

115-951 *File*

**DECISION**



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

18966

**FILE:** B-199730

**DATE:** July 31, 1981

**MATTER OF:** Paul W. Braun - Pay determination - Position classification

- DIGEST:**
1. Because statutory authority to establish appropriate classification standards and to allocate positions subject to the General Schedule rests with the agency concerned and OPM, this Office has no authority to settle claims on any basis other than the agency or OPM classification. And, since OPM determinations on classification appeals are binding on this Office under 5 U.S.C. § 5112(a), this Office has no authority to modify such actions.
  2. Agencies are authorized to classify positions in grades GS-1 through GS-15 consistent with published standards without prior approval of OPM under 5 U.S.C. § 5107, and the grades thus assigned are the basis for pay and personnel transactions. However, pursuant to 5 U.S.C. §§ 5110 and 5112, agency classification actions are subject to review by OPM which may order corrective action if warranted.
  3. Under 5 C.F.R. § 511.701 (1980), the effective date of a classification action taken by an agency is the date the action is approved in the agency or a subsequent date specifically stated. Section 511.702 provides that the effective date of a classification action upon appeal to the agency or OPM, subject to the provisions of section 511.703, is no earlier than the date of decision on the appeal.
  4. An employee of the Government is entitled to the salary of the position to which he is actually appointed, regardless of the duties actually performed. When an employee performs duties normally performed by one in a grade level lower than the one

*Request for Pay Determination and Position Classification*

~~014426~~ **115951** *Classification*

he holds, no requirement exists to reduce his salary to the lower level until such time as the individual is actually demoted to that level.

5. Agency established and classified new GS-15 position and officially appointed employee to position effective September 2, 1979. Subsequently OPM reviewed position classification and on March 27, 1980, ordered agency to take corrective action including removal of employee from improper position. Agency removed employee effective September 7, 1980. Since matters relating to propriety of position classification are for agency and OPM, and applying controlling legal authorities discussed in this decision, GS-15 rate payments received by employee from September 2, 1979, to March 27, 1980, are proper and not subject to claim by Government. Payments at GS-15 rate after March 27, 1980, are erroneous but are hereby waived under 5 U.S.C. § 5584.

W. M. Paz, Assistant Administrator for Human Resources and Organization, General Services Administration, asks our opinion concerning a pay determination in the case of Mr. Paul W. Braun, a General Schedule employee of the General Services Administration (GSA).

GSA reports that on February 8, 1979, a position was established in the GSA, National Capital Region, Office of Administration, identified as Director, Budget and Management Systems Division, GS-15. It was considered to be a new position with substantially different duties from any position then existing. The vacancy was announced under the GSA Merit Promotion Program and Mr. Paul W. Braun, a GS-14 employee of the GSA Central Office detailed to the National Capital Region, was selected for promotion to the new position. Although officially assigned to the new position, Mr. Braun never reported to the new position and continued on his detail. An on-board regional official filled in as the interim supervisor of the Budget and Management Systems Division. Mr. Braun's promotion and official assignment to the GS-15 position was effective September 2, 1979.

Subsequently, the Office of Personnel Management (OPM) visited the GSA regional office to investigate allegations concerning certain improper personnel practices. One of the personnel actions alleged to have been improper was the creation of the position of Director, Budget and Management Systems Division, GS-301-15, and the subsequent selection of Mr. Braun to fill that position. As a result of this portion of their investigation OPM determined that the personnel action in question was improper for the following reasons:

" - The position of Director, Budget and Management Systems Division, GS-301-15, was properly classified as a GS-301-14.

" - The GS-301-15 Division Director position was essentially the same as the Division Director, GS-301-14 position.

" - The initiation of competitive action was a violation of the merit promotion process. If the position was properly classifiable at the GS-15 level, the incumbent of the GS-301-14 position was entitled to non-competitive promotion. This was because the Division Director position was reclassified upward without any significant change in the duties and responsibilities of the position.

