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Mr. Browne
PLM2



DECISION

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

FILE: B-196995

DATE: November 6, 1980

MATTER OF: David J. Banyas - *[Claim for Retroactive Temporary Promotion and Backpay]*

DIGEST: Employee claims retroactive temporary promotion and backpay for performing the duties of an aircraft mechanic foreman prior to his promotion to that position. Foreman position was not established until time of claimant's permanent promotion to it. Since an employee is entitled only to the salary of his appointed position, regardless of the duties performed, the claim is denied. 52 Comp. Gen. 920 (1973).

By a letter dated November 16, 1979, Mr. David J. Banyas appealed our Claims Division's Settlement issued October 11, 1979, which denied his claim for a retroactive temporary promotion and backpay from grade WG-12 to grade WS-7 between July 9, 1972, and July 1, 1978. This decision deals only with that portion of the claim which accrued after February 16, 1973, since Mr. Banyas did not question the Claims Division's determination that the earlier portion of his claim is barred by the applicable 6-year statute of limitations.

The record shows that on June 13, 1971, Mr. Banyas was assigned to the position of Aircraft Mechanic, WG-8852-12. This position had been established as a small shop chief in the Repair and Reclamation Shop, 927th Tactical Airlift Wing, Selfridge ANG Base, Michigan. Mr. Banyas directed the activities of two subordinate employees who were Aircraft Mechanics, WG-8852-10. On July 9, 1972, a third employee came under his supervision. A fourth employee was added to the shop in 1977. Apparently Mr. Banyas attempted to have his position upgraded to foreman beginning in 1972. However, a foreman position, Aircraft Mechanic Foreman, WS-8852-07, was not established in the Repair and Reclamation Shop until May 9, 1978. Mr. Banyas competed for and was selected for the foreman position. He was promoted effective July 2, 1978. Subsequently,

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he filed a claim for a retroactive promotion and backpay from July 9, 1972, the date he began supervising three persons, through July 1, 1978, the time of his promotion to the foreman position.

As stated earlier, Mr. Banyas' claim was denied by our Claims Division on October 11, 1979. We affirm that action for the reasons set forth below.

It is well established that an employee of the Federal Government is only entitled to the salary of the position to which he is appointed, regardless of the duties he actually performs. 52 Comp. Gen. 920 (1973). While we have held in our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), that an employee who performs the duties of a higher grade position for more than 120 days without Civil Service Commission (now Office of Personnel Management) approval is entitled to a retroactive promotion beginning on the 121st day of the detail, the foreman position was not established until May 9, 1978. Therefore, there was no foreman position in the Repair and Reclamation Shop to which Mr. Banyas could be retroactively promoted during the period of his claim. Although he was promoted to grade WS-7 in 1978 after the foreman position was established, the Supreme Court in United States v. Testan, 424 U.S. 392 (1976), held that neither the Classification Act, 5 U.S.C. §§ 5101-5115, nor the Back Pay Act, 5 U.S.C. § 5596, creates a substantive right to backpay during a period of wrongful classification.

Accordingly, the action of the Claims Division on October 11, 1979, disallowing Mr. Banyas' claim for backpay is sustained.

Harry R. Van Cleave

For The Comptroller General
of the United States