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Johannie Lupton
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DECISION



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

FILE: B-185788

DATE: June 15, 1977

MATTER OF: Nathan Lesowitz - Reconsideration of Settlement
Disallowing Retroactive Promotion and Backpay
for Extended Detail

- DIGEST:
1. Employee appealed settlement that disallowed his claim for increased compensation resulting from extended detail to higher grade position, based on holding of 52 Comp. Gen. 920 (1973), that details are not compensable. Subsequently, on December 5, 1975, we issued our Turner-Caldwell decision, 55 Comp. Gen. 539, holding that employee detailed to higher grade position for extended period is entitled to retroactive temporary promotion and backpay from 121st day of detail until termination. Our Marie Grant decision, 55 Comp. Gen. 785 (1976), applied Turner-Caldwell retroactively. Thus this claim must be reconsidered on basis of these new decisions.
 2. Claimant submitted evidence in the form of correspondence addressed to him establishing his detail effective November 4, 1968, to higher grade position and stated detail terminated in late 1971 or early 1972 when he was reassigned to another position. However, agency administrative report indicated personnel records did not reflect detail or reassignment. Also claimant received special achievement award and classification desk audit during the period and no mention was made of higher grade duties. The burden of proof is on claimant to provide adequate evidence to support his claim which he has failed to do and thus claim is disallowed.
 3. Claimants' claim for backpay incident to an excessive detail, which began on November 4, 1968, was received in GAO on October 9, 1975. Under our 6-year statute of limitations, 31 U.S.C. § 71a, any portion of a claim not within 6 years preceding the date of claim

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receipt is forever barred. Hence portion of the claim that accrued prior to October 9, 1969, may not be considered by this Office.

This action concerns a review and reconsideration of a settlement issued by our Claims Division on November 28, 1975, that disallowed the claim of Mr. Nathan Lesowitz, a retired annuitant, for additional compensation alleged to be due as a result of an extended detail to a higher grade position while he was an employee of the Rehabilitation Services Administration, Social and Rehabilitation Service, Department of Health, Education and Welfare (HEW). The claim was disallowed on the basis of the legal rationale set forth in our decision 52 Comp. Gen. 920 (1973), to the effect that a detail to a higher grade position would not entitle an employee to increased compensation. Subsequent to the issuance of this claim settlement, we overruled 52 Comp. Gen. 920, supra, in our Turner-Caldwell decision, 55 Comp. Gen. 539 (1975), which held that an employee on detail to a higher grade position becomes entitled to a temporary promotion, if otherwise qualified, on the 121st day of the detail, where his agency fails to obtain an extension of the detail from the Civil Service Commission. In view of this change, we must now redetermine whether the claim of Mr. Lesowitz may now be allowed.

Mr. Lesowitz has presented evidence in the form of an office Memorandum from Joseph Hunt, Commissioner, Rehabilitation Services Administration, dated October 16, 1968, directing Mr. Lesowitz, then a grade GS-14 employee, to assume the position of Acting Chief, Division of Statistics and Studies, a grade GS-15 position, effective November 4, 1968. Mr. Lesowitz states that this detail was necessitated by the departure of the incumbent of the higher grade position, Mr. Sigmund Schor, a grade GS-15, on a detail to the United Nations in Paris, France. The claimant asserts that he served on the detail until some time in late 1971 or early 1972 when as a result of reorganization, he was reassigned to another position as Chief, Statistical Analysis and Systems Branch, Division of Monitoring and Program Analysis, Rehabilitation Services Administration. To support his claim of a continuing detail, Mr. Lesowitz has submitted additional evidence in the form of a June 17, 1969 letter from Robert H. Finch, Secretary, HEW, and a November 5, 1969 letter from Summer G. Whittier, Executive Director, National Easter Seal Society for Crippled Children and Adults, both of which were addressed to him in his detailed capacity as acting division chief.

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It should be noted that Mr. Lesowitz' claim was first received in this Office on October 9, 1975. In this connection, 31 U.S.C. § 71a (Supp. V, 1975) provides that claims against the United States cognizable by this Office shall be forever barred unless such claim shall be received in this Office within 6 years after the date such claim first accrued. Consequently the portion of Mr. Lesowitz' claim that accrued prior to October 9, 1969, may not be considered by this Office and payment thereon is forever barred. 32 Comp. Gen. 267 (1952) and 45 Comp. Gen. 172 (1965).