"- Even if the action was proper (which it was not), it is clear that Mr. Braun never served in the position of Division Director. Rather, he continued to carry out the responsibilities of his former GS-14 position.

"- The Budget and Management Systems Division never materialized."

Based upon these findings OPM ordered corrective action effective March 27, 1980, reporting its actions to this Office as follows:

"In the subject case, we found that Mr. Braun had been improperly promoted to a position, the duties of which he never performed; in fact he continued to perform the duties of the position he was promoted from. Since the action promoting Mr. Braun to the GS-15 level was improper, and he never served on the GS-15 position, we

ordered corrective action. As we stated in our March 27, 1980, letter to GSA, 'as a matter of policy, OPM in no way orders corrective action which may hurt an unwitting beneficiary of improper personnel actions unless, as in the instant case, it is absolutely necessary. Mr. Braun must be removed from his present position at GS-15. He, of course, is entitled to compete for other GS-15 positions. There remains, moreover, the matter of the overpayment. We did not order Mr. Braun to repay the money. We have no authority to do so. However, GSA may not waive the overpayment without submitting the facts to GAO for its consideration, if it is in excess of five hundred dollars. (See 5 U.S.C. 5584).'

The comprehensive administrative record in the present case shows that effective September 7, 1980, the GS-15 position was abolished and Mr. Braun was returned to his former position of Buildings Management Officer, GS-1176-14. He appealed this action to the Merit Systems Protection Board (MSPB) on September 26, 1980. In his petition Mr. Braun asked for non-competitive reassignment or repromotion to a GS-15 position and the benefits of pay retention from the date of his demotion. The MSPB dismissed the appeal on January 27, 1981.

As a result of these actions, OPM asserts that Mr. Braun has been improperly overpaid as a GS-15 from the time of his improper selection and official assignment to the erroneously classified Director's position effective September 2, 1979. GSA counters that Mr. Braun responded to a posted announcement in the appropriate manner, was considered along with other eligible candidates for the position, and was selected. Thus, in the agency's estimation, Mr. Braun is an innocent victim of OPM's subsequent classification determination. Therefore, GSA frames the following questions for our consideration:

"(1) Under the circumstances described above, is Mr. Braun considered to have been illegally overpaid from the time that he was officially assigned as a GS-15 employee?

"(2) If the answer to the first question is 'yes,' is he liable for return of the difference between the GS-15 salary he received and the GS-14 salary he would have been receiving, absent the promotion?

"(3) If the answer to the second question is 'yes,' is this a situation in which a request to waive repayment could be considered?

"(4) If the answer to the first question is 'no' and the GS-15 position has been classified for more than a year, is there any reason why Mr. Braun should not be entitled to grade and pay retention \* \* \*?"

Fundamental to the disposition of this case is the recognition of the well defined jurisdiction which this Office exercises in matters involving position classification issues. Generally, the Classification Act, 5 U.S.C. §§ 5101, et seq., governs classification of Federal positions in the General Schedule. Under 5 U.S.C. § 5107, individual agencies have authority to place positions in appropriate classes and grades in conformance with standards published by the OPM. See regulations contained in Part 511, Title 5, Code of Federal Regulations (1980). Further, under authority provided in 5 U.S.C. §§ 5110-5112, OPM reviews agency classification and may revoke or suspend the agency's classification authority. Thus, we have consistently held that an employee should appeal any alleged improper classification to his or her agency or to OPM. See 5 C.F.R. § 511.603, et seq. (1980). As a result, because statutory authority to establish appropriate classification standards and to allocate positions subject to the General Schedule rests with the agency concerned and OPM, this Office has no authority to settle claims on any basis other than the agency or OPM classification. William A. Campbell, B-183103, June 2, 1975. And, since OPM determinations on classification appeals are binding on this Office under 5 U.S.C. § 5112(a), this Office has no authority to modify such actions. Ms. Gwenn Herring, B-183120, February 21, 1975.

