

12643 *plm-1 mr. Kirkpatrick*

DECISION



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

FILE: B-191642

DATE: January 23, 1980

MATTER OF: *for* Joe F. McLeod - Retroactive Temporary Promotion
Reconsideration

DIGEST: Retroactive temporary promotion is denied where employee did not rebut employing agency's finding that higher-level duties, although accruing to employee's position, were result of classification error as opposed to detail to classified, established position at higher grade. Under United States v. Testan such error can be corrected only prospectively by employing agency or Office of Personnel Management.

Mr. Joe F. McLeod asks for reconsideration of our denial of his claim for a retroactive temporary promotion with backpay based upon a detail to a higher-graded position.

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In our decision, Matter of Joe F. McLeod, B-191642, November 17, 1978, we noted that Mr. McLeod's employing agency, the United States Army, Fort Bragg, North Carolina, had determined in May 1976 that Mr. McLeod had "apparently performed the duties of Cook WG-08." However, during the period June 9, 1970, to February 23, 1975, Mr. McLeod had occupied the lower-grade position of Cooks Helper, WG-05. In our decision, therefore, we requested that the agency determine whether higher-grade duties performed during this period resulted from an accretion of such duties to Mr. McLeod's position not accurately reflected by classification action or from the assignment of Mr. McLeod to an established, classified position at the higher grade WG-08. The decision pointed out that if the agency reached the latter conclusion, Mr. McLeod would be entitled to a retroactive temporary promotion in accordance with our Turner-Caldwell decision, 56 Comp. Gen. 427 (1977). But we said that an erroneous classification action would not warrant a retroactive temporary promotion, since it could be corrected only prospectively by reclassifying Mr. McLeod's position under the U.S. Supreme Court's ruling in United States v. Testan, et al., 424 U.S. 392 (1976).

By letter of January 17, 1979, the Finance and Accounting Officer at Fort Bragg transmitted the agency's official finding of fact as we had requested. The Civilian Personnel Officer of the employing agency reported that the evidence of record had been carefully reviewed and the agency had concluded that Mr. McLeod was not detailed to the

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higher-level position. He said that Mr. McLeod "was allowed to accrue Cook, WG-08, duties and was the victim of wrongful classification during all or a portion of the period specified in the claim."

Mr. McLeod has not furnished additional information showing that he was detailed to the higher-level position. Rather, he has supplied us with excerpts from the employing agency's Negotiated Contract Agreement with his labor union, including a provision (Section 3), which states:

"An employee will not be detailed to an unestablished position in excess of 120 calendar days."

Mr. McLeod believes that the agreement justifies a retroactive temporary promotion under our decision in Matter of Council and Washburn, 58 Comp. Gen. 347 (1979), which held that for the purpose of overtime pay the definition of "day" in a labor-management agreement governed entitlement, since the definition did not violate law or regulation.

As distinguished from Matter of Council and Washburn, however, the present case involves laws and regulations that make reclassification of positions subject to the jurisdiction of the employing agency as well as the Office of Personnel Management, and that provide that reclassification is prospective only. 5 U.S.C. §5346; 5 C.F.R., Part 532, Subpart G, Testan, supra. Further, Mr. McLeod has not rebutted the employing office's findings that there was only classification error as result of an accretion of duties, and not a detail to the position in question. Consequently, he has not met his burden of proving his claim as required by Part 31, title 4, Code of Federal Regulations.

Accordingly, our prior denial of the claim is sustained.



For The Comptroller General
of the United States