

DECISION

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

341

FILE:

DATE: **AUG 9 1976**

8-184713

MATTER OF:

- Compensation--Adjustment

DIGEST:

1. Employee who held GS-12 position assumed duties of abolished GS-13 position. Employee is not entitled to backpay for period of claimed wrongful classification since neither Classification Act, 5 U.S.C. 5101 et seq., nor Back Pay Act, 5 U.S.C. 5596, creates substantive right to backpay when employee's position is misclassified.
2. Employee who held GS-12 position assumed duties of abolished GS-13 position. New GS-13 position was created and another employee was appointed to position by merit promotion. As result of grievance examiner's recommendation, employee was appointed to GS-13 position under exception to merit promotion procedure. Employee is not entitled to retroactive pay under Back Pay Act from establishment of GS-13 position to date of appointment since there was no determination by agency that failure to promote constituted unjustified or unwarranted personnel action resulting in withdrawal of all or part of his pay.

This matter involves the claim of _____, which was the subject of our Transportation and Claims Division (now Claims Division) settlement issued September 20, 1972, Z-2469393. The settlement disallowed _____ claim for backpay.

_____ held a position at the White Sands Missile Range, Department of the Army, classified as GS-12 in 1965, when a GS-13 supervisory position was abolished. Since the supervisory duties of the abolished position needed to be performed, _____, apparently on his own initiative, assumed most of the supervisory duties of the abolished position. In June 1969, apparently in response to a complaint by _____, the position of Missile Flight Surveillance Officer, GS-13 was created. The job description of the new position reflected the duties performed by _____

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since July 1965. The position was filled through merit promotion and another employee was appointed to the position in September 1970.

contended that the GS-13 position should not have been filled through merit promotion, but should have been awarded to him on the basis of an exception to the merit promotion regulations.

The grievance was handled in accordance with the agency's grievance procedure and a hearing was held. The grievance examiner relied on Chapter 335, paragraph 7d, of the White Sands Missile Range regulations in making his finding that [redacted] had a legitimate grievance. Paragraph 7d of the above cited regulations provides as follows:

"d. Career promotion of an employee whose position is reconstituted in a higher grade.
An employee whose position is reconstituted in a higher grade because of the accretion of additional duties and responsibilities may be promoted without competition provided the accretion was not the result of planned management action but followed an increase in the level of the employee's performance or a change in workload, procedure or organization that affected the grade of the position only incidentally /sic/. To be eligible for promotion without competition when his position is upgraded under these conditions, the employee must continue to perform the same basic function and his former position must be absorbed administratively in the new one. Promotion without competition is not authorized under this provision when an additional position is created, when the new position is not a clear successor to the former position, or from a non-supervisory to a supervisory position."

The grievance examiner recommended that [redacted] be promoted to the GS-13 position. Accordingly, [redacted] was assigned to the GS-13 position on January 17, 1971.

Authority for the retroactive adjustment of an employee's compensation is contained in the Back Pay Act, 5 U.S.C. 5596 (1970), which provides, in part, as follows:

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"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period."

claim for additional compensation, for the period from July 1965 to September 1970, is based on his belief that he was misclassified. In 55 Comp. Gen. 515 (1975) we held that reclassification of a position with a concomitant pay increase may not be made retroactive except in certain classification appeal cases. In this connection we stated the following on page 516:

"The classification of positions in the Government is governed by the Classification Act of 1949, as amended, 5 U.S.C. 5101-5115. Sections 5107 of Title 5 directs each agency to classify its positions in accordance with the Civil Service Commission's published standards and, when warranted, to change a position from one class or grade to another class or grade. The Civil Service Commission is given authority under section 5110 to review the classification of positions and to require changes by a certificate which is binding on the agency and on the General Accounting Office. The Commission is empowered to prescribe regulations by section 5115.

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"The Commission's regulations for position classification under the Act are set out in part 511 of title 5 of the Code of Federal Regulations, and 5 C.F.R. 511.701 (1975), states that "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." With respect to appeals within an agency, 5 C.F.R. 511.702 states that the effective date of a change in classification resulting from an appeal "is not 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 * * *." These regulations are amplified in Federal Personnel Manual chapter 511, 7-1a, which flatly states that "an agency may not make the classification action retroactively." See also FPM chapter 531, 2-7(a); United States, 103 Ct. Cl. 702, 707-709 (1958). The only provision for a retroactive effective date in a classification action is when there is a timely appeal from classification action which resulted in a loss of pay and on appeal the prior decision is reversed at least in part. See 5 C.F.R. 511.703."

The above views concerning the retroactivity of classification actions is in accord with court decisions. See United States v. _____, decided March 2, 1976, by the Supreme Court, Docket No. 74-753, 44 USLW 4245, in which the Court held that neither the Classification Act nor the Back Pay Act creates a substantive right to backpay for claimed wrongful classifications. See B-180010.04, April 9, 1976, affirming 55 Comp. Gen. 515.

In view of the above there is no authority to pay backpay prior to the reclassification of the position.

Insofar as the period covering the selection of an employee under merit promotion procedures and following the appointment of another employee to the GS-13 position in September 1970 is concerned, the basis of _____ claim is the failure of the appropriate officials to promote him to the GS-13 position pursuant to an exception to the merit promotion regulations. The grievance examiner held that _____ had a legitimate grievance, but he did not award backpay under the Back Pay Act. In this connection the examiner stated that all regulatory procedures were followed and recommended promotion as the main remedy.

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As the result of the grievance examiner's recommendation, [redacted] was promoted to the GS-13 position. However, the record does not contain any determination by an appropriate authority that the failure to promote [redacted] constituted an unjustified or unwarranted personnel action that resulted in the withdrawal of all or part of his pay. Since such a finding is a prerequisite to monetary relief under the Back Pay Act, there is no basis to award [redacted] additional compensation for the period from the establishment of the GS-13 position in September 1970, until Mr. [redacted] was appointed thereto in January 1971.

Accordingly, the settlement disallowing Mr. Hursh's claim is sustained.

R.F. KELLER

Deputy Comptroller General
of the United States