In view of our consideration for an agency's independent classification authority, and recalling that the agency here has stated that Mr. Braun applied for, was rated eligible along with several other candidates, was rated by a proper panel, and properly referred and selected for the position in question which had been appropriately established by the agency, we are not able to independently conclude that Mr. Braun's appointment on September 2, 1979, was legally erroneous. Thus, in the absence of evidence that GSA acted beyond the scope of its authority to classify the position

in question originally, we are bound by the agency's action appointing Mr. Braun effective September 2, 1979.

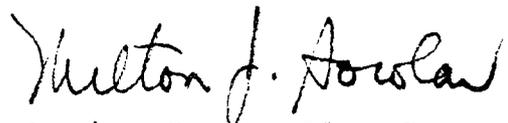
However, we are equally cognizant of OPM's superior authority under 5 U.S.C. §§ 5110-5112, to review agency classification actions and revoke or suspend an agency's classification authority. Specific implementing regulations contained at 5 C.F.R. § 5.3 (1980), provide that whenever OPM finds that any person has been appointed to or is holding a position in violation of applicable civil service statutes and regulations, OPM shall instruct the agency to take corrective action. We believe that the record here demonstrates that OPM made a dispositive finding in regard to the impropriety of Mr. Braun's appointment to the GS-15 Director's position and ordered equally definitive corrective action on March 27, 1980. Though the agency's reluctance to effectuate OPM's directive until September 7, 1980 - when Mr. Braun was administratively returned to his former GS-14 position - is not adequately explained in the record, we believe that after March 27, 1980, Mr. Braun was in fact erroneously overpaid in connection with his continued occupancy of the improper GS-15 Director's position.

At the same time, we do not believe that OPM's corrective action may be retroactively extended to the September 2, 1979, appointing date, so as to make all payments to Mr. Braun at the GS-15 rate erroneous. An employee of the Government is entitled only to the salary of the position to which he is actually appointed, regardless of the duties actually performed. When an employee performs duties normally performed by one in a grade level higher than the one he holds, no entitlement to the salary of the higher level position exists until such time as the individual is actually promoted to that level. Similarly, when an employee performs duties normally performed by one in a grade level lower than the one he holds, no requirement exists to reduce his salary to the lower level until such time as the individual is actually demoted to that level. Under 5 C.F.R. § 511.701, the effective date of a classification action taken by an agency is the date the action is approved in the agency or a subsequent date specifically stated. Section 511.702 provides that the effective date of a classification action upon appeal to the agency or OPM, subject to the provisions of section 511.703, is no earlier than the date of decision on the appeal, and not later than the beginning

of the fourth pay period following the date of the decision, except that a subsequent date may be specifically provided in a decision by OPM. The Supreme Court in United States v. Testan, 424 U.S. 392 (1976), specifically held that neither the Classification Act, 5 U.S.C. § 5101 et seq., nor the Back Pay Act 5 U.S.C. § 5596, creates a substantive right to backpay for periods of wrongful classification. We similarly believe that in the present case those authorities create no substantive right in an agency to recoup monies expended to an individual erroneously classified in a higher grade prior to the effective date of OPM's decision on appeal of March 27, 1980.

Accordingly, on the basis of the record before us, the payments Mr. Braun received as a GS-15 from September 2, 1979, to March 27, 1980, have not been demonstrated to be erroneous overpayments and are therefore not subject to any claim by the Government. Further, in regard to the agency's fourth question, as this period of otherwise proper payments is less than 1 year, grade and pay retention entitlements do not arise as justiciable issues.

With regard to payments in connection with the GS-15 Director's position which Mr. Braun received after March 27, 1980, we find those payments clearly contravene OPM's mandate for corrective action under 5 U.S.C. §§ 5110-5112 (1976) and thus constitute erroneous overpayments. However, since responsibility for implementing the required corrective action rests with the agency concerned, and since there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Mr. Braun, the resulting overpayments from March 27, 1980, through September 7, 1980, are hereby waived pursuant to 5 U.S.C. § 5584 (1976), and 4 C.F.R. §§ 91, et seq. (1980).



Acting Comptroller General  
of the United States