DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: -

DATE: JUL 27 1976

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MATTER OF: B-186556

DIGEST: Elizabeth McLaughlin - Claim for retroactive promotion and backpay

1. Employee, classified as grade GS-8, alleges that she performed grade GS-9 duties and was wrongfully denied promotion for 7 years. Claim for retroactive pay is denied since employees are entitled only to salary of position they hold regardless of the duties they perform.

2. Employee, classified as grade GS-9, alleges she was wrongfully denied promotion to grade GS-10 because of sex discrimination. Claim for retroactive pay is denied since there has been no determination that employee suffered unwarranted or unjustified personnel action under Back Pay Act because of discrimination. Employee apparently failed to file formal complaint of discrimination with employing agency or Civil Service.

This action is a request for reconsideration of the denial on October 8, 1975, by our Transportation and Claims Division (now Claims Division) of the claim of Ms. Elizabeth H. McLaughlin for backpay believed due as an employee of the Veterans Administration (VA).

Briefly stated, the facts are that Ms. McLaughlin was promoted to grade GS-9 on October 13, 1974, as a result of a reclassification of her position as a physical therapist from grade GS-8. It is now her contention that she was discriminated against in the promotion of another therapist who was hired in 1969 at the grade GS-9 level, and is entitled to have her promotion retroactively effective to the date of the original employment of the additional physical therapist and to be retroactively promoted to grade GS-10, effective the date of the other therapist's promotion to grade GS-9. Her claim was denied on the grounds that the granting of promotions is a discretionary matter

within the province of the employing agency, and that there was no evidence that she had suffered sex discrimination or an unjustified personnel action regarding her promotion or classification.

The general rule in cases of this nature is that an employee of the Government is entitled only to the salary of the position to which he is actually appointed, regardless of the duties he performs. See B-183218, March 31, 1975. When an employee performs duties normally performed by one in a grade level higher than the one he holds, he is not entitled to the salary at the higher level until such time as he is promoted to the higher level. United States v. McLean, 95 U.S. 750 (1877); Coleman v. United States, 100 Ct. Cl. 41 (1943); Dianish, et al. v. United States, 183 Ct. Cl. 702 (1968); 52 Comp. Gen. 631 (1973). In Coleman v. United States, supra, a claimant sued to recover money allegedly owed him because he had been required to perform duties at a grade level higher than the one he held. The Court of Claims stated:

> "There are innumerable instances in the Government service where employees of a lower classification perform the duties of a higher classification * ** The salaries fixed by Congress are the salaries payable to those who hold the office and not to those who perform the duties of the office. One may hold the office only by appointment by his superior, and the law vests in the superior the discretion as to whether or not appointment to the office shall be made. Where the plaintiff has received the salary of the office to which he is appointed he has received all to which he is entitled under the law. * **." (Emphasis supplied.)

The courts have consistently held that a person's right to salary is determined by the position which he holds rather than the duties he performs.

It is also well settled that the power to appoint and to promote civilian employees of the Federal Government are matters of administrative discretion which rests with the Civil Service Commission and the administrative agency involved in individual cases. See Tierney v. United States, 168 Ct. Cl. 77 (1964); Nordstrom v.

United States, 177 Ct. Cl. 818 (1966). Federal employees have no vested right to be promoted to higher grades at specific times. See B-173815, November 6, 1972. When a position is classified in accordance with regulations, an employee may not be promoted retroactively, even though the agency may subsequently reconsider its classification determination and reclassify the position upwards. B-178562, July 10, 1973, and B-170500, October 28, 1970.

Our Office has held as a general rule that an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947); 39 id. 563 (1960); 40 id. 207 (1960); 52 id. 631 (1973); 52 id. 920 (1973). However, we have permitted retroactive adjustments in cases where the administrative error has deprived the employee of a right granted by statute or regulation. See 21 Comp. Gen. 360, 376 (1941); 37 id. 300 (1957); 37 id. 774 (1958). Under the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), and the Civil Service Commission's regulations implementing the Back Pay Act, 5 C.F.R. Part 550, Subpart H, there must be a determination by an appropriate decision-making authority that a personnel action taken by an authorized official was improper or erroneous and such action must have resulted directly in the withdrawal or reduction of pay or allowances of the employee. No such determination has been made in this case.

Subsequent to the decisions cited above the Supreme Court of the United States in United States v. Testan, decided March 2, 1976, 47 L. Ed. 2d 114, 44 U.S.L.W. 4245, held that neither the Classification Act, 5 U.S.C. § 5101 et seq. (1970), nor the Back Pay Act, 5 U.S.C. § 5596 (1970), creates a substantive right to backpay for the period of an improper classification.

Ms. McLaughlin also argues on appeal that she was not promoted because of sex discrimination. It would appear that her remedy lies in the procedures provided by the Civil Service Commission in Part 713 of Title 5 of the Code of Federal Regulations to implement section 717 of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e et seq., as added by section 11 of the Equal Employment Opportunity Act of 1972, Public Law 92-261, approved March 24, 1972, 86 Stat. 103, 111. The above-cited provisions set forth the procedures for the filing of a complaint with the employing agency or the Civil Service Commission. In addition, with the enactment of Public Law 92-261, 86 Stat. 103, the 1972 Amendments to the 1964

Civil Rights Act, an aggrieved Federal employee may file a civil action in Federal court under certain time restrictions. 42 U.S.C. §§ 2000e-5, 16 (Supp. II, 1972). It is not within the jurisdiction of this Office to conduct investigations of allegations of discrimination in employment in other agencies of the Government.

Accordingly, the action of our Claims Division is sustained.

R.F.KELLER

Deputy Comptroller General
of the United States