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DECISION



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

FILE: B-191360

DATE: May 10, 1978

MATTER OF: Russell Swain - Claim for Backpay

DIGEST: Employee of Department of Housing and Urban Development claims retroactive promotion and accompanying backpay for period of alleged wrongful classification. Claimant has no entitlement under civil service regulations and Supreme Court holding 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. 5593 (1970), creates a substantive right to backpay for period of wrongful position classification. See B-183218, March 31, 1975.

By recent correspondence Mr. Russell Swain, an employee of the Department of Housing and Urban Development (HUD) in Buffalo, New York, has appealed the action of our Claims Division which in Certificate of Settlement dated January 26, 1978, disallowed Mr. Swain's claim for a retroactive promotion and accompanying backpay. This claim arises out of Mr. Swain's allegations that he was improperly classified at the grade GS-11 level and that he was performing duties of higher graded positions and that he was also assigned to a higher graded position.

The record shows that on February 21, 1971, Mr. Swain was reassigned from the position of Realty Specialist grade GS-11 to that of Rehabilitations Loan and Grants Representative grade GS-11. On October 17, 1971, another individual was appointed to a position in Mr. Swain's office from the Civil Service Commission Register as a Community Development Representative grade GS-12. This individual was apparently hired as Mr. Swain's replacement. Effective November 23, 1971, Mr. Swain was reassigned from his position as Community Development Representative grade GS-11 to that of Codes Specialist grade GS-11. Mr. Swain continued in the Codes Specialist grade GS-11 position in the Operations Division, Planning and Relocation Branch until October 27, 1974, when he was promoted to grade GS-12 due to the reclassification of his Codes Specialist position.

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Mr. Swain claims a retroactive promotion and accompanying backpay for the period from his initial reassignment on February 21, 1971, to the Rehabilitation Loan and Grants Representative position up to his promotion on October 27, 1974, to the position of Codes Specialist grade GS-12. Mr. Swain states that he was performing the duties of at least a grade GS-12 during the period in question and cites in support of his position such facts as his replacement by a grade 12 Community Development Representative in October 1971 and to the reclassification of his Codes Specialist position effective October 27, 1974.

Concerning Mr. Swain's contention that he was performing the duties of a higher graded position during the period he occupied positions classified at the grade GS-11 level, the general rule 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 he is promoted to the higher level. Matter of Norman M. Russell, B-783218, March 31, 1975.

The classification of positions in the General Schedule is governed by 5 U.S.C. 5101-5115. Section 5115 empowers the Civil Service Commission to prescribe regulations regarding the classification of positions. Under the Commission's regulations the only provisions 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.

In United States v. Testan, et al., 424 U.S. 392 (1976), the United States Supreme Court held that neither the Classification Act nor the Back Pay Act, 5 U.S.C. 5596 (1976) creates a substantial right to backpay for periods of wrongful position classification. In view of the Testan case and the above-cited civil service regulations, Mr. Swain does not qualify for a retroactive promotion as a result of any erroneous classification of his position during the period in question.

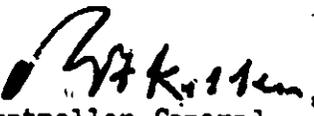
Mr. Swain also alleges that he was detailed or assigned to a higher grade position. Mr. Swain has cited as evidence of a detail to a higher graded position an office memorandum dated

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March 1, 1974, which he received from the Acting Assistant Director of the HUD, Planning and Relocation Branch, which stated that his job designation was "Workable Program Officer." However, the record does not support the contention that this memorandum constituted a detail to a higher graded position. We have been advised by the HUD Buffalo area office that there was never any established position in Mr. Swain's office, the Planning and Relocation Branch which was designated as "Workable Program Officer."

Our Office has held that employees officially detailed to higher graded positions for more than 120 days without Civil Service Commission approval, are entitled to retroactive promotions with backpay for the period beginning with the 121st day of the detail and continuing until the detail is terminated. Everett Turner and David L. Caldwell, 55 Comp. Gen. 539 (1975) and Marie Grant, 55 Comp. Gen. 785 (1976). However, these decisions are applicable only to details to higher graded positions which have been classified by competent authority, since there can be no promotion to a position which has not be previously classified to a higher grade. Hubert J. Buteau, B-187287, May 13, 1977.

In accordance with the above, there is no basis on which to allow Mr. Swain's claim for retroactive promotion and accompanying backpay and the Certificate of Settlement issued by our Claims Division on January 26, 1977, is hereby sustained.


Deputy Comptroller General
of the United States



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

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May 10, 1978

The Honorable Jack Kemp
House of Representatives

Dear Mr. Kemp:

Further reference is made to your letter dated March 1, 1978, concerning the claim of Mr. Russell Swain for retroactive promotion and backpay as an employee of the Department of Housing and Urban Development.

By our decision of today, B-191360, copy enclosed, we have determined that the claim may not be allowed as there is no authority for backpay for a period of alleged erroneous classification. There is also no authority for backpay incident to a detail assignment to a position which has not been classified to a higher grade. We regret that under the circumstances we are unable to give a more favorable reply to Mr. Swain.

Sincerely yours,

Deputy

R. F. Kinn
Comptroller General
of the United States

Enclosure

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UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

May 10, 1978

TO : Director, Claims Division

Deputy
FROM : Comptroller General *Agatarian*

SUBJECT: Russell Swain - Claim for Backpay - B-191360-O.M.

Returned herewith is your file Z-2718126, forwarded here on February 24, 1978, in connection with Mr. Swain's appeal from your denial of his claim for backpay for a period of alleged erroneous classification and for an alleged detail to a higher graded position. That denial is sustained by our decision of today B-191360, copy attached.

Also attached is a copy of our letter of today to Representative Jack Kemp who is interested in this matter.

Attachments