UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, AUSTIN COMPLIANCE CENTER, AUSTIN, TEXAS Respondent and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 247 Charging Party	Case No. 6-CA-90506

Susan L. Nieser, Esquire
On brief: Roger Rhodes, Esquire
Gary A. Anderson, Esquire
For the Respondent

Michael J. Wolf, Esquire
On brief: Dennis Schneider, Esquire
Ana Mejia-Dietche, Esquire
For the Charging Party

Christopher J. Ivits, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,[1/] and the

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7122(b) will be referred to, simply, as "§ 22(b)."

Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns principally: (a) whether Respondent unreasonably delayed compliance with a final arbitration award; (b) whether Respondent has fully complied with the award of backpay, i.e., specifically, is backpay due for the two week period between Respondent's notification and grievant's return to work and should overtime earnings and/or earnings derived from work hours outside grievant's government schedule of hours,[2/] be deducted from the gross backpay award; and (c) whether, as Charging Party asserts, Mr. Tyler should be compensated for the increased income tax he incurred because of Respondent's delay of payment of backpay and interest.

This case was initiated by a charge filed on June 2, 1989 (G.C. Exh. 1(a)), and by a First Amended Charge filed on January 11, 1990 (G.C. Exhs. 1(d) and (e)) each of which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued on January 17, 1990, also alleged violations of §§ 16(a)(1), (5) and (8) of the Statute, and set the hearing for the week of April 16, 1990 (G.C. Exh. 1(b)). By Order dated April 12, 1990, the hearing was rescheduled for June 18, 1990 (G.C. Exh. 1(l)); on June 7, 1990, General Counsel moved to postpone the hearing and the other parties did not oppose General Counsel's motion (G.C. Exh. 1(n)); on December 20, 1990, Notice was given of the rescheduling of the hearing for January 29, 1991; and by Notice dated January 23, 1991 (G.C. Exh. 1(r)), the hearing was further rescheduled for January 30, 1991, pursuant to which a hearing was duly held on January 30, 1991, in Austin, Texas, before the undersigned.

As General Counsel states, the Complaint alleged that Respondent violated §§ 16(a)(1) and (8) when, ". . . since July 31, 1989[3/], it failed and refused to fully implement an

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2/ That is, that grievant could have held such "moonlighting" employment simultaneously with his government employment, notwithstanding that he had never done so.

3/ This is the date, 30 days after the date of receipt of the arbitrator's Opinion and Award on Reconsideration [dated June 27, 1989], that time for judicial review had expired and the decision, in the absence of an appeal, had become final (5 U.S.C. §§ 7121(d), (e), (f); 7512; 7703(b)(1)).

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arbitrator's award dated March 8, 1989, by refusing to pay the backpay and other benefits due to the grievant as ordered by the arbitrator. The complaint also alleged that Respondent violated 5 U.S.C. 7116(a)(1), (5) and (8) when it failed and refused to negotiate in good faith with the Union, by failing and refusing to implement the terms of an arbitration award dated March 8, 1989, and by engaging in unreasonable delay in implementing and complying with the terms of the arbitration award." (General Counsel's Brief p. 2). General Counsel further noted, that, "At the time of issuance of the Complaint and Notice of Hearing, the Respondent had not paid to the grievant any backpay or other

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The arbitration was a bifurcated proceeding in which the arbitrator first issued his decision on arbitrability, on November 28, 1988, and then, on March 8, 1989, his decision on the merits. On April 14, 1989, Office of Personnel Management filed a Petition for Reconsideration; and, as noted, the arbitrator issued his Opinion and Award on Reconsideration on June 27, 1989.

Because no request for a stay was filed, the Charging Party (hereinafter, "NTEU") requested that I amend the Complaint to allege that, ". . . the agency's obligation to implement the award arose April 14, 1989, not July 31, '89. . . ." (Tr. 38-39). General Counsel stated,

> "It is our position that we have the ability to amend the complaint. The regional director has that ability and duty, and we do not choose to amend the complaint. We do not see any need to amend the complaint." (Tr. 39).

NTEU's request was denied at the hearing (Tr. 39); was renewed in its brief (NTEU's Brief pp. 25-30); and NTEU's request is, again, hereby denied. In denying NTEU's request, I express no opinion as to whether, in the absence of a stay, an arbitrator's decision under § 21(f) is or is not effective pending disposition by the arbitrator of a request for reconsideration; nor is it necessary to reach, and I expressly do not decide, whether I have the authority to amend a complaint when such amendment is opposed by General Counsel, as I fully agree with General Counsel that no need has been shown for amendment of the Complaint as requested by NTEU.

benefits due to him by the award. Part of the backpay was paid . . . on February 23, 1990, and part of the interest was paid to him on March 19, 1990. Thus the Complaint . . . when it states in paragraph 6, 'by failing and refusing to pay the backpay and other benefits due . . . as ordered by the arbitrator,' reflects the . . . state of affairs when the Complaint issued. However, since Respondent failed to full pay the entire amount of backpay and interest due . . . this allegation was not withdrawn or amended." (General Counsel's Brief, p. 2, n.1)

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party exercised. At the conclusion of the hearing, March 4, 1991, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, initially on timely motion of Respondent, to which the other parties did not object, for good cause shown, to April 2, 1991, and later, on timely motion of NTEU, to which the other parties did not object, for good cause shown, to April 9, 1991. General Counsel, NTEU and Respondent each timely mailed an excellent brief, received on or before April 12, 1991, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. Mr. Douglas Tyler is currently employed as a Tax Examiner Technician in the TEFRA Exam Branch at the Austin Compliance Center. He was removed from that position from June 23, 1988, to October 8, 1989 (G.C. Exh. 15; Tr. 144). His removal was grieved and arbitrated by NTEU (G.C. Exhs. 15 and 16; Tr. 52). On November 28, 1988, Arbitrator Matthew W. Finkin issued an award and opinion on arbitrability (G.C. Exh. 15). On March 8, 1989, Arbitrator Finkin issued an award and opinion on the merits, concluding:

> "The grievance is sustained. Mr. Douglas Tyler is to be reinstated to the position of Tax Examiner with back pay and accumulated benefits and seniority, less back pay, benefits and seniority for a six month period commencing on the date of his discharge." (G.C. Exh. 16).

2. On April 14, 1989, the Office of Personnel Management petitioned the Arbitrator for reconsideration (G.C. Exh. 17).

3. On June 2, 1989, NTEU filed the original charge herein (G.C. Exh. 1(a)).

4. On June 27, 1989, the Arbitrator issued his Opinion and Award upon reconsideration sustaining his previous decision (G.C. Exh. 18; Tr. 53, 54).

5. On July 7, 1989, National Treasury Employees Union Attorney Michael Wolf[4/], who had taken over the represen-

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4/ Mr. Wolf had entered his appearance as attorney for NTEU; had made an opening statement; and then was called as a witness by General Counsel, at which point Respondent objected to Mr. Wolf appearing as a witness when he was also appearing as an attorney for one of the parties. Respondent asserted, inter alia, that such conduct by Mr. Wolf could violate the Texas disciplinary rules as Mr. Wolf was known to be a Texas attorney. I held that under our rules there is no bar to an attorney appearing as a witness, notwithstanding that it is a bad practice and does compromise the attorney's credibility as a witness (Tr. 50-51). Thereafter, Mr. Wolf cross-examined witnesses, introduced exhibits, and presented a closing argument. While it is certainly true that he was called as a witness by the General Counsel and, in a sense, was not appearing voluntarily, it is obvious that his testimony was well planned. Thus, his testimony was lengthy and through him General Counsel introduced all of his 34 exhibits, except the formal documents.

