

DOCUMENT RESUME

03798 - [B2834078]

[Claims for Retroactive Promotions and Backpay for a Period of Alleged Wrongful Classification]. October 5, 1977. 2 pp.

Decision re: Linda Palermo; Emmett Grubbs, Jr.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Veterans Administration.

Authority: 5 U.S.C. 5346 (Supp. II). 5 U.S.C. 5101-15. 5 U.S.C. 5506. 5 C.F.R. 532.702 (b). B-183218 (1975). United States v. Testan, 424 U.S. 392 (1976).

Two employees who were promoted to a higher grade level because they were performing duties at the higher level claimed retroactive promotions and backpay for the period of wrongful classification. The employees were entitled only to the salaries of the positions to which they were appointed, regardless of the duties performed. The claims for backpay were not allowed. (SW)

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*David  
Agarman  
C. P. ...*

**DECISION**



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

**FILE: B-189109**

**DATE: October 5, 1977**

**MATTER OF: Linda Palermo and Emmett Grubbs, Jr. - Request  
for Retroactive Promotion and Backpay**

**DIGEST:** Wage grade employees of Veterans Administration claim retroactive promotions and backpay for period of alleged wrongful classification. Claimants have no entitlement to backpay under civil service regulations or 5 U.S.C. 5346 (Supp. II, 1972) which authorizes job grading system for prevailing rate employees. Supreme Court held in United States v. Testan, 424 U.S. 392 (1975) that there is no entitlement to backpay for periods of erroneous classification under either Back Pay Act, 5 U.S.C. 5596 (1970), or pertinent classification statutes which did not expressly provide for backpay.

By letter dated May 11, 1977, the Veterans Administration has requested our decision concerning the claims of Mrs. Linda Palermo and Mr. Emmett Grubbs, Jr., WG-3 employees of the Veterans Administration Hospital, Erie, Pennsylvania, for backpay for the period February 10, 1976, to September 26, 1976.

The record shows that Mrs. Palermo and Mr. Grubbs both occupied the position of Food and Service Worker, WG-2. On June 23, 1976, claimants' supervisor, the Chief, Dietetic Service, advised the hospital's personnel officer that she had conducted a review of claimants' duties which showed that they were performing duties at the WG-3 level. A subsequent desk audit of claimants' positions conducted by the personnel officer disclosed that an accretion of higher level duties had occurred and that claimants were performing some duties at the WG-3 level. As a result, the positions in question were upgraded and claimants and others were promoted to grade WG-3 on September 26, 1976.

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 appointed, regardless of the duties he performs. When an employee performs duties normally performed by one in a grade level higher than one he holds, he is not entitled to the salary of the higher level until such time as he is promoted to the higher level. Matter of Norman M. Russell, B-183218, March 31, 1975.

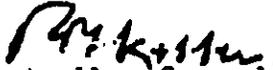
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The job grading or classification of prevailing rate positions is governed by the provisions of 5 U.S.C. 5346 (Supp. II, 1972) which empowers the Civil Service Commission to prescribe regulations regarding the classification of positions.

Section 532.702(b)(11) of title 5, Code of Federal Regulations (1976) provides that except where a classification action results in a downgrading or other reduction in pay, the effective date of a change of classification may not be earlier than the date of the decision nor later than the beginning of the first pay period which begins after the 60th day from the date the application was filed. The sole provision for a retroactive effective date for classification is when there is a timely appeal which results in the reversal, in whole or part, of a downgrading or other classification action which had resulted in the reduction of pay. See 5 C.F.R. 532.702(b)(9). Accordingly, the reclassification of a position may not be made retroactively other than as provided for in 5 C.F.R. 532.702(b)(9).

In United States v. Testan, et al., 424 U.S. 392 (1976) the United States Supreme Court held that there is no substantive right to backpay for periods of wrongful position classification where the pertinent classification statutes 5 U.S.C. 5101-5115 did not expressly make the United States liable for pay lost through an improper classification. We note that the classification statute applicable in this instance, 5 U.S.C. 5346 (Supp. II, 1972), also does not contain any express provision making the United States liable for pay lost during a period of improper classification. In addition, the court held in Testan, supra, that the Back Pay Act, 5 U.S.C. 5596 (1970) did not afford a remedy for periods of erroneous classification.

In view of the Supreme Court's holding in Testan and since neither Mrs. Palermo nor Mr. Grubbs qualifies for retroactive promotion and backpay under the above-discussed civil service regulations, there is no authority which would allow the claim for backpay for the period they occupied positions classified at WG-2. Accordingly, the backpay claimed for the period from February 10, 1976, to September 26, 1976, may not be allowed.

  
Deputy Comptroller General  
of the United States