

Legal Opinion: GMP-0026

Index: 6.440  
Subject: Interest on Backpay

November 27, 1991

MEMORANDUM FOR: Elmer Lee, Acting Director  
Office of Personnel and Training, AP

FROM: Sam E. Hutchinson, Assistant General Counsel for  
Personnel and Ethics Law, GPL

SUBJECT: Interest on Backpay

Laverne Dixon of your office requested a legal opinion on the appropriateness of paying interest on the payment of monies owed as the result of administrative error.

We understand the facts to be as follows:

A Complainant filed an EEO complaint alleging unlawful discrimination under Title VII of the 1964 Civil Rights Act, in the denial of a promotion. The Department and complainant entered into a settlement agreement whereby the Department promised to promote complainant retroactively and pay backpay to the effective date of promotion. The settlement agreement did not address the payment of interest. Interest was not paid on the initial amount paid under the settlement agreement and is not the subject of this memorandum. The Department failed to pay the entire amount of backpay due within the time period set forth in the settlement agreement. Fifteen months later, the remaining amount of back pay (approximately \$1,000) was paid to the employee. The delay in payment of this portion of the back pay award was occasioned by administrative error.

You have requested our opinion as to whether the Department owes interest on that portion of the back pay award that was paid fifteen months after the agreed upon date for payment.

It is well established that there is no authority for the assessment of interest against the United States except where sovereign immunity has been waived by statutory provision. *U.S. v. Tillamooks*, 341 U.S. 48 (1951). Title VII, the basis of the complainant's discrimination complaint, does not waive sovereign immunity and therefore does not itself allow for the assessment of interest against the federal government. *Library of Congress v. Shaw*, 47 U.S. 310 (1986). However, the Supreme Court has held that the express waiver of sovereign immunity from the payment of prejudgment interest may be supplied by a separate statute. *Loeffler v. Frank*, 486 U.S. 549 (1988). In consolidated cases,

the Court of Appeals for the District of Columbia held in *Brown v. Secretary of the Army*, and *Mitchell v. Secretary of Commerce*, 918 F.2d 214 (D.C.Cir 1990), that the Back Pay Act supplies the requisite waiver of sovereign immunity absent in Title VII to entitle a successful federal employee in a Title VII action to prejudgment interest on an award of back pay. Such interest is available where the plaintiff is affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of her pay, allowances or differentials as required by the Back Pay Act (5 U.S.C. 5596(b)(2)). In *Brown* and *Mitchell*, however, the court found that an award based on a wrongful failure to promote, which does not result in the withholding of pay owing the employee, should not include interest under the Back Pay Act. In this regard the court distinguished between failure to promote competitively, which is discretionary with the agency, and failure to promote non-competitively, such as promotions mandated by the provisions of a collective bargaining agreement under circumstances where specific criteria are met, i.e. career ladder promotions, or by agency regulation.

We do not have specific information relating to the category of promotion that was denied in the present situation. However, we do not believe that the denial of the promotion, whether it be competitive or non-competitive, is the issue that should be addressed at this juncture. It is our view that the settlement agreement created an independent, enforceable obligation on the Department to pay the agreed upon amount within a specified time period regardless of the type of promotion that was the subject of the original complaint. The focus should be on the subsequent administrative error which resulted in the withholding of pay previously determined (by virtue of the settlement agreement) to be owing the employee.

The issue then, is whether an administrative error that results in the withholding of monies due an employee is an unjustified or unwarranted personnel action resulting in the withdrawal or reduction of the employees pay, allowances or differentials for which interest may be assessed against the Department under the provisions of the Backpay Act.

We believe that the failure to implement a pay action because of administrative error warrants payment of interest under the Back Pay Act. OPM's final rule on the interest provision of the Back Pay Act notes that the term "unjustified or unwarranted personnel action" includes pay actions, alone or in combination with personnel actions and also addresses the applicability of interest to the withholding of pay due to administrative error." ...for example, if an agency, through administrative error, fails to implement a pay action...the employee is made whole by issuing the appropriate payment of back

pay and interest...." (Comments on Entitlement to Interest,  
Federal Register Vol. 53, No.220 November 15, 1988)

We conclude that interest is due on that portion of the  
settlement award that was wrongfully withheld for a period of  
fifteen months.