Back Pay Act.<sup>19</sup>

In cases of an award of retroactive promotion with back pay, the grievant is entitled to back pay in conjunction with the date the promotion would have become effective if the agency had not taken the unjustified or unwarranted personnel action.

An arbitrator may opt to apply the Barring Act time period in establishing the appropriate period for determining the entitlement to back pay. Consequently, the arbitrator is given “great latitude and discretion”<sup>20</sup> in formulating the remedy.

<sup>1</sup> The full text of The Back Pay Act, 5 U.S.C. §5596, can be found in its entirety in Section II of this Guide.

<sup>2</sup> Celmer, Al and Robert Creo, Federal Arbitration Advocate’s Handbook, Second Edition, p. 409.

<sup>3</sup> 5 U.S.C. §5596(b)(1).

<sup>4</sup> Citations omitted.

<sup>5</sup> 5 U.S.C. §5596(b)(4).

<sup>6</sup> The full text of 5 C.F.R. §550.801 to §550.808 is found in Section VII.

<sup>7</sup> In the Matter of John Cahill, 58 Comp. Gen. 59.

<sup>8</sup> Supra, note #2, p. 413; See, e.g., NLRB Office of the General Counsel, 7 FLRA 21, 81 FLRR 1-1241.

<sup>9</sup> SSA, San Francisco, 5 FLRA 759, 81 FLRR 1-1100.

<sup>10</sup> SSA, Mid-America Service Center, 9 FLRA 229, 82 FLRR 1-1539.

<sup>11</sup> NTEU and U.S. Customs Service, 18 FLRA 780, 85 FLRR 1-1239.

<sup>12</sup> Immigration and Naturalization Service and AFGE, Local 40, 18 FLRA 412, 85 FLRR 1-201.

<sup>13</sup> Elkouri and Elkouri, How Arbitration Works, Fourth Edition, p. 534; Supra, note #2, p. 406.

<sup>14</sup> 31 U.S.C. §3701, et. seq.

<sup>15</sup> Matter of Cecil E. Riggs, et al., 71 Comp. Gen. 374, 92 FLRR 1-7001.

<sup>16</sup> Supra, Note 2, p. 412.

<sup>17</sup> 31 U.S.C. §3702(b)(1).

<sup>18</sup> SSA, Baltimore, MD and AFGE, 47 FLRA 78, 93 FLRR 1-1130.

<sup>19</sup> Id.

<sup>20</sup> Id.