In its Brief, Respondent again objected to the conduct of NTEU's representative and formally requested that Mr. Wolf be disqualified from representing NTEU in this case or that his testimony be stricken. I adhere to my ruling made at the hearing that under our rules Mr. Wolf was not disqualified and his testimony will not be stricken. It is regretted that, notwithstanding the prior condemnation as a poor practice and one to be avoided, in United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, (hereinafter "Austin Service Center"), 25 FLRA 71, 78 (1987), counsel for NTEU has again assumed both the position of an advocate and of a witness. I fully agree with the statement of the Fifth Circuit Court of Appeals, in Ingelett & Co. v. Everglades Fertilizer Co., 255 F.2d 342, 349-50 (5th Cir. 1958), that:

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tation of Mr. Tyler, called Mr. Gary Anderson, Assistant Regional Counsel, Internal Revenue Service, about compliance with the award. Mr. Anderson responded by noting that he was aware that the Union had filed an unfair labor practice charge (ULP) over the issue and that the Agency was going to let the ULP process take its course. (Tr. 57).

6. The Office of Personnel Management (OPM) did not appeal the June 27, 1989, Finkin award (Tr. 191) and by letter dated September 13, 1989, to Mr. Anderson (G.C. Exh. 19), Messrs. Dennis Schneider, National Counsel, NTEU, and Wolf, stated, in part, as follows:

> "The undersigned attorneys for NTEU have called your office on numerous occasions and left messages for you each time that we have called. You have not returned any of our telephone calls. The Auction Compliance Center Personnel Chief also refuses to return calls to our office. We therefore are sending you this letter with the hope that you will call one of us at your earliest convenience concerning the above referenced matter [Doug Tyler removal arbitration].
>
> "As you are aware, the arbitration decision rendered in the above referenced case became final at the end of July 1989. Now, almost seven (7) weeks later, Mr. Tyler still has not received notice of the date that he is to return to work. The Union has contacted local management at all levels at the Austin Compliance Center. Local

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> ". . . we think it an unnatural, if not virtually impossible task for counsel, in his own case, to drop his garments of advocacy and take on the somber garb of an objective fact stater."

While I do not find Mr. Wolf disqualified, I do find his credibility seriously impaired and do not credit his testimony when there is conflicting testimony or evidence.

As I stated in Austin Service Center, supra, it is entirely possible that by such conduct Mr. Wolf has violated the Texas Code of Professional Responsibility; but this is not the forum to determine that issue.

management expressed its awareness that the arbitration decision is final. However, the Center Director's office informed us this week that they will not take any action to return Mr. Tyler to duty until they have written instructions from you to do so.

". . . we fully expect your office to expedite Mr. Tyler's return to duty, swiftly issue a back pay check, and immediately restore Mr. Tyler's leave balance and other benefits of employment.

"Please call either of the undersigned to confirm the agency's intentions. . . ." (G.C. Exh. 19).

7. Respondent received NTEU's letter of September 13 on September 18, 1989, as shown by the date stamp (G.C. Exh. 19). Mr. Wolf never received a response to the September 13, 1989, letter (Tr. 62); but, on September 19, 1989, Mr. Anderson wrote a memorandum to the Director of the Austin Compliance Center concerning Douglas Tyler in which he stated, in part, as follows:

". . . OPM went to the Department of Justice and requested that the matter by appealed to the United States Court of Appeals for the Federal Circuit. Unfortunately, the Department of Justice refused to appeal the matter. Therefore, the agency must follow the arbitrator's decision.

"We presently have the Gilbert Hess Arbitration[5/] on appeal at the United States Court of

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5/ In Devine v. Levin, 739 F.2d 1567 (Fed. Cir. 1984), the United States Court of Appeals for the Federal Circuit reversed the decision of an arbitrator where the employee at the time of the offense had been acting temporarily as a supervisor but was back in a bargaining unit job when the discipline was invoked, because, ". . . the arbitrator lacked jurisdiction. . . ." (739 F.2d at 1572) inasmuch as the employee, ". . . was acting as a 'supervisor' at the time she misused the Government vehicles. As a result, she was lifted from the bargaining unit, her grievance was not arbitrable, and the arbitrator erred in taking jurisdiction over this case." (739 F.2d at 1572).

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Appeals for the Federal Circuit which raises the identical jurisdictional issue that is present in Tyler. We have explored the possibility of refusing to follow the arbitrator's decision in Tyler and waiting until the Federal Circuit renders its decision in Hess. However, it appears that even if we win Hess we would still be required to follow the arbitrator's decision in Tyler because the Department of Justice refused to file a notice of appeal, and in any event the time limits in which to appeal have now expired.

"While the Tyler case is very upsetting, we see no alternative other than reinstating Tyler in accordance with the arbitrator's decision. Of course, the fact that the arbitrator in effect gave Tyler a six-month suspension should not be overlooked. . . ." (Agency Exh. 15).

8. On Thursday, September 21, 1989, the Director of the Austin Compliance Center told Mr. Richard Kelly, Chief of

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In Hess v. Internal Revenue Service, 892 F.2d 1019 (Fed. Cir. 1990), although the Court purports to distinguish Levin, supra, and "Therefore, no conflict . . . should be inferred from the language of the opinion in either." (892 F.2d 1020 n.), the United States Court of Appeals for the Federal Circuit there specifically held that,

"We conclude that the employee's status at the time the adverse action is taken - not the status at the time of the underlying conduct - determines arbitrability [footnote omitted]. An employee becomes 'aggrieved' due to an agency's adverse action and not because of any action on the employee's part. The time for determining whether he is an 'aggrieved' employee is necessarily at the time the adverse action was taken because, prior to that time, he has nothing to appeal and cannot be aggrieved." (892 F.2d at 1020).

Of course, like Levin and Hess, Mr. Tyler at the time of the improper conduct had been temporarily assigned as a supervisor; but at the time of the adverse action he was back in his bargaining unit job.

Labor Relations, Employee Relations and Classification at the Compliance Center (Tr. 187), to reinstate Mr. Tyler immediately (Tr. 192, 193). Mr. Kelly then called Mr. Bill Hargrove, President of Chapter 247, and told him that he (Kelly) had been told to bring Mr. Tyler back immediately, "effective tonight" but could understand it if Mr. Tyler couldn't make it in tonight (Tr. 193). Mr. Hargrove, who sounded excited, told Mr. Kelly he would call him back and did so sometime after 4:00 p.m. on the 21st and told Mr. Kelly, "Doug had to give notice where he was working. And he would not show up until the pay period following." (Tr. 194).6/ The next pay period after September 21 began September 24 (Tr. 193-194) and the "pay period following" would have begun October 8, 1989. Respondent unilaterally, and without notice to Mr. Tyler, or to NTEU, placed Mr. Tyler on the "rolls" effective Sunday, September 24 and carried him on leave without pay (LWOP), which is an approved leave status, until he returned to work (Tr. 195).

