

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

FILE: B-199730

DATE: January 18, 1983

MATTER OF: Paul W. Braun - Reconsideration -  
Grade Retention

**DIGEST:** General Services Administration requests reconsideration of decision Paul W. Braun, B-199730, July 31, 1981, contending that Mr. Braun is entitled to grade retention under 5 U.S.C. § 5362. We sustain our July 31, 1981, decision and reject the agency's contention concerning grade retention. Mr. Braun is not entitled to grade retention because the Office of Personnel Management found his promotion to the GS-15 position to have been in violation of merit system principles and ordered GSA to cancel the improper promotion.

The General Counsel of the General Services Administration (GSA) requests reconsideration of our decision Paul W. Braun, B-199730, July 31, 1981. Specifically, the request contends that in the circumstances addressed by our decision, Mr. Braun is entitled to grade retention protections under 5 U.S.C. § 5362(b) (Supp. III 1979), and, therefore, none of the payments made to Mr. Braun were legally erroneous as found by our decision. We are sustaining our July 31, 1981, decision and rejecting the agency's contention that Mr. Braun is entitled to grade retention benefits. This determination follows from our finding that Mr. Braun does not qualify for coverage under the terms and conditions of 5 U.S.C. § 5362, and the implementing regulations set out in title 5 of the Code of Federal Regulations.

**BACKGROUND**

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-301-15. 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

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to the National Capital Region, was selected for promotion to the new position. Mr. Braun's promotion and official assignment to the GS-15 position was effective September 2, 1979. Although officially assigned to the new position, Mr. Braun never reported to the new position and continued on his detail in another position.

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 because: (1) the position of Director, Budget and Management Systems Division, GS-301-15, was improperly classified and should have been GS-301-14 since both the GS-301-14 and GS-301-15 Division Director positions were essentially the same; (2) the agency's initiation of competitive action was a violation of the merit promotion process and Mr. Braun was improperly promoted; (3) Mr. Braun never reported to or served in the erroneously classified GS-301-15 Director's position--and in fact, the Budget and Management Systems Division never materialized.

Based upon these findings and acting under its enforcement authority found in Part 5 of title 5, Code of Federal Regulations, OPM ordered corrective action on March 27, 1980, directing that Mr. Braun's promotion be canceled and that the improperly classified position of Director, Budget and Management Systems Division, GS-301-15, be abolished. Effective September 7, 1980, the agency complied with the OPM directives by abolishing the improperly classified GS-15 position and returning Mr. Braun to his position of Buildings Management Officer, GS-1176-14.

To review for ease of reference:

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- February 8, 1979 - GS-15 position established by GSA
- September 2, 1979 - Mr. Braun appointed to GS-15 position
- March 27, 1980 - OPM orders GS-15 position abolished and Mr. Braun's promotion canceled
- September 7, 1980 - GSA complies with OPM directives, abolishes GS-15 position, and returns Mr. Braun to former GS-14 position

As a result of these actions, OPM asserted that Mr. Braun had 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 countered 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 was an innocent victim of OPM's subsequent classification determination.

DECISION OF JULY 31, 1981

In our analysis of Mr. Braun's case we noted that under 5 U.S.C. § 5107, individual agencies have authority to place positions in appropriate classes and grades in conformance with standards published by OPM. Part 511, title 5, Code of Federal Regulations (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, the General Accounting 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.

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We further noted that 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.

In determining whether and to what extent Mr. Braun might have been illegally overpaid in the circumstances outlined above, we reasoned as follows in our July 31, 1981, decision:

"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."

We held that the payments Mr. Braun received as a GS-15 from September 2, 1979, to March 27, 1980, were not demonstrated to be erroneous overpayments and were therefore not subject to any claim by the Government. And, with regard to payments in connection with the GS-15 Director's position which Mr. Braun received after March 27, 1980, we held those payments contravened OPM's mandate for corrective action under 5 U.S.C. §§ 5110-5112 and thus constituted erroneous payments. However, since responsibility for implementing the required corrective action rested with the agency concerned and since there was 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, were waived pursuant to 5 U.S.C. § 5584 (1976), and 4 C.F.R. §§ 91, et seq. (1980).

RECONSIDERATION

In requesting reconsideration of our July 31, 1981, decision in Mr. Braun's case, GSA's General Counsel states as follows:

"It is our belief that Mr. Braun is entitled to grade retention under section 5362(b)(1) and (2) of title 5 United States Code. The position from which Mr. Braun was demoted was classified on February 8, 1979. The Office of Personnel Management ordered correction of the erroneous classification on March 27, 1980. Thus, the position was classified for more than one year and the requirements for grade retention entitlement satisfied under 5 USC 5362(b). The period of time that Mr. Braun occupied the position is irrelevant in downgradings involving classification.

