

DECISION



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

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99085

FILE: B-180010.04

DATE: APR 9 1976

MATTER OF:

Marion McCaleb: Retroactive Promotion - Position
Reclassification - Reconsideration

DIGEST:

Employee's GS-12 position was reclassified administratively to GS-13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 C.F.R. § 511.703. Upon reconsideration, decision is affirmed.

This action responds to a request for reconsideration of decision B-180010.04, November 28, 1975; 55 Comp. Gen. 515. That decision held that the National Labor Relations Board (NLRB) could not retroactively adjust Marion McCaleb's promotion with pay where the retroactivity of the promotion involved the reclassification of Ms. McCaleb's position. The digest of the decision of November 28, 1975, reads as follows:

"Employee's GS-12 position was reclassified administratively to GS-13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 C.F.R. § 511.703."

Helen C. Reiner, attorney for Ms. McCaleb, in requesting reconsideration, states that the ruling in the decision of November 28, 1975, is based on the general rule concerning the effective dates of promotions, presumably that such promotions are generally effective only prospectively. Ms. Reiner urges that Ms. McCaleb's situation falls into the exception to the general rule as provided by the Back Pay Act, 5 U.S.C. § 5596 (1970). In this connection, Ms. Reiner refers to B-180056, May 28, 1974, and B-175275, June 20, 1975.

The decision in B-180056 involved denial of a claim for backpay involving an alleged failure to promote. To the extent

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that classification of a position was involved in the promotion process, it was stated that until the employee's position was classified upward and he was promoted, he was not entitled to the pay of the higher rated position. The decision cited, among other cases, Dianish et al. v. United States, 183 Ct. Cl. 702 (1968). The decision also stated that 5 U.S.C. § 5596 created an exception to the general rule that an employee is entitled only to the salary of the position to which he was actually appointed. While that statement could be construed to indicate the possibility of retroactive promotion under the Back Pay Act in a case where it is alleged that a position was not timely classified upward, such construction is erroneous and is negated by the holding in United States v. Testan, referenced below. The decision in B-175275 involved a backpay claim for overtime denied in violation of a labor-management agreement. Promotion incident to position classification was not involved.

As pointed out in the decision of November 28, 1975, the only provision for a retroactive effective date in a classification action is when there is a timely appeal from classification action which resulted in a loss of pay and on appeal the prior decision is reversed at least in part. See 5 C.F.R. § 511.703. None of our decisions hold that retroactive pay adjustments can be predicated on an error or failure in classification other than within section 511.703. On the contrary, we have held consistently that the effective date of a promotion based upon reclassification of a position may not be made retroactive. B-180010.04, supra, and cases cited therein.

The Supreme Court in United States v. Testan, No. 74-753, decided March 2, 1976, 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 claimed wrongful classifications.

Upon review we find no basis that would warrant reversing our decision of November 28, 1975, and accordingly it is affirmed.

R. F. KELLER

Acting
Comptroller General
of the United States