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D. Agazarian CP

DECISION



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

FILE: B-191369

DATE: April 3, 1978

MATTER OF: Francis J. McGrath - Claim for Backpay
for Period of Erroneous Classification
Under the General Schedule

DIGEST: Employee of Smithsonian Institution occupied position which the Civil Service Commission determined was erroneously included in the General Schedule and Commission instructed agency to classify position under Federal Wage System. Employee seeks backpay for period of erroneous classification. Claim may not be allowed as civil service regulations provide for retroactive effective date for classification only when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which had resulted in the reduction of pay. See 5 C.F.R. 511.703; 5 C.F.R. 532.702(b)(9).

This decision concerns a claim by Mr. Francis J. McGrath for retroactive classification and accompanying backpay in connection with his employment with the Smithsonian Institution as a Planner Estimator.

The record shows that Mr. McGrath was employed in the Office of Plant Services, Management Services Division, Work Coordination Branch, as a Planner Estimator grade GS-302-9. By letter dated September 30, 1976, Mr. McGrath appealed his classification to the U.S. Civil Service Commission (Commission). We also note that on October 22, 1976, a group of Planner Estimators, including Mr. McGrath, sent a memorandum to the Chief, Management Services Division, of the Smithsonian, requesting that their Planner Estimator positions be "reclassified" from the General Schedule to the Federal Wage System.

Upon an examination of the duties and responsibilities of Mr. McGrath's position, on March 18, 1977, the Classification Appeal Office of the Commission issued a Classification Appeal Decision which held that Mr. McGrath's position was exempt from the General Schedule classification system under 5 U.S.C. 5102(c)(7) and that the position was properly classifiable under the Federal Wage System. Since the Commission's regulations set forth at 5 C.F.R. 532.703(a) do not provide that the Commission can render a classification decision as to grade under the Federal Wage System where the agency has not classified the position, the Commission remanded Mr. McGrath's case to the Smithsonian Institution for a

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classification action. Accordingly, on April 24, 1977, the Smithsonian Institution converted the classification of Mr. McGrath's position to that of Planner Estimator General, WD-6701-8, step 1. Mr. McGrath states that he was performing the duties of a WD-8 position for several years prior to his conversion to the Federal Wage System and he claims backpay representing the difference between the compensation of his current WD-8 position and that of his prior grade GS-9 position.

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.

The classification of positions in the General Schedule and the job grading of prevailing rate positions is governed by 5 U.S.C. 5101-5115 and 5 U.S.C. 5346 (Supp. II, 1972). Sections 5115 and 5346 empower the Commission to prescribe regulations regarding the classification of positions. Under the Commission's regulations the only provision for a retroactive effective date for classification is when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which had resulted in the reduction of pay. See 5 C.F.R. 511.703 and 5 C.F.R. 532.702(b)(9).

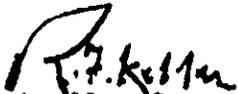
In United States v. Testan, et al., 424 U.S. 392 (1976) the United States Supreme Court held that there is no substantive right to backpay for periods of wrongful position classification where the pertinent classification statutes 5 U.S.C. 5101-5115 did not expressly make the United States liable for 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 Mr. McGrath does not qualify for retroactive promotion and backpay under the above-discussed civil service regulations, there is no

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authority which would allow the claim for backpay for the period he occupied a position classified in the General Schedule classification system.

We note that Mr. McGrath also presents claims for backpay for periods of erroneous classification for other Planner Estimators who occupied positions under the General Schedule. Our determination with regard to Mr. McGrath would also be applicable to other employees similarly situated who were erroneously included in the General Schedule and who do not fall under the provisions of 4 C.F.R. 511.703 or 5 C.F.R. 532.702(b)(9).


Deputy Comptroller General
of the United States