"\* \* \* Mr. Braun is now employed by the Food and Nutrition Service of the United States Department of Agriculture. As the grade retention entitlement would follow Mr. Braun to his new employing agency, we have included personnel and pay corrective actions up to the present time.

"If you agree with our opinion, we will initiate action to make Mr. Braun whole."

We do not agree, finding our views on this case widely divergent from GSA's.

The grade retention provisions of 5 U.S.C. § 5362(b), which are cited by the agency, state as follows:

"(b)(1) Any employee who is in a position subject to this subchapter and whose position has been reduced in grade is entitled, to the extent provided in subsection (c) of this section,

to have the grade of such position before reduction be treated as the retained grade of such employee for the 2-year period beginning on the date of the reduction in grade.

"(2) The provisions of paragraph (1) of this subsection shall not apply with respect to any reduction in the grade of a position which had not been classified at the higher grade for a continuous period of at least one year immediately before such reduction."

OPM regulations implementing this authority, and promulgated under the statutory delegation of 5 U.S.C. § 5365, provide the following general statement on the applicability and coverage of the grade and pay retention provisions at 5 C.F.R. § 536.101 (1982):

"(a) Title VIII of Pub. L. 95-454 (The Civil Service Reform Act of 1978) provides that an employee who is placed in a lower grade as a result of reduction-in-force procedures, or whose position is reduced in grade as a result of reclassification of the position, is entitled to retain for a period of 2 years the grade held immediately before that placement or reduction. It also provides the authority for granting an employee indefinite pay retention. In addition to specifying criteria and conditions for the application of the grade and pay retention provisions, the law authorizes the Office of Personnel Management to extend the application of these provisions to other individuals and situations to which they would not otherwise apply."

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More specifically addressing the applicability and coverage of grade retention, section 536.103 of 5 C.F.R. (1982), states as follows:

"(a) Grade retention shall apply to an employee who moves to a position in a covered pay schedule which is lower graded than the position held immediately prior to the demotion in the following circumstances:

"(1) As a result of reduction-in-force procedures; or

"(2) As a result of a reclassification process."

Our rejection of GSA's grade and pay retention entitlement theory corners on the twin demerits that Mr. Braun was never placed in a lower grade as a result of reduction in force procedures, nor was he placed in a lower grade as a result of a reclassification of that position. On the contrary, OPM determined on March 27, 1980, that the initiation of competitive action for filling the position was a violation of the merit promotion process and that the promotion of Mr. Braun was not a bona fide action. Accordingly, OPM required GSA to take corrective action, including the cancellation of Mr. Braun's promotion.

In regard to Mr. Braun's pay, OPM stated that GSA must follow prescribed procedures for either recovering illegally expended funds or granting waiver of such recovery. In our prior decision, as stated above, we declined to hold that the pay for the position received by Mr. Braun prior to March 27, 1980, was erroneous. After that date, we found the GS-15 pay received by Mr. Braun to be clearly erroneous, but we granted waiver of recovery under 5 U.S.C. § 5584.

GSA now argues that grade retention applies because the position in question was classified on February 8, 1979, and correction of the erroneous classification was

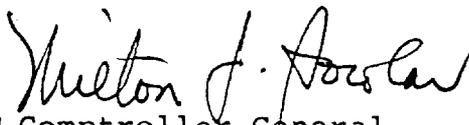
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not ordered until March 27, 1980. Thus, the position was classified at the higher grade for more than 1 year and, therefore, met the time requirement for grade retention stated in 5 U.S.C. § 5362(b)(2).

We concede that the 1-year classification requirement in the statute was satisfied, but we do not agree that Mr. Braun is entitled to grade retention. On the contrary, we conclude that to grant him grade retention in the face of OPM's action in finding that his promotion was not bona fide and ordering its cancellation, would perpetuate the improper personnel action rather than correct it. Under these circumstances, we conclude that Mr. Braun has no entitlement to either the grade or the pay of the GS-15 position beyond March 27, 1980, the date of OPM's action on this matter.

Accordingly, since Mr. Braun is not entitled to the grade retention protections of 5 U.S.C. § 5362, it follows that his coverage under the statute might arise--if at all--under 5 U.S.C. § 5365, which authorizes OPM to provide for the application of all or portions of grade and pay retention benefits under 5 U.S.C. §§ 5362 and 5363 to individuals to whom such provisions do not otherwise apply. Under section 5365, the Director, OPM, or his designee, is authorized to approve the application of grade and pay retention benefits, or any appropriate portion thereof, in such situations as determined to be appropriate and necessary.

There being no evidence that OPM has made such a determination in Mr. Braun's case, and in consequence of our determination set out above, we are unaware of any legal basis upon which Mr. Braun is entitled to grade retention.

*for*   
Comptroller General  
of the United States