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DECISION



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

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FILE: B-190648

DATE: June 16, 1978

MATTER OF: Michael H. Telfer - Request for reconsideration
of retroactive promotion and backpay

DIGEST: Federal Aviation Administration employee claims retroactive promotion with backpay for period of alleged higher level duties. Claimant has no entitlement under Turner-Caldwell "detail" decisions because he did not meet time-in-grade requirements for temporary promotion. Moreover, as Supreme Court held in United States v. Testan, 424 U.S. 392 (1976), neither the Classification Act, 5 U.S.C. 5101-5115 (1970) nor the Back Pay Act, 5 U.S.C. 5596 (1976) creates a right to backpay for period of wrongful position classification.

This action concerns the claim of Mr. Michael H. Telfer for backpay on the basis of alleged entitlement to retroactive promotion and accompanying backpay for the period May 19, 1972, to the present. Mr. Telfer has appealed our Claims Division settlement dated August 17, 1977, disallowing his claim.

The record shows that during the period in question the claimant was promoted to the position of air traffic controller, GS-11 on November 14, 1971, and was promoted to GS-12 on November 26, 1972. Mr. Telfer alleges that beginning on May 19, 1972, he was performing GS-12 duties and began performing GS-13 duties on June 9, 1972. He states that he was promoted to GS-13 in December 1973.

Mr. Telfer's claim was denied by the Federal Aviation Administration and by our Claims Division on the basis that he was not eligible for promotion to GS-12 any earlier than the date his promotion did become effective because of the requirements of the Whitten Amendment, 5 U.S.C. 3101, note, which mandates that an employee serve at least one year in grade before being promoted. Mr. Telfer appeals this determination on the basis that the Whitten Amendment requirement is not consistent with our decision Everett Turner and David L. Caldwell, 55 Comp. Gen. 539 (1975), which allowed retroactive temporary promotions with backpay for employees detailed to higher grade positions in excess of 120 days without prior approval of the extension by the Civil Service Commission.

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We must disagree with the claimant's view. In our Reconsideration of Turner-Caldwell, 56 Comp. Gen. 477 (1977), we clarified the earlier decision as follows:

"* * * It is necessary, however, that the employee satisfy the requirements for a retroactive temporary promotion. In this connection, certain statutory and regulatory requirements could affect the entitlements of an employee otherwise qualified for corrective action as a result of an improper extended detail. For example, an employee improperly detailed for an extended period, who fails to meet the time in grade requirements of the 'Whitten Amendment,' 5 U.S.C. § 3101, note, would not become entitled to a retroactive temporary promotion until such time in grade requirements were satisfied. See 55 Comp. Gen. 539, 543. * * *"

Thus, it is clear that the time-in-grade requirements are applicable. Since Mr. Telfer received promotions at approximately yearly intervals during the period in question, he is clearly not entitled to retroactive relief for any periods of detail under Turner-Caldwell.

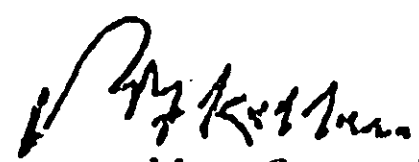
Moreover, whether or not the claimant performed GS-12 and GS-13 duties, as he alleges, it is clear that he occupied only a GS-11 position during the entire period of his claim. He is, in effect, arguing that he was wrongfully classified during this period. The classification of positions in the General Schedule is governed by the Classification Act of 1949, as amended, now codified at 5 U.S.C. 5101-5115. Section 5115 empowers the Civil Service Commission to prescribe regulations regarding the classification of positions. The regulations of the Commission are at title 5 of the Code of Federal Regulations. Section 511.701, 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 511.702 provides that the effective date of a classification action upon appeal to the agency or the Commission, subject to the provisions of section 511.703, is no earlier than the date of 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 by the Commission. The sole provision for

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a retroactive effective date for classification is when there is a timely appeal which results in the reversal, in whole or part, of a downgrading or other classification action which had resulted in the reduction of pay. See 5 C.F.R. 511.703. Accordingly, the reclassification of a position may not be made retroactively other than as provided for in 5 C.F.R. 511.703. See Matter of Marion McCaleb, 55 Comp. Gen. 515 (1975).

In addition, the United States Supreme Court held in United States v. Testan, 424 U.S. 392 (1976) that neither the Classification Act nor the Back Pay Act, 5 U.S.C. 5595 (1970) creates a substantive right to backpay for periods of a wrongful position classification. The decisions of this Office, consistent with Testan, hold that classification actions upgrading a position may not be made retroactive so as to entitle incumbents to backpay. See Matter of George A. Jackson, B-188617, September 20, 1977, and Matter of Gary K. Neller, B-187861, June 17, 1977.

In view of the above the settlement of August 17, 1977, denying the claim of Mr. Telfer is sustained.


Acting Comptroller General
of the United States