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DECISION



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

15647

FILE: B-195477

DATE: December 10, 1980

MATTER OF: Clyde C. Kendrick - *Claim For* Retroactive Promotion
and Backpay

DIGEST: Employee's claim for backpay from September 20, 1973, to November 6, 1978, when he was promoted from WG-5 to WG-8, based on contention that WG-5 position was misclassified during period and promotion was reclassification of WG-5 position, cannot be allowed. There is no right to backpay for periods of claimed wrongful classification and, except for successful appeals of downgradings, classification actions cannot be made retroactive. Neither can claim be allowed on theory that employee was detailed to position classified in higher grade in absence of conclusive evidence that he performed full range of duties of WG-8 position during entire period claimed.

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Mr. Clyde C. Kendrick, an employee of the Department of the Navy in the Commissary Store of the Naval Air Station at Pensacola, Florida, seeks further consideration of his claim for a retroactive promotion and backpay based on the alleged wrongful classification of his position. For the reasons set forth subsequently his claim cannot be allowed.

By letter dated February 9, 1978, Mr. Kendrick, then a Meatcutting Worker WG-5, appealed the classification of his position to this Office and claimed backpay from September 20, 1973, on the grounds that he had been performing the duties of the position of Meatcutter WG-8 since that date. In support of his claim he submitted (1) a report of a position classification specialist, dated September 20, 1973, indicating that in three annual classification reviews Meatcutting Workers WG-5 had been found to be performing tasks which fell within the difficulty range of Meatcutter WG-8; (2) a memorandum from the Head of the Wage and Classification Division of the Consolidated Personnel Office for the Naval Air Station,

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dated June 15, 1977, indicating inadequate distinctions between job descriptions for the WG-8 and WG-5 positions, lack of clearly defined duties and responsibilities, and difficulty in differentiating between levels of work since employees were indiscriminately utilized as needed which resulted in employees working above or below the level appropriate for their classifications; and (3) statements from several fellow workers indicating that Mr. Kendrick performed the same duties as Meatcutters WG-8.

The record indicates that Mr. Kendrick filed grievances on this matter on June 11, 1973, and November 12, 1975, which apparently resulted in classification reviews but no further action. In addition he filed a classification appeal with the Office of Civilian Personnel of the Department of the Navy in Washington, D.C. However, precisely what he appealed is not clear, i.e., whether he appealed for an upgrading of the duties described in his WG-5 position description or whether he appealed for a higher grade on the basis of the WG-8 duties he alleged he was performing. The Office of Civilian Personnel apparently construed it to be the former and decided on January 17, 1978, that the WG-5 position was properly classified. There is no evidence that Mr. Kendrick carried the appeal further.

By letter dated March 20, 1978, our Claims Division advised Mr. Kendrick (1) that the authority to classify positions is vested by law in the employing agency and the Civil Service Commission (CSC) - now the Office of Personnel Management (OPM) - and that the General Accounting Office has no jurisdiction in this area; (2) that making classification actions retroactive is prohibited by CSC/OPM regulations except in the case of a successful appeal of a downgrading or other classification action resulting in a reduction in pay; and (3) that the United States Supreme Court has held in United States v. Testan, 424 U.S. 392 (1976), that there is no right to backpay for a period of claimed wrongful classification. It is noted that the Claims Division inadvertently cited the law and regulations governing General Schedule (GS) positions (5 U.S.C. § 5101 et seq., 5 C.F.R. § 511.701 et seq.) rather than those governing prevailing rate (WG) positions

✓ (5 U.S.C. § 5346, 5 C.F.R. § 532.701 et seq.) However, with regard to the matter at hand the rules for both categories are substantially the same. Moreover, while the Testan case involved GS positions we can perceive of no justification for applying a different rule for WG positions. Francis J. McGrath ✓ 57 Comp. Gen. 404 (1978).