Pursuant to our request, HEW has provided our Office with an administrative report concerning this claim which reads in pertinent part as follows:

'Mr. Lesowitz' Official Personnel Folder has been secured from the Federal Records Center and the following represents a summary of his career with DHEW as reflected in the Official records:

- "1. July 3, 1968 he transferred from the Bureau of the Census to the Vocational Rehabilitation Administration as a Statistician GS-1530-14/4, \$16,204 p. a.
- "2. June 4, 1967 he received a within grade increase to GS-14/5, \$17,198 p. a.
- "3. February 11, 1968 he was mass changed along with three other employees to the Social and Rehabilitation Service, Rehabilitation Services Administration, Division of Statistics and Studies, Data Center.
- "4. June 1, 1968 he received a within grade increase to GS-14/6, \$19,771 p. a.
- "5. April 19, 1971 he received a cash award of \$500.00 for special achievement during the period 4/15/70 to 4/15/71. The award was 'for performance exceeding job requirements in compiling and providing statistics in meaningful terms which can be used in the development of programs both centrally and in the States.'

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- "6. May 30, 1971 he received a within grade increase to GS-14/7, \$24,979 p. a.
- "7. June 29, 1973 he retired voluntarily from the position of Statistician (General) GS-1530-14/7, \$27,708 p. a., Rehabilitation Services Administration, Division of Statistics and Special Studies.

"There are no documents in his Official Personnel Folder which confirm or refute Mr. Lesowitz' allegations of an illegal detail to a higher graded position.

"The following facts should be noted:

- "1. Mr. Lesowitz had been assigned to an official position description properly classified at the GS-14 level. His cash award covering the period 4/15/70 to 4/15/71 relates to his position of record and no mention is made of any duties he had assumed in an acting capacity.
- "2. His position of record was audited in June 1969 and, to our knowledge, no mention was made of his performing duties other than those to which he was officially assigned.
- "3. While Mr. Lesowitz has provided copies of an unsigned memorandum authorizing him to assume the position of Acting Chief, Division of Statistics and Studies, there is no indication in the official record of the duration of this assignment, nor is there anything 'official' terminating the assignment.
- "4. The position of Chief, Division of Statistics and Studies was properly classified as a Statistician (General) GS-1530-15 on 9/21/62. That position is currently inactive. There are no official records existent which substantiate whether the position was officially constituted as a GS-15 during the period when Mr. Lesowitz alleges he was assigned to it.

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"5. There are no records of an official detail nor are there any records of an extension requested from the Civil Service Commission.

* * * * *

"Based on the evidence presented thus far, it is difficult to make a recommendation other than to deny his claim."

A review of the evidence in this case indicates that the claimant was apparently detailed to perform the duties of a higher grade position effective November 4, 1969. On the other hand, the evidence is insufficient to prove that claimant did in fact perform the duties of the higher grade position in view of the information contained in the administrative report. A special achievement award for the period April 15, 1970, to April 15, 1971, apparently was based on claimant's performance of his permanent grade GS-14 position and made no mention of any duties he had assumed in an acting capacity. In addition Mr. Lesowitz has not furnished adequate evidence to establish the date on which his detail terminated. He asserts his detail ended sometime in late 1971 or early 1972, when he was appointed Chief of the Statistical Analysis and Systems Branch, Division of Monitoring and Program Analysis, Rehabilitation Services Administration. Yet the administrative report does not reflect that he was ever assigned to such position.

The regulations of this Office governing claim settlements require a claimant to support his claim by furnishing acceptable evidence. In this connection 4 C. F. R. § 31.7 provides as follows:

"§31.7 Basis of claim settlements.

"Claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. The burden is on claimants to establish the liability of the United States, and the claimants' right to payment. The settlement of claims is based upon the written record only." (Emphasis supplied.)

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It is a general rule of law that the one raising the plea of compensation is faced with the burden of proving the claim upon which his plea is based, and that burden carries with it the risk of nonpersuasion. Day v. Niebur, 534 S. W. 2d 843 (1976); Fontenot's Rice Drier, Inc. v. Farmers Rice Milling Co., Inc., 329 So. 2d 494 (1976); and Marcum v. United States, 452 F.2d 36 (1971). Consequently we must conclude that the present evidence in the record before us is insufficient to establish that claimant in fact performed the duties of the higher grade position or to establish the date the detail terminated. Thus we must disallow Mr. Lesowitz' claim. However, we will reconsider our determination should claimant submit additional evidence concerning the aforementioned deficiencies. Such evidence may be in the form of official records or written statements from claimant's supervisors or other management officials familiar with his work. These officials should certify that to their personal knowledge the claimant performed the duties of the higher grade position until a specific date.

Acting

W. K. ...
Comptroller General
of the United States

Johnnie Lupton
Ch. Sec.

UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

TO : Director Claims Division

RM 15907

Acting
FROM : Comptroller General *G. P. KELLER*

SUBJECT: Nathan Lesowitz - Reconsideration of Settlement Disallowing
Retroactive Promotion and Backpay for Extended Detail -
B-185766-O. M.

Claim Z-2609977 is returned herewith along with decision B-185766, of
today, subject as above, that sustains your disallowance of the claim.

Attachments