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DECISION



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

FILE: B-186758

DATE: March 23, 1977

MATTER OF: Dr. Keith A. Baker - Implementation of
Arbitration Award

- DIGEST:**
1. Community Services Administration (CSA) employee claimed that due to accretion of duties he was performing functions of GS-14 and filed grievance. Arbitrator awarded employee backpay but did not award retroactive promotion. CSA agreed to retroactively promote employee and pay backpay from August 1, 1971, to August 18, 1973, subsequent to employee's transfer to HEW. Arbitration award may not be implemented since employee's grievance involved classification matter for which statutory appeal system exists, thus removing matter from scope of arbitration system.
 2. Arbitration award granting backpay but not retroactive promotion for agency's alleged erroneous classification of employee's position may not be implemented since matter was outside jurisdiction of arbitration system. Furthermore, retroactive reclassification of position is not proper in this case since employee claimed his position should have been classified higher due to accretion of duties and Civil Service Regulations do not permit retroactive reclassification except when employee appeals classification action reducing his pay and action is reversed in whole or part.
 3. Employee who grieved agency failure to reclassify his position and promote him was awarded backpay but not retroactive promotion by arbitrator. Pursuant to agreement entered into between agency and employee, agency retroactively promoted employee and paid \$5,142 in backpay. Employee was overpaid since no authority exists to retroactively reclassify employee's position under facts of this case, agency was without authority to retroactively promote employee and award backpay, and United States is neither bound nor estopped by unauthorized acts of its agents. However, in view of facts of this case, overpayment is waived pursuant to 5 U. S. C. § 5584.

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The Community Services Administration (formerly Office of Economic Opportunity (OEO)) requests a ruling by this Office concerning the propriety of its action in retroactively promoting a former employee of the Community Services Administration (CSA).

The facts of this case, as reported by CSA, are quoted below in pertinent part:

"On October 6, 1972, Dr. Keith Baker filed a grievance with OEO alleging that OEO violated the National Agreement between OEO and the National Council of OEO Locals by requiring Baker to work at a higher classification than what he was paid. Baker maintained that this was in violation of Article 11, Section 8, of that agreement, which provided:

'The employer and the Union agree that the principle of equal pay for substantially equal work will be applied to all position classifications and actions.'

"Baker asserted that he was not timely promoted from GS-13 to GS-14 based upon accretion of duties. The grievance was duly processed to arbitration. On March 13, 1974, the duly selected arbitrator, Francis J. Robertson, issued his award. * * * The award found in favor of Baker, ordering OEO to pay him a sum equal to the difference between the GS-13 and GS-14 salary for the time period from August 1, 1971, to January 1, 1973. The arbitrator did not recommend retroactive promotion, only retroactive pay."

* * * * *

"On August 5, 1973, Baker began his employment with the Department of Health, Education and Welfare (HEW). Subsequent to Baker's transfer to HEW, the arbitrator's award was issued. Community Services Administration, the successor of OEO, believed that the Arbitrator erred in his award and appealed his decision to Federal Labor Relations Council arguing that the award was not in compliance with the Back Pay Act (5 U. S. C. 5596) or Comptroller General Decisions (i. e. CG Opinion B-178562, July 10, 1973). Subsequently, CSA withdrew its appeal and entered into an agreement with Baker and the Union for

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the purpose of implementing the arbitrator's decision. The agreement provided that CSA would retroactively promote Baker effective August 1, 1971 and would pay him all back pay due him at the GS-14 rate, including normal within grade increases from August 1, 1971 to August 18, 1973. This agreement went beyond the arbitrator's award. On August 16, 1975, CSA paid Baker a total sum of \$5,142.00 in gross salary. * * *

"HEW, in disaffirmance with the arbitrator's decision, requested a legal opinion from the Civil Service Commission as to whether the retroactive promotion issued by the CSA was lawful."

