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UNITED STATES GENERAL ACCOUNTING OFFICE

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WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

Subject Cord

In reply refer to
B-180344 (JEL)

December 14, 1977

The Honorable Barbara Allen Babcock
Assistant Attorney General
Civil Division
Department of Justice

Dear Ms. Babcock:

We refer to your letter of June 28, 1977, expressing disagreement with our construction of the Back Pay Act of 1966, 5 U.S.C. § 5596, and with the Civil Service Commission's amended Back Pay Regulations contained in 5 C.F.R. Part 550, subpart H.

The question is whether the current civil service regulations and our decisions on backpay are consistent with judicial determinations construing the Back Pay Act. As we indicated in our May 23, 1977 letter to you, the Supreme Court in United States v. _____, 424 U.S. 392 (1976), and the Court of Claims in _____ v. United States, 208 Ct. Cl. 373 (1975), never had the opportunity to decide this important issue because the current administrative interpretation of the Back Pay Act was not before them in those cases. Hence, those courts did not pass upon the validity of the interpretation of the Back Pay Act now followed by the General Accounting Office and the Civil Service Commission. Presumably, the courts would, if the issue were presented to them, defer to the administrative interpretation as judicial policy requires. See for example _____ v. Duke Power Co., 401 U.S. 424, 433-434 (1971); _____ v. _____, 380 U.S. 1, 16-18 (1965); and _____ v. Seminole Rock and Sand Co., 325 U.S. 410, 413-414 (1945).

Following your letter of June 28 we received a letter dated August 30, 1977, from the Chairman of the Commission expressing concern about the disagreement among our agencies on this subject. The Chairman states that he hopes for an early resolution of differences and that he anticipates working with us to reach an acceptable solution.

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I am writing to provide you with some background information that may be helpful prior to the meeting which we have been attempting to arrange.

Before 1974, both this Office and the CSC followed a rather narrow interpretation of the Back Pay Act of 1966 which diminished its remedial effect and hampered the effectiveness of the Federal employees' labor relations program under Executive Order 11491. ^{Oct. 29, 1969} Following meetings with the staff of the House Post Office and Civil Service Committee and with their approval, this Office and the CSC undertook to read the Back Pay Act as allowing backpay in cases where agencies had violated mandatory provisions of collective bargaining agreements or regulations by failing to take the action required by such provisions.

Thus, beginning with 54 Comp. Gen. 312 in October 1974, we began to issue decisions that expanded the remedies available under the Back Pay Act. At the same time, the CSC began the process of amending its regulations under the Back Pay Act to reflect a more liberal interpretation of the statute.

Unfortunately, the Department of Justice was not aware of these actions. Consequently, the expanded interpretation was not being brought to the attention of the courts in pending cases. As the result of a letter of March 17, 1976, to GAO and CSC from James F. Merow, Chief, Court of Claims Section, Department of Justice, I arranged a meeting at the Office of Legal Counsel, Department of Justice, to discuss the proper interpretation of the Back Pay Act in light of the Supreme Court's decision of March 2, 1976, in _____

The meeting on June 21, 1976, was attended, among others, by the Deputy Assistant Attorney General, Office of Legal Counsel; the Chief of the Court of Claims Section, Civil Division, Department of Justice; the General Counsel, and the Director, Office of Labor Management Relations, of the Civil Service Commission; the Executive Director of the Federal Labor Relations Council; and the General Counsel of the General Accounting Office. It was agreed by all concerned that the Back Pay Act would be continued to be construed broadly on a case-by-case basis and that the _____ case applied only to classification matters, not to other matters arising under the Act. In addition, there was agreement to reconsider our decision on over-long details, _____, 55 Comp. Gen. 539 (1975).

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Based on this understanding several decisions were issued applying the _____ doctrine to classification cases only and holding it inapplicable to other matters arising under the Back Pay Act. Also, on March 23, 1977, our earlier "detail" decision in _____ was sustained, 56 Comp. Gen. 427. ✓

In addition, based on the understanding reached at the June meeting, the Civil Service Commission, on March 25, 1977, issued amended Back Pay Regulations (42 Fed. Reg. 16127). These regulations reflect the understandings arrived at in June by construing the Act to carry out its remedial purpose. Accordingly, under the new regulations, when an agency violates a nondiscretionary provision of a law, a regulation, or a collective-bargaining agreement which deprives an employee of pay or allowances, such error may be corrected with backpay by an "appropriate authority," including an arbitrator in binding arbitration cases. The approach taken by GAO and CSC has meant that the labor relations program in the Federal service has been able to continue to function effectively.

Because of the importance of this issue and the apparent disagreement about it, we suggest another meeting among the three agencies most concerned, namely the Department of Justice, the Civil Service Commission, and the General Accounting Office. This meeting should be conducted at the level which will provide the policy decisions for each agency and I strongly suggest that it be arranged as quickly as possible.

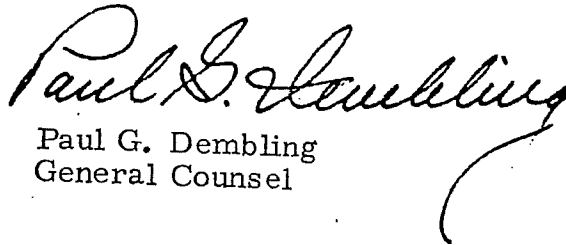
In the last paragraph of your letter, you state that you will test our interpretation of the Back Pay Act in an appropriate case in court in order that the courts may have an opportunity to resolve the issue. We believe that our meeting should occur before such an action is taken.

The executive branch has determined that our interpretation of authority under the Back Pay Act is consistent with its policies in the Federal labor management arena. We think it important that judicial determinations construing this Act not be cast in terms that preclude the furtherance of executive branch policy without a full consideration of the approach taken in our decisions.

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We look forward to an early response to this letter.

Sincerely yours,



Paul G. Dembling
General Counsel

cc: General Counsel, Civil
Service Commission

Executive Director, Federal
Labor Relations Council

Chief, Court of Claims Section,
Department of Justice

Director, Office of Labor
Management Relations,
Civil Service Commission