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**DECISION**



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

**FILE:** B-18/211

**DATE:** November 17, 1977

**MATTER OF:** Joseph W. Brogan - Claim for Retroactive  
Promotion and Backpay

**DIGEST:** Employee of Department of Labor claims backpay for period of alleged wrongful classification. Claimant has no entitlement since the Supreme Court held in United States v. Testan, 424 U.S. 392 (1976), that neither Classification Act, 5 U.S.C. 5101-5115 (1970), nor the Back Pay Act, 5 U.S.C. 5596 (1970), creates a right to backpay for period of wrongful position classification. Further, GAO is without jurisdiction to determine whether a position has been properly classified. See Comp. Gen. decs. cited.

By letter dated December 9, 1976, Mr. Joseph W. Brogan, an employee of the Department of Labor, Occupational Safety and Health Administration (OSHA), appealed Settlement Certificate No. Z-2707234, dated November 22, 1976, issued by our Claims Division which disallowed Mr. Brogan's claim for a retroactive promotion and accompanying backpay for the period December 17, 1972, to April 28, 1974.

The facts in this case as revealed by official records available to this Office are as follows. The OSHA issued a vacancy announcement for a grade GS-14 Supervisory Safety Engineer position under the Department's Merit Promotion Plan on August 1, 1972. The vacancy announcement contained the following statement concerning time-in-grade restrictions:

"Applications will be accepted from persons who do not meet the new time-in-grade restrictions but who are otherwise eligible. If such a person is selected for this vacancy, the position will be reconstituted at the next lower grade level until such time as the selected candidate meets the restrictions."

Mr. Brogan, a grade GS-13 Safety Specialist, applied for the position and was selected. Because he did not meet the time-in-grade criterion, a request for a waiver of this requirement was submitted on his behalf but was denied. Accordingly, the position was

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restructured at grade GS-13 by deleting those duties that supported the higher grade, and Mr. Brogan was reassigned into it effective December 17, 1972. At that time, he had a little over 1 year in grade as a GS-13. The position was never upgraded.

In September 1973, OSHA officially announced plans to reorganize the Administration. When the plan was implemented in early 1974, Mr. Brogan's position was abolished and he was reassigned, effective April 28, 1974, to a grade GS-13, nonsupervisory Safety Engineer position through reduction-in-force procedures that he did not appeal. On February 4, 1974, Mr. Brogan filed a formal grievance with his agency requesting that he be awarded a retroactive promotion to grade GS-14 effective as of April 29, 1973, on the basis that he had satisfied the time-in-grade criterion of the original position vacancy announcement inasmuch as the Department of Labor had suspended an agency-wide time-in-grade policy. Subsequently he withdrew his grievance before it was adjudicated.

On July 14, 1976, Mr. Brogan filed a claim with this Office for a retroactive promotion to grade GS-14 and associated backpay for the period December 17, 1972, through April 28, 1974, alleging that he had performed the duties of the grade 14 position. That claim was disallowed by our Claims Division and he now appeals that disallowance. In his request for review, the employee makes the following contentions.

First he contends that some similarly situated employees were granted waivers of the time-in-grade requirement and that waivers were granted or denied in an arbitrary manner. Under Civil Service Commission regulations, Federal agencies and departments have wide discretion in allocating duties to positions and in establishing qualifications for position applicants. The burden of establishing abuse of that discretion is a heavy one. Nordstrom v. United States, 177 Ct. Cl. 818 (1966). The claimant has presented no evidence to support his assertion that OSHA abused its discretion in denying the request for waiver of the time-in-grade requirement for his position and accordingly we find no merit in his allegation.

Second, Mr. Brogan alleges that OSHA and Department of Labor policies governing time-in-grade restrictions and conditions under which such restrictions could be waived were never published and made available to employees.

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A review of the record discloses that Department of Labor Under Secretary Lawrence H. Silberman, forwarded a memorandum dated September 3, 1971, subject: "Government-wide Program for Cost Reduction" to Assistant Secretaries which set forth time-in-grade restrictions and provided for waiver of the restriction in hardship cases. However, as we have already pointed out, the Department of Labor had wide discretion in establishing these criteria and was not required to limit the exercise of such discretion through the promulgation of detailed regulations.

Finally, Mr. Brogan contends that his position was improperly classified at grade GS-13 and that during the period from December 17, 1972, until April 28, 1974, he performed the duties associated with the position of a grade GS-14 Supervisory Safety Engineer.

It is not within the jurisdiction of this Office to determine whether a position has been properly classified or described. B-186087, June 1, 1976. The classification of positions in the General Schedule is governed by the Classification Act of 1949, as amended, now codified at 5 U.S.C. 5101-5115 and Commission regulations contained in 5 C.F.R. Part 511. These regulations specifically provide that a position may not be retroactively reclassified to a higher grade except as provided for in 5 C.F.R. 511.703, which is not apposite to the case at hand. 55 Comp. Gen. 515 (1975).

Recently, the United States Supreme Court affirmed the validity of this rule in United States v. Testan, 424 U.S. 392 (1976) by holding that neither the Classification Act nor the Back Pay Act, 5 U.S.C. 5596 (1970) creates a substantive right to backpay for periods of a wrongful position classification.

In view of the holding in the Testan case and since Mr. Brogan does not qualify for retroactive promotion and backpay under Civil Service Commission regulations, there is no authority under which his claim for backpay may be allowed. Accordingly, we sustain the Certificate of Settlement issued November 22, 1976, which disallowed Mr. Brogan's claim.

  
Deputy Comptroller General  
of the United States