This Office had no further word on this matter for more than a year. Then a letter dated June 1, 1979, was received advising that Mr. Kendrick had been promoted to Meatcutter WG-8 on November 6, 1978, and alleging that this was a reclassification of his WG-5 job entitling him to a retroactive promotion and backpay from September 20, 1973, to the date of his promotion under ✓ 5 C.F.R. § 511.703 [5 C.F.R. § 532.702]. Enclosed with this letter was a copy of another report by a position classifier, dated June 1978, which (1) reiterated that differentiation between levels of work was nearly impossible because employees were indiscriminately utilized on an "as needed" basis; (2) stated that the grade controlling work of the WG-8's might occupy only a relatively small portion of their time and that sharing this work with WG-5's could "thin it out" to such an extent as to affect the classification; and (3) stated that Mr. Kendrick and another employee had been found to be performing work at the WG-8 level and should be promoted to that level or assigned duties commensurate with the WG-5 level.

It is alleged that as a result, Mr. Kendrick was assigned WG-5 duties for 2 days and then returned to WG-8 duties. In any event we are told by the personnel office at the Naval Air Station that it was subsequently decided that additional Meatcutters WG-8 were needed, that the position was advertised, and that Mr. Kendrick was competitively promoted to it on November 6, 1978.

There appears to be little doubt that Mr. Kendrick's employing activity was remiss in managing its staff by failing to distinguish between levels of difficulty and assigning tasks to the work force indiscriminately. As a result Meatcutting Workers WG-5 sometimes performed duties contained in the position description for Meatcutters WG-8 and the WG-8's sometimes performed duties

described at the WG-5 level. Nevertheless, as has been pointed out by our Claims Division, (1) this Office has no authority to change, retroactively or otherwise, the classification of a prevailing rate position in another agency-only CSC/OPM can do this, 5 U.S.C. § 5346; (2) the Supreme Court in the Testan case made it very clear that backpay may not be allowed for periods of alleged wrongful classification, and (3) even if it were assumed that Mr. Kendrick's promotion resulted from the reclassification of his position on appeal, that promotion could not have been made retroactive and backpay could not have been awarded since he had not been downgraded or reduced in pay, 5 C.F.R. § 532.702. Therefore, Mr. Kendrick may not be allowed backpay for the period claimed, September 20, 1973, to November 6, 1978, on the theory that his position was misclassified. McGrath, supra. He should have pursued a remedy through a timely classification appeal to CSC/OPM. 5 U.S.C. § 5346(c); 5 C.F.R. § 532.703.

The only other theory under which Mr. Kendrick might possibly be entitled to backpay is that he was detailed to the Meatcutter WG-8 position within the purview of Turner-Caldwell, 55 Comp. Gen. 539 (1975), affirmed 56 id. 427 (1977). This decision holds that if an employee is detailed to a position classified in a grade higher than his or her assigned grade for a period in excess of 120 days without CSC approval, the employee is entitled to a temporary retroactive promotion and backpay for such period, provided he or she would have met all qualification and other requirements for such a promotion. This decision involved GS employees but its application has been extended to WG employees. Annette Smith, et al., 56 Comp. Gen. 732 (1977).

However, for entitlement to backpay under Turner-Caldwell the claimant must prove beyond a reasonable doubt on the record that during the entire period claimed, he performed the full range of duties set forth in the position description for the classified position to which the detail is alleged. The performance of some of the duties of a higher-grade position

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for some of the time is not sufficient to invoke the remedy provided by Turner-Caldwell. Thomas L. Tyburski, B-196175, August 6, 1980; Vernon P. Humphries, B-194890, March 28, 1980.

While the record here does establish that Mr. Kendrick performed tasks of the WG-8 level of difficulty for at least some of the time, it suggests that he, as well as all the other employees, also at times performed tasks at the WG-5 level when the workload required. In any event, the record does not establish conclusively that he performed the full range of duties of the Meatcutter WG-8 position throughout the entire period claimed. This Office settles claims solely on the basis the written record and the claimant has the burden of proving the liability of the United States and his or her right to pay. 4 C.F.R. § 31.7. In the absence of sufficient evidence to establish this liability and this right there is no legal basis to allow the claim.

Accordingly, Mr. Kendrick's claim for backpay for the period September 20, 1973, to November 6, 1978, cannot be allowed either on the theory that his position was misclassified or on the theory that he was detailed to a position classified in a higher grade.



For the Comptroller General
of the United States