

DECISION



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

FILE: B-200638

DATE: October 9, 1981

MATTER OF: Gordon L. Wedemeyer - Delayed Classification Action

- DIGEST:**
1. There is no entitlement to backpay for the period prior to reclassification of incumbent's position. Alleged delays in processing job descriptions to a higher grade position do not provide a basis for backpay. In addition, remedy provided by our Turner-Caldwell line of cases is precluded for the period prior to reclassification of employee's position.
 2. When a position is reclassified to a higher grade level, agency must, within a reasonable time after the date of final position reclassification, either promote the incumbent or remove him. However, where final classification action rested with headquarters office, employee may not be promoted prior to date of final agency action.

ISSUE

The issue in this case is the entitlement of an employee to a retroactive promotion and backpay for the nearly 1-year period that the reclassification of his position was delayed. We hold that there is no entitlement to a retroactive promotion and backpay based on an overlong detail for the 8-month period prior to the date his job description was approved. In addition, we hold that there is no entitlement to a retroactive promotion and backpay from the date the job description was signed since final classification action had not yet been completed by the agency.

BACKGROUND

This is an appeal from the settlement of our Claims Group denying Mr. Gordon L. Wedemeyer's claim for backpay for the period beginning May 30, 1979, to May 18, 1980.

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Mr. Wedemeyer was employed by the Department of the Army as a Supervisory Civil Engineer, GS-810-12, Facilities Engineering Directorate, Headquarters 5th Infantry Division (Mechanized) and Fort Polk, Fort Polk, Louisiana. In December 1978, the agency received a new classification guide and sample job descriptions from the U.S. Civil Service Commission (now Office of Personnel Management (OPM)) for the position of Chief, Facilities Engineering Division, GS-810-13. Based upon this data, the local activity prepared a proposed job description of Mr. Wedemeyer's position as Chief, Building and Grounds Division, and performed a desk audit. A new job description was typed in final form and dated May 24, 1979, but all signature lines were left blank. On May 30, 1979, the local activity advised the installation command that as a result of the application of the new classification guide, Mr. Wedemeyer's position would equate to the grade GS-13 level.

There were numerous communications between the local activity and headquarters which followed concerning the agency ceiling on positions at the grade GS-13 level and above and the validity of certain statistical or quantitative data used to support the upgrading of Mr. Wedemeyer's position.

Finally, in January 1980, a revised job description reflecting the agreed-upon changes in the quantitative data was typed in final and signed on January 31, 1980. On February 6, 1980, the local civilian personnel officer noted his approval on a disposition form to headquarters and requested authorization for a grade GS-13 position. His request noted that, although there was a ceiling on the number of grade GS-13 positions, that fact did not permit local officials to misclassify the position solely for the purpose of not exceeding the ceiling. It also noted that consideration had been given to restructuring the position so as to preclude the establishment of a grade GS-13 level position. However, no alternate staffing structure seemed feasible. Nonetheless, the local activity did not receive authorization from headquarters for the establishment of another grade GS-13 position until May 12, 1980. Mr. Wedemeyer was subsequently promoted to grade GS-13 effective May 18, 1980.

ANALYSIS

As noted above, Mr. Wedemeyer claims backpay from May 30, 1979--the date the command was first advised that his position equated to a grade GS-13 level--to May 18, 1980, the date he was actually promoted. His claim for the period May 30, 1979, to January 31, 1980--the date his job description was signed--must be denied. There is no entitlement to backpay for the period prior to reclassification of a position. Alleged delays by management in processing job descriptions used to support a higher grade position do not provide a basis for backpay. George W. Noller, B-192560, December 14, 1978; and Connon R. Odom, B-196824, May 12, 1980. As the Supreme Court noted in United States v. Testan, 424 U.S. 392 (1976), neither the Classification Act nor the Back Pay Act create a substantive right to backpay for periods of wrongful position classification. Since the earliest date Mr. Wedemeyer's position could be considered classified to a higher grade was January 31, 1980, there is no entitlement to backpay for the period prior to that date.