9. Mr. Wolf, Mr. Tyler's designated representative (Tr. 62, 151) never received notice, oral or written, from Respondent7/ that Mr. Tyler was being returned to work

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6/ Mr. Hargrove was not called as a witness. Mr. Tyler's testimony, while not different in most material respects, was, necessarily, based on the hearsay statements of Mr. Hargrove and accordingly was less convincing than Mr. Kelly's testimony which I credit. Mr. Tyler, for example, said that a couple of days before September 23, 1989, Mr. Hargrove called him and said, ". . . he had heard that the agency was proposing to bring you [Tyler] back on the 23rd. And that was, I believe, on a Sunday. And I said to Bill that, well, my -- the award said my normal tour of duty, which would have been Monday through Thursday. And I said, I don't have a tour of duty that begins on Sunday. And he said, okay. I will talk to them about that. And I said also, I would like to give two-week notice to where I am working at . . . And then a few days later after that, he called back and said, they are going to bring you back on the 8th." (Tr. 152).

7/ Mr. Tyler testified that, "I kept in contact with Ann [Ellzey] throughout . . . and then with Michael Wolf when he assumed control of the case. I tried to keep contact with them at least once a week. Sometimes it was more or less." (Tr. 151). It would be reasonable to infer that he told

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(Tr. 62). Mr. Kelly stated that, "The National Treasury Employees Union was Doug Tyler's representative. . . ." (Tr. 193) and, while he understood that his [Kelly's] boss had dealt with Mr. Wolf, he called Mr. Hargrove because he had only dealt with Anita Greenberg [previous President of Chapter 247 (Tr. 21)] and Bill Hargrove [President of Chapter 247 (Tr. 192-193) following Ms. Greenberg's resignation (Tr. 211)].

10. Mr. Tyler did give two weeks notice at Circle K (Tr. 153, 179; G.C. Exh. 10; Agency Exh. 8, Attachment [memorandum of October 19, 1989, from Mr. Tyler to Ms. Strudel]) and returned to work on October 8, 1989 (Tr. 153, 197). Mr. Tyler stated that, ". . . I took his [Hargrove's] word at that point that I was supposed to come back for work. But I didn't know for sure. I just showed up." (Tr. 153). He had Ms. Karen Lang, Chief Steward, meet him because he did not have a badge to get into the building (Tr. 153-154). Immediately upon his return to work, Mr. Tyler asked about his backpay (Tr. 154). The following day, or possibly the day after, he went to Personnel and asked the night chief about his backpay (Tr. 154-155). She told him Mr. Kelly would be handling the matter and that he would need Tyler's record of his earnings while he had been gone (Tr. 154). Mr. Tyler said he told her he had his earnings records and would bring them in (Tr. 155). Mr. Tyler provided the cumulative earnings statements from Circle K and Wal-Mart (Agency Exh. 17) within the first week of his return to work (Tr. 156). By letter dated October 18, 1989 (G.C. Exh. 9) Respondent requested further information which was supplied the following day by memorandum dated October 19 (G.C. Exh. 10; Agency Exh. 8, Attachment).

On October 23, 1989, Respondent wrote Mr. Tyler that he had failed to provide some of the requested information, specifically, that he had failed to indicate what efforts he had made to secure outside employment (G.C. Exh. 11) and,

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Mr. Wolf that Respondent had "called him back" and/or that Mr. Hargrove informed Mr. Wolf; but this was not shown on the record (Tr. 105, 106). It is clear, nevertheless, that at least by October 19, 1989, when the memorandum to Ms. Barbara Strudel was written (Agency Exh. 8, Attachment; G.C. Exh. 10), Mr. Wolf was fully aware that Mr. Tyler had returned to work on October 8, 1989.

again on the following day, October 24, 1989, Mr. Tyler supplied the requested information (G.C. Exh. 12); the Austin Compliance Center transmitted the case file to the Southwest Region the second week of November (about November 11, 1989) (G.C. Exh. 12; Tr. 200); however, it was not until December 29, 1989, that Mr. Tyler's backpay claim was submitted to the Detroit Computing Center for ". . . adjudication of backpay, including payment of backpay interest." (Agency Exh. 8).

11. On February 23, 1990, Respondent paid Mr. Tyler $7,090.22 for backpay (Tr. 159).[8/] Respondent made no payment for the two week period immediately preceding Mr. Tyler's reinstatement, i.e., specifically, the pay period September 24 through October 7, 1989.[9/] (Tr. 64; G.C. Exh. 21). Respondent deducted, or set off, all of Mr. Tyler's earnings during the period of his wrongful discharge including substantial overtime earnings at Circle K as shown on the cumulative earnings statement submitted by Mr. Tyler shortly after his reinstatement (Agency Exh. 17). Moreover, Respondent deducted, or set off, earnings by Mr. Tyler for work outside the hours of his government duty hours, i.e., a second, or "moonlighting", job which he could have held simultaneously with his government job. It is further true that Respondent did not include in the backpay award any government overtime earnings (Tr. 159); however, the record does not show that Mr. Tyler worked overtime hours in government employment or, more specifically, whether he would have had overtime earnings in the period of January 1, 1989 through October 7, 1989 (Tr. 144, 176). Indeed, Attachment 3 to NTEU's Brief shows that no claim to government overtime earnings is made. Consequently, this contention will not be further considered.

8/ The check was dated February 8, 1990; was received by the Austin Compliance Center on February 13, 1990, but Mr. Tyler was not notified of the availability of the check until after 4:00 p.m. on February 22 at which time the finance office had closed (Tr. 159); and the check was not released to Mr. Tyler until February 23, 1990 (Agency Exh. 9; Tr. 159).

9/ Interestingly, as noted above, although Mr. Kelly told Mr. Hargrove that he [Kelly] had been told to bring Mr. Tyler back immediately, effective tonight - September 21, he did not place Mr. Tyler "on the rolls" until the beginning of the next pay period, September 24, 1989.

12. Both prior to his removal from, and upon his reinstatement to, Respondent's employment, Mr. Tyler had worked, on the night shift 1700 to 0330, an alternate work schedule (or compressed work schedule) of 10 hours per day, four days (Monday through Thursday) per week (Tr. 144, 176).

13. Mr. Tyler began work for the Circle K Corporation on May 30, 1989, and worked through the payroll period ending October 5, 1989 (G.C. Exh. 14, Attachments). His total earnings for Circle K were $4,654.80 of which $1,030.57 constituted overtime earnings (Agency Exh. 17), i.e., $3,624.23 straight time; $1,030.57 overtime; total $4,654.80.

For the first three days of his employment, Mr. Tyler worked the day shift. Thereafter, his hours varied. His time sheets (G.C. Exh. 14, Attachment) and NTEU's Compilation (Attachment 3 to its Brief, pp. 3-8) show the starting and quitting time for each day.

14. On July 3, 1989, Mr. Tyler began work on a second job for Wal-Mart stores and worked through July 21, 1989. His total earnings for Wal-Mart were $571.15 (Agency Exh. 17). No overtime was earned at Wal-Mart (NTEU Brief, Attachment 3, p. 2).

At Wal-Mart, Mr. Tyler worked the day shift. His starting time was roughly 8:00 a.m., although it varied from 8:00 to 8:20, and his quitting time was in the neighborhood of 5:00 p.m., although on one day, July 7, he worked until 6:00 p.m., on July 17 he left at 2:10 p.m.; and on other days he left from 4:00 p.m. to 5:15 p.m. His starting and quitting times daily at Wal-Mart are shown separately on General Counsel Exhibit 13 and are consolidated on NTEU's Attachment 3 to its Brief. From the times shown on G.C. Exh. 13, only 2 hours and 3 minutes of Mr. Tyler's work hours at Wal-Mart extended beyond 5:00 p.m.