The record indicates that in response to the HEW request the Civil Service Commission by letter dated March 2, 1976, found that the matter before the arbitrator was essentially a classification matter, and, as such, was outside of the jurisdiction of the grievance system. The Commission also stated that Executive Order 11491, as amended, which governs the relations between the Executive Branch and Federal employees or organizations representing them, requires that negotiated agreements be consistent with existing and future laws and regulations, and also that such agreements may not cover matters for which a statutory appeal process exists. The Commission then stated:

"A classification appeals procedure is authorized by Chapter 51 of title 5, U. S. Code. Pursuant to the authority of 5 U. S. Code §§ 5115 and 5338 the CSC promulgated regulations, in 5 CFR, Part 511, for appeals from classification decisions. The classification of any position is therefore, a matter beyond the jurisdiction of an arbitrator because it is outside the scope of any agreement an agency and a labor organization may enter into. The arbitrator cannot circumvent the denial to him of authority to rule on what is in effect a classification appeal by awarding a retroactive increase in pay equal to the difference between the certified grade level of the position and the level the arbitrator deems the position to be.

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"It is our opinion that insofar as the promotion action by CSA was taken on the basis of the arbitrator's award, it was not proper, as the arbitrator's award made no mention of promotion, but merely awarded backpay for a specific period of time. The action of the arbitrator in so doing also was improper since compliance with the award of back pay would have required retroactive promotion which was beyond the arbitrator's authority to grant. The arbitrator's award being contrary to statute and regulation, is void and unenforceable. See Nuest v. Westinghouse Air Brake Co., 313 F. Supp. 1228 (1970)."

CSA advises that in entering into the agreement with Dr. Baker they assumed that the arbitrator's award was valid. However, they are now in agreement with the Civil Service Commission decision that the Arbitrator exceeded his authority. Our decision is requested since the CSA is now confronted with the problem of remedying its actions in light of the Civil Service Commission ruling.

By letter of November 4, 1976, Dr. Baker submitted to this Office his rebuttal of the Civil Service Commission's decision. In effect, he argues that the matter was properly the subject of arbitration, that the arbitrator's decision was consistent with existing law and regulation, and that the Civil Service Commission has no appellate authority in arbitration matters. Dr. Baker believes that the provision in the negotiated agreement which requires "equal pay for substantially equal work" mandated immediate reclassification of his position with accompanying promotion. He further states that the agreement between CSA and himself is now the controlling document in this matter.

Thus, this case presents two issues-- 1. Whether the arbitrator's decision is legally proper and may be implemented, and 2. The effect of the agreement entered into between Dr. Baker and CSA.

Propriety of Arbitrator's Decision

In his letter of November 4, 1976, to this Office, Dr. Baker explains the essence of his grievance by stating:

"The facts were that the grievance concerned OEO's handling of an accretion of duties promotion for a position * * *"
(Emphasis added.)

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It is clear from Dr. Baker's letter and other documents submitted by him that the situation described by him is not one in which he applied through competitive procedures for a newly created position, but, rather, one in which it was necessary to reclassify his existing position in order that he could then be promoted to the higher graded position. Thus, Dr. Baker's grievance essentially involved a classification matter. As such, it is outside the scope of the arbitration system for the reasons quoted above from the Civil Service Commission letter of March 2, 1976. See 55 Comp. Gen. 515, 517 (1975).

Dr. Baker cites several of our decisions in support of his position. However, the decisions cited by him are not in point as they do not involve classification matters. Decisions of this Office involving requests for retroactive promotions to correct errors in classification consistently deny such relief. See 55 Comp. Gen. 515, supra. In that decision, the National Labor Relations Board (NLRB) requested that we permit retroactive promotion of an NLRB employee in order to correct an erroneous classification, stating that they adhered to the principle of "equal pay for substantially equal work" set forth in the Classification Act of 1949, 5 U. S. C. §5101 (1)(A) (1970). We stated on page 517 that:

"Since the NLRB's submission states that the promotion of Marion McCaleb involved herein is a reclassification based upon accretion of duties and not a competitive action, it falls squarely within the regulations of the Civil Service Commission * * * and may not be made retroactive. We have ruled that when a position once has been classified in accordance with regulations, an employee may not be promoted retroactively, even though the employing agency may subsequently reconsider its classification determination and reclassify the position upwards. B-183218, March 31, 1975; B-170500, October 29, 1970."