Similarly, his claim for the same period from May 30, 1979, to January 31, 1980, is not cognizable under our Turner-Caldwell cases, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977). The Turner-Caldwell line of cases authorize retroactive temporary promotions and backpay for certain overlong details to higher grade positions. However, the higher grade position to which the employee is detailed must be an established position, classified at the higher level. Since an employee cannot be promoted to a position which has not been established and classified, he may not receive a retroactive temporary promotion and backpay based upon a detail to an unclassified position. Odom, supra; and Roger F. Dierking, B-195656, December 10, 1979.

There remains for consideration Mr. Wedemeyer's claim for the period from January 31, 1980, the date his job description was signed, to May 18, 1980, the date he was actually promoted to the grade GS-13 position.

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The general rule is that an employee is entitled only to the salary of the position to which he is actually appointed, regardless of the duties performed. When an employee performs the duties of a higher grade level, no entitlement to the salary of the higher grade exists until such time as the individual is actually promoted. See Marion McCaleb, 55 Comp. Gen. 515 (1975). Since Mr. Wedemeyer was not actually promoted until May 18, 1980, he would ordinarily not be entitled to the grade GS-13 salary until that date.

There is, however, an exception to this rule which applies when the promotion in question is based upon a reclassification of the incumbent's position. In 53 Comp. Gen. 216 (1973), we held that when a position has been reclassified to a higher grade, an agency must within a reasonable time, either promote the incumbent, if qualified, or remove him. We further held that the reasonable time within which the incumbent should be either promoted or removed expires at the beginning of the fourth pay period after the date of the reclassification action. Keith A. Baker, B-186758, November 3, 1980.

Unavailability of funds is not a sufficient reason for denying a promotion to the higher grade position. B-165307, November 4, 1968. In addition, where the incumbent's position has been reclassified by the local activity, the incumbent must be promoted even if the local activity has no authority to promote employees to a grade level where positions will be filled from agency-wide referral records. Robert L. Bruce, B-173783.154, June 21, 1976.

The question presented in the case before us is what is the date of the reclassification action? The agency argues that Mr. Wedemeyer's position was not actually classified at the grade GS-13 level until May 1980, when headquarters authorized the establishment of the grade GS-13 position. Army Civilian Personnel Regulation 501.6-1c (1 March 1979) provides that a position is not established until manpower space and funds are available, a properly signed job description has been prepared, and the position has

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been entered in the personnel control file. Since funds were not available and a grade GS-13 position was not allocated until May 1980, the agency reasons that the position could not be considered classified prior to that time.

Ordinarily, we do not question an agency determination as to when a position has been established and classified. See Burnell A. Tickles, B-196562, July 7, 1980; Paul Monteleone, B-198388, February 23, 1981; and William F. Murray, B-193737, March 14, 1979. However, since the employee raised the question concerning the effective date of the reclassification, we shall consider that question at this point.

Based on the record before us, it appears that final classification authority for positions at the grade GS-13 level and above was reserved to headquarters because of the ceiling on these higher level positions. Although the job description for Mr. Wedemeyer's position was completed and signed by local officials in January 1980, final approval and allocation of the grade GS-13 position was not granted by the headquarters office until May 1980. The effective date for a classification action is the date the action is approved by the agency or a subsequent date. 5 C.F.R. § 511.701(a) (1980).

This case, therefore, is distinguishable from our prior cases involving reclassification of the incumbent's position and the agency's failure to promote within four pay periods. In the present case, since the final classification action was not completed until May 1980, there is no entitlement to a retroactive promotion prior to that date.

Accordingly, we sustain the Claims Group denial of Mr. Wedemeyer's claim for a retroactive promotion and backpay.

Nancy R. Chas. Clive

For the

Comptroller General
of the United States