There are obvious discrepancies in a few instances between the hours reported worked at Wal-Mart and at Circle K. For example: (a) on July 4, Mr. Tyler could not have worked at Wal-Mart from 1300 to 1708 and, at the same time, have worked from 1350 to 1810 at Circle K; (b) on July 7, he could not have worked from 1305 to 1800 at Wal-Mart and, at the same time, have worked from 1650 at Circle K; and (c) he could not have worked on July 14 at Wal-Mart until 1700 and, on the same day, have started to work at Circle K at 1650 (G.C. Exhs. 13, 14; NTEU Brief, Attachment 3, pp. 4-5).

15. On March 19, 1990, Mr. Tyler received an interest payment on the backpay award in the amount of $803.06 (G.C. Exh. 21, Attachment, memorandum dated April 10, 1990). It goes without saying that if Respondent owes more for backpay it also owes additional interest (Tr. 88).

16. Upon receipt of the check for his backpay, Mr. Tyler felt that it was incorrect and contacted Mr. Wolf (Tr. 160). Mr. Wolf, after checking, concluded that the amount of backpay paid Mr. Tyler was incorrect for two primary reasons: First, Respondent had not paid Mr. Tyler for the pay period of September 24 to October 8, 1989; and Second, Respondent had improperly deducted all of Mr. Tyler's outside earnings. Mr. Wolf protested the perceived deficiency (see, for example: G.C. Exhs. 20, 22, 23, 24, 26, 27); however, Respondent asserts that Mr. Tyler has, pursuant to the arbitration award, been fully and completely paid, ". . . all backpay owed as a result of the arbitration award along with interest . . . Respondent has thus fully complied with the arbitration award." (G.C. Exh. 1(a), Respondent's Amended Answer; see, also G.C. Exh. 21).

Conclusions

A. Respondent failed and refused to comply with Arbitration Award in a timely manner.

The award consisted, in essence, of two elements: reinstatement and backpay.[10/] Without doubt, the computation of backpay entitlement and interest is complex and requires care. Both the adequacy, i.e., proper payment, and timeliness of the payment of backpay will be considered hereinafter.

The Authority has jurisdiction in an unfair labor practice proceeding to review the alleged non-compliance with an arbitration award involving a § 21(f) subject matter, notwithstanding that it is without jurisdiction

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10/ The award was:

> "The grievance is sustained. Mr. Douglas Tyler is to be reinstated to the position of tax examiner with backpay and accumulated benefits and seniority, less backpay, benefits, and seniority for a six month period commencing on the date of his discharge." (G.C. Exh. 16, p. 9).

under § 22 to review the substance of the § 21(f) award. United States Army Adjutant General Publications Center, St. Louis, Missouri, 22 FLRA 200, 206-208 (1986); United States Department of Justice, Bureau of Prisons, Washington, D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York, 22 FLRA 928, 932 (1986), enf'd mem. sub nom. Department of Justice v. FLRA, No. 86-4133, 819 F.2d 1131 (2d Cir. 1987); Columbia Power Trades Council v. U.S. Department of Energy, 671 F.2d 325 (9th Cir. 1982). Failure to comply with an arbitrator's award in a timely manner may violate §§ 16(a)(1) and (8) of the Statute. U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida, 37 FLRA No. 44, 37 FLRA 603, 605 (1990) (hereinafter "Customs Service"); Veterans Administration Central Office, Washington, D.C. and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, 27 FLRA 835, 838 (1987), aff'd sub nom., AFGE v. FLRA, 850 F.2d 782 (D.C. Cir. 1988); United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, 25 FLRA 71, 82 (1987); cf. Department of Health and Human Services and Social Security Administration, 22 FLRA 270 (1986).

Here, the arbitrator's Award, dated March 8, 1989, had ordered Mr. Tyler's reinstatement; OPM on April 14, 1989, had filed a Motion for Reconsideration[11/]; and the

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11/ § 7703 of Title 5, as enacted, P.L. 95-454, 92 Stat. 1143, granted concurrent jurisdiction to the Court of Claims or to a United States Court of Appeals for review of decisions of the Merit Systems Protection Board and, pursuant to § 21(f), arbitration awards. The United States Court of Appeals for the District of Columbia Circuit, in Devine v. White, 697 F.2d 421 (D.C. Cir. 1983), held that OPM is neither required nor permitted to seek reconsideration of arbitrators' decisions before requesting judicial review. In 1982, when Congress created the United States Court of Appeals for the Federal Circuit to supplant the Court of Claims, § 7703 was amended to grant exclusive jurisdiction to the United States Court of Appeals for the Federal Circuit, and, in Devine v. Nutt, 718 F.2d 1049 (Fed. Cir. 1983), the Federal Circuit held that OPM is entitled to seek reconsideration by the arbitrator. Of course, reconsideration by the arbitrator must be sought within 30 days of receipt of the decision. Devine v. Sutermeister, 724 F.2d 1558, 1562, n.4 (Fed. Cir. 1983).

arbitrator's Decision on Reconsideration was dated June 27, 1989. Accordingly, the time to file for judicial review expired on, or about, July 27, 1989; but it was not until September 21, 1989, that Respondent notified Mr. Tyler that he was being "called back". This was not a question of oversight or inadvertence by Respondent for NTEU had repeatedly prodded Respondent to comply with the arbitrator's decision (Tr. 55, 56, 57, 60, 62; G.C. Exh. 19) and, on June 2, 1989, had filed the original charge herein (G.C. Exh. 1(a)).

Until OPM decided not to appeal the arbitrator's decision, or the time to appeal had expired, Respondent's non-compliance with the arbitrator's decision was understandable since, under Devine v. Levin, 739 F.2d 1567 (Fed. Cir. 1984), it appeared the arbitrator was without jurisdiction; but once the arbitration decision had become final, as Respondent well knew (Agency Exh. 15), Respondent was required to comply with the arbitration decision, and the Authority has made clear that prompt compliance is required, or, stated otherwise, failure to comply with an arbitrator's final award in a timely manner constitutes a violation of §§ 16(a)(1), (8) and, under the circumstances here, of § 16(a)(5)[12/]. While Respondent on July 7, 1989,

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12/ Although violation of § 16(a)(5) has been charged in other cases, as well as violation of §§ 16(a)(1) and (8), see, for example, Department of the Navy and Department of the Navy, Portsmouth Naval Shipyard (Portsmouth, New Hampshire), 21 FLRA 195 (1986), so far as I am aware, the Authority had not found it necessary to decide whether such conduct also violated § 16(a)(5). Id. at 200 n.6 [Petition for review granted, 815 F.2d 797 (1st Cir. 1987), decision on remand 28 FLRA 209 (1987), mandamus issued, 835 F.2d 921 (1st Cir. 1987)]. But see, Department of Health and Human Services, Social Security Administration, Field Operations, New York Region, Case No. 2-CA-30127, 40 ALJ Dec. Rep., August 28, 1984, where Judge Chaitovitz held, in part, that,

> ". . . because the grievance and arbitration process is an integral part of the parties' collective bargaining relationship, Respondent's inordinate and unjustified delay in complying with the arbitrator's award constituted a failure to bargain in good faith. . . ."