Furthermore, the matter is not one for which the Back Pay Act provides a remedy. In United States v. Testan, 424 U. S. 392 (March 2, 1976), the Supreme Court in discussing the Classification Act stated on page 399 that:

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"To be sure, in the 'purpose' section of the Act, 5 U.S.C. §5101(1)(A), Congress stated that it was to 'provide a plan for classification of positions whereby... the principle of equal pay for substantially equal work will be followed.' And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified."

The Court also discussed the application of the Back Pay Act, 5 U.S.C. §5596 (1970) to wrongful-classification claims. It concluded that neither the Classification Act nor the Back Pay Act creates a substantive right to backpay when an agency does not classify a position upwards.

Accordingly, since Dr. Baker's grievance involved a classification matter and, as such, was outside the jurisdiction of the arbitration system, the arbitrator's award cannot be the basis for the payment of backpay to him.

Effect of March 21, 1975, Agreement

The agreement entered into between Dr. Baker and CSA on March 21, 1975, states that Dr. Baker shall be promoted to GS-14, effective August 1, 1971, and that he shall be paid the difference between the salary and the compensation he received as a GS-13 for the period from August 1, 1971, to August 18, 1973. Thus, the agreement purports to retroactively promote him and to award him the resulting difference in salary. Under Civil Service Regulations, 5 C.F.R. §511.701 et seq., classification actions may generally be made prospectively only. The sole provision for a retroactive effective date in a classification action is when there is a timely appeal from a classification action which resulted in a loss of pay and on appeal the prior decision is reversed at least in part. 5 C.F.R. §511.703. Therefore, the promotion of Dr. Baker on the basis of "accretion of duties" to the existing position could only be accomplished subsequent to the reclassification of his position to a higher grade. 55 Comp. Gen. 515, supra.

In dealing with its employees the rule is well established that the United States can be neither bound nor estopped by the unauthorized

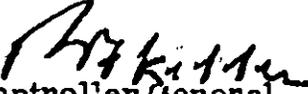
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acts of its agents. Where a Government official approves and promises reimbursement beyond that allowed by applicable law, any payments made under such unauthorized actions are recoverable by the Government. See W. Penn. Horological Inst., Inc. v. United States, 148 Ct. Cl. 540 (1959). Thus, it is clear that no administrative official can enlarge rights created by statute and regulation by misinforming persons concerning their entitlement. B-183633, June 10, 1975.

Since an agency may not legally retroactively reclassify a position, except as provided in 5 C.F.R. §511.701 et seq., any agreement which purported to retroactively promote Dr. Baker to GS-14 on the basis of alleged "accretion of duties" in his former position cannot be the basis for entitlement to backpay.

CSA states that incident to the agreement dated March 21, 1975, Dr. Baker was paid \$5,142 on August 16, 1975, representing "backpay" for the period from August 1, 1971, to August 18, 1973. Since the agreement on March 21, 1975, cannot form the basis for payment of backpay, the payments made to Dr. Baker pursuant to such agreement constitute overpayments which must be either recovered or waived under the provisions of 5 U.S.C. §5584 (Supp. V, 1975), and the implementing regulations contained at 4 C.F.R. Part 91. Those regulations permit waiver of an erroneous payment of pay or allowances where collection action would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are considered as having been met where the overpayment is determined to have occurred due to administrative error and where there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee who was overpaid.

The facts of this case clearly support waiver of the subject debt, and the \$5,142 paid Dr. Baker pursuant to the March 21, 1975, agreement is hereby waived pursuant to 5 U.S.C. §5584.


Deputy Comptroller General
of the United States