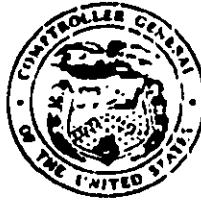


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J. P. ...

**DECISION**



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

**FILE:** B-190069

**DATE:** February 13, 1978

**MATTER OF:** Fred F. Cherye- Request for Reconsideration  
of Claim for Backpay

**DIGEST:** Employee of Department of Army claims compensation adjustment for period he served as GS-12 in position later reclassified to GS-13 and for period he served as GS-11 due to reduction in force. Employee has no entitlement under civil service regulations and Supreme Court held in United States v. Testan, 424 U.S. 392 (1976), that neither Classification Act, 5 U.S.C. 5101-5115 (1970), nor the Back Pay Act, 5 U.S.C. 5596 (1970), creates substantive right to backpay for period of wrongful position classification. Claims regarding improper reduction in pay due to reduction in force actions are for submission to Civil Service Commission under 5 C.F.R. 351.901.

By letter dated August 15, 1977, Mr. Fred F. Cherye has requested reconsideration of Settlement Certificate No. Z-2631002, dated August 4, 1977, by which our Claims Division disallowed his claim for backpay.

The record shows that Mr. Cherye was employed as a Motion Picture Production Specialist grade GS-12, Step 2 in the Long Island, New York, District of the Department of the Army, Army Pictorial Center, Information Films Branch, when he was notified by letter dated May 5, 1970, that his position would be affected by a reduction in force. In lieu of separation by the reduction in force, Mr. Cherye was offered the position of Motion Picture Production Specialist Grade GS-11, Step 8 in National Range Operations, Data Collection Directorate, Pictorial and Processing Division, Motion Picture Branch, Motion Picture Editing Section, White Sands Missile Range, New Mexico. Mr. Cherye accepted that appointment effective June 29, 1970. On September 24, 1972, he was promoted to grade GS-12 and on April 4, 1976, he was promoted to

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grade GS-13. The latter promotion was the result of a determination by the U.S. Civil Service Commission, Dallas Region that grade GS-13 was the proper grade classification for the position of Motion Picture Production Specialist.

As a result of the reclassification action, Mr. Cherye made a claim for backpay in the amount of the difference between the grade GS-12 and grade GS-13 salary from October 27, 1968, the date of his original promotion to grade GS-12. He also claimed backpay for the period of July 1, 1970, to September 24, 1972, when he was employed as a grade GS-11.

Backpay is awarded under the authority of 5 U.S.C. 5596 (1970) as a remedy for wrongful reductions in grade, removals and suspensions, and other unjustified or unwarranted actions affecting pay or allowances. A prerequisite for the award of backpay is a determination by an appropriate authority that an employee has undergone an unjustified or unwarranted personnel action.

Mr. Cherye has asked that we consider his claim under Matter of Everett Turner and David L. Caldwell, 55 Comp. Gen. 539 (1975). In that decision we held that employees detailed to higher graded positions beyond 120 days without prior Civil Service Commission approval were entitled to temporary retroactive promotions with backpay. Although the Civil Service Commission changed the classification of Mr. Cherye's position to a higher grade, that action was not retroactive.

Under the Classification Act of 1949, codified in 5 U.S.C. 5101 et seq. (1970), and the implementing regulations found in Part 511 of title 5 of the Code of Federal Regulations, an employee's agency and the Civil Service Commission are primarily responsible for the classification of the duties of the employee's position. Section 511.701(a), title 5 C.F.R. provides 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. Section 511.701(b) provides that a classification decision made by a certificate issued by the Commission takes effect not earlier than the date of receipt of the certificate in the agency and not later than the beginning of the fourth pay period following the receipt of the certificate in the agency, unless a subsequent date is specifically stated in the certificate. The sole provision for a retroactive effective date for a classification action is when there is a timely

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appeal which results in the reversal, in whole or part, of a downgrading or other classification action which has resulted in the reduction of pay. See 5 C.F.R. 511.703. See Matter of Marion McCaleb, 55 Comp. Gen. 515 (1975). Also, as our Claims Division pointed out, the Supreme Court held in United States v. Testan, 424 U.S. 392 (1976), that neither the Classification Act nor the Back Pay Act creates a substantive right to backpay for a period of wrongful position classification. See Matter of George A. Jackson, B-188617, September 20, 1977.

In accordance with the above, Mr. Cherye is not entitled to backpay due to the reclassification of his position. It is not clear whether Mr. Cherye claims entitlement to backpay during the period he was a grade GS-11 because of the reclassification action or because he feels his reduction in grade was improper. In the latter instance, Mr. Cherye's proper course is an appeal to the Civil Service Commission. In the case of employees who have suffered a reduction in pay as the consequence of a reduction in force action, the Civil Service Commission is the appropriate authority under the Back Pay Act, having power to correct improper or unjustified personnel actions. The regulations regarding appeal to the Civil Service Commission are set forth in 5 C.F.R. 351.901 as follows:

"(a) An employee who has received a notice of specific action and who believes this part has not been correctly applied may appeal to the Commission. He may appeal any time after he receives a notice of specific action, but not more than 15 calendar days after the effective date of the action.

"(b) The Commission may extend the time limit in paragraph (a) of this section when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit.

"(c) An appeal shall (1) be in writing, (2) identify the appellant, the agency, and the nature and effective date of the action appealed, and (3) state why the appellant believes the action appealed is improper.

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"(1) The decision of the office of the Commission having appellate jurisdiction is final. However, either party to the appeal may petition the Appeals Review Board to reopen and reconsider the decision under 772.310 of this chapter."

In accordance with the above, we sustain the action of our Claims Division, disallowing Mr. Cherye's claim.

*P. H. Keiser*  
Deputy Comptroller General  
of the United States

J. Botsford

FEB 1978

CP

Director, Claims Division

Comptroller General R.F. KILLER

Fred F. Cherye - Claim for Backpay - B-190069-O.M.

Returned herewith is file Z-2631002 along with a copy of our decision B-190069, dated today, sustaining your settlement of August 4, 1977.

Attachments: 2