Here, as the record shows, while there was no ambiguity in the award, compliance with the award required contact and dialogue and Respondent's failure and refusal to consult or negotiate in good faith with NTEU also violated § 16(a)(5).

told NTEU that it ". . . was going to let the ULP process 'take its course' and . . . that they had no intention of at that time implementing the award." Tr. 57; G.C. Exh. 28), from the record as a whole it is apparent that Respondent's response was conditioned by the fact that the award had not then become final, i.e., OPM had not at that time decided not to appeal and/or the time to appeal had not expired. However, from on, or about, July 27, 1989[13/], Respondent had no reason whatever for its failure and refusal to promptly comply with the arbitration award to reinstate Mr. Tyler. Like compliance with the award in Customs Service, supra, to pay a fixed amount of money for attorney's fees, compliance with the arbitrator's award to reinstate Mr. Tyler was singularly simple and wholly devoid of complexity. Indeed, this is emphasized by Respondent's own regulations:

> "If a case involves returning the employee to active duty, the first order of business is to restore the employee to the rolls . . . so that his/her first pay check will not be delayed by the backpay determination. . . ." (IRM 0550.54(1), G.C. Exh. 5) (Emphasis added).

But rather than promptly offering reinstatement, Respondent intentionally delayed implementation of the award (see, Agency Exh. 15), refused to return NTEU's calls (G.C. Exh. 19), and, of course, for seven weeks after the award had become final took no action to return Mr. Tyler to work. Finally, prodded by NTEU's letter of September 13 (G.C. Exh. 19), which it had received on September 18, Respondent by letter to the Director of the Austin Compliance Center the following day [September 19] reluctantly advised the Compliance Center that, ". . . we see no alternative other than reinstating Tyler in accordance with the arbitrator's decision. . . ." (Agency Exh. 15). It certainly is true, as Respondent states, that, "Because Mr. Tyler was not

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13/ The arbitrator's decision was, as noted previously, dated June 27, 1989. The record does not show, it is true, either the date that OPM received notice of the decision or the date OPM informed Respondent that it would not appeal; but with notice, inter alia, by NTEU's letter of September 13, 1989 (G.C. Exh. 19) that the case had become final at the end of July 1989, Respondent made no effort to refute NTEU's assertion that the award had become final on, or about, July 27, 1989.

reinstated on the date of the initial award, the Agency incurred additional backpay liabilities. Mr. Tyler was also compensated by additional interest for any delay." (IRS Brief, p. 25). Nevertheless, neither backpay nor interest, nor both, is a substitute for prompt compliance with an award. § 22(b) of the Statute mandates that, "An agency shall take the actions required by an arbitrator's final award." (5 U.S.C. § 7122(b)); and Respondent's unwarranted failure or refusal to reinstate Mr. Tyler in accordance with the arbitrator's final award frustrated the purposes and policies of the Statute, and, inter alia, subjected Mr. Tyler to the continuing vicissitudes, uncertainties and hardships attendant to the deprivation of his rightful employment. By its unreasonable delay in offering reinstatement as directed by the arbitrator's final award Respondent violated §§ 16(a)(1), (5) and (8) of the Statute.

B. Preparation of backpay check, although inadequate, was not sufficiently dilatory as to constitute an unfair labor practice.

Mr. Tyler returned to work October 8, 1989; immediately initiated his request for backpay; and promptly undertook providing all of the information requested by Respondent. Nevertheless, Mr. Tyler's backpay check, which for reasons fully set forth hereinafter was inadequate and, therefore, improper, was not prepared by the Detroit Computing Center until February 8, 1990 (Agency Exh. 9).

General Counsel and NTEU assert that Respondent did not prepare its backpay check in a timely manner and thereby also failed to timely comply with the arbitrator's final award in violation of §§ 16(a)(1), (5) and (8) of the Statute, while Respondent, citing and relying on Department of Health and Human Services and Social Security Administration, 22 FLRA 270 (1986) (hereinafter referred to as "Social Security") contends that it, ". . . acted in a reasonable manner to comply with the award and there was no harm to Mr. Taylor." (IRS's Brief, p. 25).

Austin Compliance Center transmitted the Tyler case file to Southwest Region [Dallas] the second week of November 1989, on or about Saturday, November 11 (Tr. 201) after having received the last of the requested information on October 25, 1989 (G.C. Exh. 12; Tr. 200). The Southwest Region transmitted the case file to the Detroit Computing Center by memorandum dated December 29, 1989 (Agency Exh. 9), and Detroit made the determination and issued the backpay

check on February 8, 1990. Detroit made its interest computation on its backpay determination of February 8, 1990, on, or about, Monday, February 26, 1990 (Agency Exh. 10), which was paid to Mr. Tyler on, or about, March 19, 1990 (Tr. 161; G.C. Exh. 21, p. 3) [Memorandum dated April 10, 1990, from Detroit to S.W. Region].

Obviously, Respondent set no speed record for processing a backpay claim. Four months is a long time, but the arbitration award imposed no time constraints on Respondent and Detroit issued Mr. Tyler's check in one third the time required in Social Security, supra. While some of the factors which made Social Security especially troublesome are absent here, the determination of backpay, nevertheless, remains a complex matter. General Counsel contends, for example, that, ". . . even after Tyler submitted the documentation it was not until late December . . . that the documentation was even forwarded to Respondent's Detroit Computing Center for action." (General Counsel's Brief, p. 22). In a sense this is true, but in reality is a serious misrepresentation. Austin collected all data necessary for determination of the backpay claim, prepared the time and attendance Records, and, as noted above, transmitted the case file to the Regional Office about November 11. As it had received the last requested information from Mr. Tyler on October 25, the record shows that Austin acted with reasonable dispatch.

It is not suggested by either the General Counsel or by NTEU that Austin should not have submitted the case file to its Regional Office and it clearly appears that this was done pursuant to established procedure. While the file was transmitted to the Regional Office for ". . . review and submission to Detroit. . . ." (Agency Exh. 8, Attachment, transmitted from Austin to Mary McFadden SWRO), the record does not show what the Regional Office did to review the material. Certainly, the Regional Office proceeded at a snail's pace and to have taken well over a month to review the file before transmitting it, on December 29, 1989, to Detroit (Agency Exh. 8) was lackadaisical. Nevertheless, there was no time frame and nothing in the record suggests any deliberate delay. Accordingly, while the time consumed by the Regional Office may appear excessive, I do not find that the record demonstrates that the Regional Office unreasonably delayed compliance with the determination of Mr. Tyler's backpay claim.

Detroit, which would not have received the file until on, or after, January 2, 1990, made the backpay computation

and issued a check to Mr. Tyler on February 8, 1990. As the computation shows (Agency Exh. 9), gross earnings must be computed for each pay period, numerous required deductions for taxes, FICA, Medicare, and retirement made, gross and adjusted earnings determined, and net backpay determined. The record demonstrates that Detroit acted responsibly and with all deliberate speed. So, too, did Detroit timely make its interest computation (Agency Exh. 10).

C. Respondent unreasonably delayed delivery of backpay check to Tyler.

Austin received Mr. Tyler's backpay check on February 13, 1990 (Agency Exh. 9); did not notify Mr. Tyler of the availability of the check until after the finance office had closed on February 22 (Tr. 159); and the check was not released to Mr. Tyler until February 23, 1990 (Agency Exh. 9; Tr. 158).

Whether through gross neglect or intentional design, Austin unreasonably delayed effectuation of the award by holding the backpay check for nine days (seven working days) without notice of the availability of the check. Indeed, by waiting until after the finance office had closed on the 22d to notify Mr. Tyler smacks of pure cussedness. By its wholly unjustified delay in performing the simple ministerial act of releasing the backpay check to Mr. Tyler, Respondent further failed to comply with the arbitrator's award in a timely manner in violation of §§ 16(a)(1), (5) and (8) of the Statute.

D. Respondent, fully in accord with applicable regulations, properly offset all of Mr. Tyler's outside earnings.

Respondent states that,

> "The review standard in determining whether the Agency complied with the award is one of reasonableness, IRS, Austin Service Center, and NTEU Chapter 72, 25 FLRA 71 (1987). The question is whether the construction of the award by the agency is: (1) consistent with the entire award, and (2) consistent with applicable rules and regulations. Id. at 85.
>
> "There is no dispute over the wording of Arbitrator Finkin's award as was the case in IRS,

Austin Service Center and other similar cases. The award required the Agency to reinstate Mr. Tyler and to pay him backpay except for a six-month suspension. The dispute here revolves around whether the Agency's backpay calculations were consistent with outside regulations. The Agency need not comply with what the General Counsel or the Charging Party believe the award requires. Instead, the Agency has committed an unfair labor practice only if the Agency's compliance with the award is unreasonable and inconsistent with applicable rules and regulations." (IRS Brief, pp. 11-12).

Respondent has very accurately stated the law and the dispute. I fully agree that in offsetting all of Mr. Tyler's outside earnings Respondent not only acted reasonably but fully in accord with applicable regulations. Accordingly, in this regard, Respondent fully and faithfully complied with the arbitrator's award.

Section 702 of the Statute provided, in relevant part, as follows:

> "Sec. 702. Section 5596(b) of title 5, United States Code is amended to read as follows:
>
> > "'(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to . . . a grievance) is found by appropriate authority . . . to have been affected by an unjustified or unwarranted personnel action. . . .
> >
> > > "'(A) is entitled, on correction of the personnel action. . . .
> > >
> > > > "'(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; . . .'" (92 Stat. 1216, P.L. 95-454 (1978),

codified as 5 U.S.C. § 5596(b)(1)[14/])
(Emphasis supplied).

5 C.F.R. § 550.805, "Backpay computations" in subsection (e) provides as follows:

> "(e) In computing the amount of backpay under section 5596 of title 5, United States Code, and this subpart, an agency shall deduct --
>
> (1) Any amounts earned by an employee from other employment during the period covered by the corrective action; and
>
> (2) . . . The agency shall include as other employment only employment engaged in by the employee to take the place of employment from which the employee has been separated by the unjustified or unwarranted personnel action." (5 C.F.R. § 550.805 (e)).

The Statute [5 U.S.C. § 5596(b)(1)] provides without qualification that any amounts earned by the employee through other employment shall be deducted. The Code of Federal Regulations first states the unqualified language of the Statute, "Any amounts earned . . . from other employment. . . ." shall be deducted; but then qualifies this by stating that the agency shall include, ". . . as other employment only employment engaged in . . . to take the place of employment from which the employee has been separated. . . ." (Emphasis supplied). If this were all, it might be arguable, as General Counsel (General Counsel's Brief, pp. 15-17) and NTEU (NTEU's Brief, pp. 16-23) contend, that overtime earned in "other employment", where no overtime had been worked by Mr. Tyler in his government employment, should not be deducted; that no income from his "second", "other employment" [Wal-Mart] should, pursuant to the "moonlighting" rule, have been deducted; and/or that no income from hours of "other employment" outside the hours of his normal government work hours should be deducted.

But, the Code of Federal Regulations do not stand alone. First, there is the Federal Personnel Manual, a Government-

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14/ The operative provisions of 5 U.S.C. § 5596(b)(1)(A)(i), including specifically the language underscored, have remained unchanged since at least 1967. See, 81 Stat. 203, P.L. 90-83, § 5596(b)(1)(1967).

wide regulation, Department of the Interior, Washington, D.C. and Bureau of Reclamation, Lower Colorado Dams Project, Boulder City, Nevada, 26 FLRA 832, 835-836 (1987), which in SUBCHAPTER S-8. BACKPAY provides in pertinent part as follows:

> "C. Computation of net backpay. (1) Outside employment. Under 5 CFR 550.805(e) an agency must deduct any amounts earned by an employee from other employment during the period covered by the corrective action. . .
>
> "Set-off for other employment. If the employee was engaged in outside part-time employment (teaching, lecturing, or writing activities) prior to removal, suspension, or furlough from Government employment . . . the part-time job is not other employment (Emphasis in original) within the meaning of section 5596 of title 5, United States Code, because it does not take the place of the Government employment. If the employee was able to expand the part-time job to a full-time job, or took a second part-time job, as a substitute for Government employment, only those hours worked on the full-time job in excess of the aggregate of the part-time job, or only the hours worked on the second job, as the case may be, are considered as other employment in place of Government employment.
>
> "In other words, the only earnings from other employment that may not be deducted from backpay are earnings from outside employment the employee already had before the unjustified suspension or separation. For example, if an employee worked 20 hours on an outside part-time job prior to separation from Government employment, and during the period of separation worked 40 hours, the amount representing the 20 hours additional time worked would be set-off against the backpay computation. . . ." (FPM Supplement 990-2, Inst. 73, April 20, 1984; G.C. Exh. 3).15/

15/ In the FPM, i.e., prior to Supplement 990-2, Inst. 73, subsection e. of section 8-5 had provided:

(Footnote continued on next page.)

The FPM in clear and unambiguous language directs that all earnings from outside employment be deducted except earnings from outside employment the employee already had prior to the separation. Here, Mr. Tyler had no outside employment prior to his separation and, accordingly, the FPM required that Respondent deduct all of his outside earnings, whether from overtime, hours worked outside his government hours of duty, or from "moonlighting".

Likewise, Respondent's Regulation, IR Manual 0550.50, provides in pertinent part as follows:

> "2. 'Other employment' means employment which the employee secured to replace that lost by the unjustified action:
>
> > "a. Employment during the employee's regular IRS duty hours.
> >
> > "b. Employment which he/she would not have been permitted to undertake as an IRS employee.
>
> "3. If the employee already had a part-time job at the unjustified absence, such job is not 'other employment.' However, if he/she expanded the part-time job to a full-time job or were to take a second part-time job (as a substitute for

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(Footnote continued from previous page.)

> "e. Deductions. The agency shall deduct the amounts earned by the employee from other employment during the period covered by the corrected personnel action, but shall include as other employment only that employment engaged in by the employee to take the place of the employment from which the employee was separated by the unjustified or unwarranted personnel action. For example, when an employee had outside employment before his/her Government separation (such as evening work as a cab driver), the amounts earned from the continuation of that driving work after separation are not deductible. But any daytime earnings from cab driving, or any other employment engaged in to take the place of the Government employment are deductible." (FPM, Inst. 262, May 7, 1981; G.C. Exh. 4, § 8-5e, p. C-3).

his/her IRS employment), the hours worked in excess of the hours worked in the part-time job or the hours worked in the second part-time job would be considered 'other employment' in place of his IRS employment." (IR Manual 0550.57(2)(f) 2 and 3; G.C. Exh. 5).

Thus, Respondent's own Regulation, like the FPM, directs that all outside earnings, except earnings from outside employment which the employee had before the unjustified absence, must be deducted.[16/]

As noted above, the standard to determine adequacy of compliance with an arbitration award, as the Authority has stated, is:

". . . whether the Respondent's construction of the award is reasonable, which would depend on whether the construction is consistent with the entire award and consistent with applicable rules and regulations." (IRS, Austin Service Center, supra, 25 FLRA at 72).

In deducting all of Mr. Tyler's earnings from "other employment" Respondent acted fully in accord with the language of the Statute [5 U.S.C. § 5596(b)(1)]; consistent with the language of the Code of Federal Regulations [5 C.F.R. 550.805(e)]; pursuant to the clear, specific and unambiguous directions of the FPM [FPM Supplement 990-2, Inst. 73] and the Internal Revenue Manual, [IR Manual 0550.57(2)(f) 2 and 3] and pursuant to the decisions of the Comptroller General,[17/] see, for example: B-182526, 55 Comp. Gen. 48 (1975); B-165843, 48 Comp. Gen. 572 (1969); B-235638 [Matter of: Chung Yang Kido] (1990). Because deduction of all of Mr. Tyler's earnings from "other employment" was required by the specific provisions of the governing regulations, the nature of our review renders immaterial decisions of the Courts and/or the National Labor

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16/ To support a contrary conclusion, NTEU ignored the provisions of IRM 0550.57(2)(f) 3 (NTEU Brief, p. 17). Both General Counsel and NTEU totally ignored the FPM.

17/ The advisory opinion of Harry R. Van Cleve, General Counsel, United States General Accounting Office, although designated "B-224073" (March 17, 1987) (Agency Exh. 16), is not a decision of the Comptroller General.

Relations Board with respect to the private sector, or the decisions of the Merit Systems Protection Board,[18] or of the Courts under the Back Pay Act, see, for example, Payne v. Panama Canal Company, 428 F. Supp. 997, 1001 (D.C. Canal Zone 1977), rev'd on other grounds, 607 F.2d 155 (5th Cir. 1979). Stated otherwise, in determining compliance with an arbitration award, we make no initial determination but, rather, look to the agency's determination to ascertain whether the agency has acted reasonably. Where the agency follows applicable rules and regulations, as Respondent has in deducting earnings from other employment, it has acted reasonably and, of course, has complied with the award.

E. Respondent did not act reasonably in denying Mr. Tyler payment for the two week period of September 24 to October 8, 1989.

As I have found, Mr. Kelly called Mr. Hargrove, President of Chapter 247 but not Mr. Tyler's designated representative,[19] on Thursday, September 21, 1989, and told him he had been instructed to bring Mr. Tyler back immediately, "effective tonight" but could understand it if Mr. Tyler couldn't make it in tonight (Tr. 193). Mr. Hargrove called back on the same day and told Kelly, "Doug had to give notice where he was working. And he would not show up until the pay period following." (Tr. 194). Respondent unilaterally, and without notice to Mr. Tyler, his designated representative, or to NTEU, placed Mr. Tyler on the "rolls" effective Sunday, September 24 and carried him on leave without pay (LWOP), an approved leave status, until he returned to work on October 8, 1989.

The Federal Personnel Manual in section S8-5 entitled, "METHODS OF CORRECTING UNJUSTIFIED OR UNWARRANTED PERSONNEL ACTIONS" in paragraph a. provides, in part, as follows:

> "When an employee has been separated, corrective action is completed on the date that

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18/ IRS is plainly correct that: (a) the March 17, 1987, advisory opinion of the General Counsel, General Accounting Office (Agency Exh. 16) is not a Comptroller General decision (IRS Brief, pp. 18-19); and (b) that MSPB has miscited the advisory opinion (IRS Brief, p. 18, n.2).

19/ Mr. Tyler's designated representative was Mr. Wolf (Tr. 62, 151) who never received notice from Respondent that Mr. Tyler was being returned to work.

agency has reasonable set, with written notice to the employee, for his or her return to duty. Until that date, the erroneous action is in effect. Failure by the employee to report for duty on the date set by the agency may result in his or her being charged annual leave, if available, leave without pay, or absence without leave for the period from the date set for return of the employee to work until the date the employee actually returns to work. . . ." (FPM Supplement 990-2, Subchapter S-8, Inst. 73, Sec. S8-1a; G.C. Exh. 3, pp. 550-59 to 550-60) (Emphasis supplied).

The only date set by Respondent for Mr. Tyler to return to duty was immediately - "effective tonight", i.e., September 21, 1989. However, even Mr. Kelly recognized that this was not a reasonable date and stated that he could understand it if Mr. Tyler couldn't make it in tonight. When Mr. Hargrove told Mr. Kelly that, "Doug had to give notice where he was working. And he would not show up until the pay period following" to which Mr. Kelly responded, "I told Mr. Hargrove that that is fine if he is going to do that, but my instructions are that he is on [sic (the)] rolls because the agency wants to reinstate him. And he is -- he comes to work, or he is not ready, willing, and able to work." (Tr. 194).20/ Although I have credited Mr. Kelly's testimony as set forth above (see n.6 supra), from Mr. Kelly's testimony that he ". . . told Mr. Hargrove that that is fine . . . ", i.e., that he give notice where he was working, Mr. Hargrove could reasonably have understood that Respondent had thereby "set" Tyler's return date as October 8, 1989, as Mr. Tyler testified Mr. Hargrove had told him, ". . . he [Hargrove] called back and said, they are going to bring you back on the 8th." (Tr. 152).

20/ In his letter of October 19, 1989, in reference to his back pay claim, Mr. Tyler stated, in part, as follows:

> "2. I was able and ready to perform my job duties as a tax examiner during the period from December 24, 1988, through October 8, 1989. I was not incapacitated nor unavailable during this time frame due to health problems or otherwise. I did require a two week notice of a return date in order that I could give my employers, at that time, a notice of my intentions to terminate my employment with them, in order to return to duty with the IRS. . . ." (G.C. Exh. 10) (Emphasis supplied).

The FPM requires that the agency reasonably set a time for return. The National Labor Relations Board has well stated the reason for the "reasonable time" rule as,

> ". . . the fundamental right of these backpay claimants, who had been discriminatorily discharged, to a reasonable time to consider whether to return to Respondent's employ, how they were to get there, and what they were likely to face upon arriving there. "Southern Household Products Company, Inc., 203 NLRB 881, 882 (1973); Penco Enterprises, Inc., 216 NLRB 734 (1975); Freehold AMC-Jeep Corporation, 230 NLRB 3903 (1977).

Of course, the reason, in part, for a reasonable notice period to report is to permit the employee to give notice to his then employer, a condition implicit in the policy of mitigation through the seeking of other employment during the period of removal (G.C. Exh. 5, § 0550.55(4); G.C. Exh. 3, FPM Supplement 990-2, § S8-7c.(2) Mitigation of damages). A two week period of notice to an employer has become an accept business practice. Nevertheless, the regulations fix no specific time as "reasonable", because, as the National Labor Relations Board has also stated, ". . . we do not attempt to prescribe what is reasonable in every circumstance. . . ." (Penco Enterprises, Inc., supra, 216 NLRB at 735). What is reasonable must be determined on a case-by-case basis in light of the circumstances. Here, a two week period within which to report for duty would have been reasonable.

The Federal Personnel Manual further requires that the notice of the date reasonably set by the agency be given to the employee in writing. Respondent not only failed to set a reasonable period for Mr. Tyler to consider the offer and get his affairs in order but Respondent further violated the specific requirement of the FPM by failing to give written notice to Mr. Tyler.

It is true, as General Counsel (General Counsel Brief, pp. 13, 15) and NTEU (NTEU Brief, p. 13) assert, Respondent did not contact Mr. Tyler's designated representative, Mr. Wolf. The record is clear that NTEU insisted that where an employee was represented Respondent deal with NTEU and not contact the employee directly. Accordingly, Respondent acted properly in not contacting Mr. Tyler personally. It acted improperly, however, in not contacting Mr. Tyler's designated representative. Nevertheless, nothing in the record indicates that Mr. Kelly, in contacting Mr. Hargrove,

President of Chapter 247, rather than Mr. Wolf, Mr. Tyler's designated representative, was guilty of more than ignorance.

Because Respondent failed to set a reasonable date for Mr. Tyler to return to duty and because it failed to give written notice to Mr. Tyler, Respondent's offer of reinstatement as made by Mr. Kelly was not valid; Mr. Tyler's alternate reporting date of October 8, 1989, was reasonable; and Mr. Tyler's backpay period was tolled as of October 8, 1989, not as of September 23, 1989.

F. Respondent properly denied "Tax Consequences"

Finally, NTEU contends that the Agency should be liable for the "tax consequences" to Mr. Tyler because his backpay award was paid in 1990 instead of 1989.21/ This type of recovery has been repeatedly rejected by the Merit Systems Protection Board and was recently rejected by the United States Court of Appeals for the Federal Circuit.

NTEU claims that the Agency conceivably could have paid the backpay award in 1989, yet neglected to do so until 1990, and that the Agency should thus be held liable for the "tax consequences" of payment in 1990. Mr. Tyler testified that because the backpay award was paid in 1990 (when he earned additional money from his IRS salary), he would owe more taxes than he would have if the award had been paid in 1989 (Tr. 162-166). NTEU is thus requesting that the Agency be held liable for consequential damages suffered by Tyler.

"Consequential damages" are traditionally defined as damages that do not flow directly and immediately from an act but arise from the intervention of special circumstances not ordinarily predictable. Black's Law Dictionary (5th Ed.) 352. The Backpay Act only allows an Agency to pay to an aggrieved employee amounts which would take the place of his salary which he would have earned during the relevant time period. The Backpay Act does not allow for the payment of incidental expenses. National Labor Relations Board and NLRB Union, 36 FLRA 743 (1990); 63 Comp. Gen. 170 (1984) (travel expenses to replacement jobs); 61 Comp. Gen. 578 (1982) (moving and storage expenses).

21/ General Counsel apparently does not support or advocate the adverse "tax consequences" theory. General Counsel's opening statement did not mention the "tax consequences" theory although Mr. Wolf, while a witness for the General Counsel, did testify regarding this issue. See Tr. 37-38.

Federal employees have often attempted to expand the types of relief available from the government but consistently have been turned down by the courts. National Labor Relations Board and NLRB Union, supra. The courts assert that any additional amounts are in the nature of punitive damages which the government is not allowed to pay. The rationale behind these rulings is sovereign immunity. The federal government has waived its sovereign immunity to the full extent of the Backpay Act, but has not waived sovereign immunity for other consequential damages. See Rathjen v. OPM, 1991 U.S. App. Lexis 2114 (unpublished decision of Federal Circuit, 2/12/91).

The Merit Systems Protection Board has ruled that tax consequences are not recoverable by a federal employee who has prevailed before the MSPB. In Wilson v. U.S. Postal Service, 38 M.S.P.R. 156 (1988), the MSPB ruled that federal employees could not recover damages for the tax consequences of a backpay award. The MSPB held that the federal government had not waived sovereign immunity for this type of damage. See also Gay v. U.S. Postal Service, 41 M.S.P.R. 476 (1989).

The MSPB expanded on this position in another case, Kopp v. Air Force, 37 M.S.P.R. 434 (1988), where it stated:

> The instant case differs from Wilson in some respects. Because the appellant in Wilson was a U.S. Postal Service employee, his back-pay award was governed by that agency's regulations, rather than by the Back Pay Act. The award in the instant case, however, is covered by the Back Pay Act, 5 U.S.C. § 5596. In addition, the appellant in Wilson prevailed on his claim of racial discrimination, and he based his claim regarding tax liability on the "make whole" purpose of the remedies provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The appellant in the instant case did not raise an allegation covered by the Civil Rights Act and is not raising a claim related to that act.
>
> Despite these differences, we find that the appellant in the case now before us is no more entitled to the reimbursement at issue than was the appellant in Wilson. The Board has previously held that reimbursement of consequential expenses, incurred as a result of an improper personnel action, are not provided for in the Back Pay Act or

in any other authority. Similarly, the federal courts have held that, since the Back Pay Act speaks only in terms of pay, the courts do not have authority to direct payment of additional expenses. (Citations omitted).

NTEU seems to be requesting the award of "tax consequences" for Mr. Tyler to punish Respondent for the delay in implementation of the award. The Authority is also bound by the Back Pay Act and will not uphold an arbitration award that provides relief not allowed by the Back Pay Act, National Labor Relations Board and NLRB Union, 36 FLRA 743 (1990); nor, of course, may it order payment of any amount in an unfair labor practice proceeding that would be illegal under the Back Pay Act.

Accordingly, having found that Respondent violated §§ 16(a)(1), (5) and (8) of the Statute by its unreasonable delay in offering reinstatement to Mr. Tyler, by its unreasonable delay in delivering payment for backpay due under the arbitrator's final award, and by its failure and refusal to fully comply with the award of backpay by improperly excluding from payment the period of September 24, 1989, to October 8, 1989, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas (hereinafter referred to as "Respondent") shall:

1. Cease and desist from:

(a) Failing and refusing to comply promptly and fully with the final award of Arbitrator Matthew W. Finkin, issued on March 8, 1989, and sustained upon reconsideration on June 27, 1989, in the grievance of Douglas Tyler, or with any other arbitrator's final award issued pursuant to the Statute.

(b) Refusing to bargain in good faith with National Treasury Employees Union, Chapter 247 (hereinafter referred to as "NTEU") concerning compliance with the final arbitration award of Arbitrator Finkin, above, or with any other arbitrator's final award issued pursuant to the Statute.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Comply promptly with the March 8, 1989, final award of Arbitrator Matthew W. Finkin, sustained upon reconsideration on June 27, 1989, by paying Mr. Douglas Tyler backpay for the period September 24, 1989, to October 8, 1989, erroneously excluded by Respondent, together with lawful interest to the date of payment.

(b) Post at its facilities at the Austin Compliance Center, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Compliance Center and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Upon request, negotiate in good faith with National Treasury Employees Union, Chapter 247 concerning compliance with the final arbitration award of Arbitrator Finkin as ordered herein, or with any other arbitrator's final award issued pursuant to the Statute.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, Dallas, Texas 75202, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all other allegations of the Compliant be, and the same are hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Issued: August 21, 1991
Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to comply promptly and fully with the final award of Arbitrator Matthew W. Finkin, issued on March 8, 1989, and sustained upon reconsideration on June 27, 1989, in the grievance of Douglas Tyler, or with any other arbitrator's final award issued pursuant to the Federal Labor-Management Relations Statute.

WE WILL NOT refuse to bargain in good faith with National Treasury Employees Union, Chapter 247, concerning compliance with the final arbitration award of Arbitrator Finkin, above, or with any other arbitrator's final arbitration award issued pursuant to the Federal Labor-Management Relations Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply promptly and fully with the March 8, 1989, final award of Arbitrator Matthew W. Finkin, sustained upon reconsideration on June 27, 1989, by paying Mr. Douglas Tyler backpay for the period September 24, 1989, to October 8, 1989, erroneously excluded by Respondent, together with lawful interest to the date of payment.

WE WILL, upon request of National Treasury Employees Union, Chapter 247, negotiate in good faith concerning compliance with the final arbitration award of Arbitrator Finkin as ordered herein, or concerning compliance with any other arbitrator's final award issued pursuant to the Federal Labor-Management Relations Statute.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Regional Office, whose address is: 525 Griffin Street, Suite 926, Dallas, Texas 75202, and whose telephone number is: (214) 767-4996.