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Civ. Per.
J. D Mosher

DECISION

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

FILE: B-190695 DATE: July 7, 1978

MATTER OF: Mr. David A. Webb - Backpay and retroactive promotion for alleged improper classification

DIGEST: 1. Questions regarding classification of positions are solely within jurisdiction of employing agency and the Civil Service Commission (5 U.S.C. 5107, et. seq.), and this Office lacks authority to consider propriety of classification actions.

2. There is no substantive right to backpay for periods of wrongful position classification where the pertinent classification statutes 5 U.S.C. 5101-5115 do not expressly make the United States liable for pay lost through an improper classification. United States v. Testan, et al., 424 U.S. 372 (1976).

3. An employee of the Government is entitled only to the salary of the position to which he is appointed, regardless of the duties he performs. Thus, in the absence of an overlong detail, when an employee performs duties normally performed by one in a higher grade level [higher than the one he holds,] he is not entitled to the salary of the higher level until the position is reclassified.

This action is in response to Mr. David A. Webb's appeal to our Claims Division's denial of his claim for the difference in pay between grades GS-12 and GS-13 commencing March 3, 1976, and retroactive promotion to the grade GS-13 level, as an employee of the Department of Health, Education, and Welfare (HEW).

Subsequent to the settlement by our Claims Division of February 4, 1977, the claimant was promoted to the grade GS-13 effective June 6, 1977. His claim has therefore been amended to claim retroactive temporary promotion to grade GS-13 effective March 1976 and retroactive temporary promotion to grade

GS-14 effective July 1977 and backpay citing 56 Comp. Gen. 427 (1977) and 55 Comp. Gen. 539 (1975).

Mr. Webb is employed as a contract specialist in the Office of Education in HEW. On March 3, 1976, the employee's supervisor initiated a Request for Personnel Action to promote the employee from contract specialist, grade GS-12 to grade GS-13. The personnel officer for the Office of Education did not process the action because in November 1975, the Office of Personnel and Training in HEW had made a determination that the grade GS-13 position to which the employee desired to be promoted was at the grade GS-12 level. It is the contention of the employee that although he was fully qualified and had been performing duties at the grade GS-13 level since March 3, 1976, he had been continuously denied a promotion to that position on the basis that at some future date, he might be subject to a downgrade classification action and that the agency's decision not to promote him was irrelevant, arbitrary, capricious and discriminatory. On May 31, 1977, the employee submitted additional information in which he alleges that since March 3, 1976, he has been required to perform duties at the grade GS-13 level while being paid at the grade GS-12 level. He therefore claims that in effect he has been detailed to a higher grade position for more than 120 days in violation of subchapter 8, chapter 300 or the Federal Personnel Manual and is therefore claiming that he should receive a retroactive temporary promotion and backpay for grade GS-13 for the period commencing 121 days after March 3, 1976, citing 56 Comp. Gen. 427, supra. Effective June 6, 1977, the employee was promoted to grade GS-13. On November 21, 1977, the employee further amended his claim alleging that had his promotion not been held up he would have qualified and been eligible for promotion to grade GS-14 in July 1977. He therefore is also seeking retroactive temporary promotion to grade GS-14 and backpay effective July 1977, again citing 56 Comp. Gen. 427, supra.

From the beginning this claim appears to have been a dispute over the proper classification of a position, i.e., contract specialist. Although the administrative report indicates that the employee was given information on procedures to follow, for some reason he elected not to appeal his position classification to the Civil Service Commission (CSC) but continued to request his agency to upgrade his position.

Ultimately, in June 1977, his request was granted when he was promoted to grade GS-13.

Under the provisions of 5 U.S.C. § 5105 (1976), the CSC has the authority and responsibility for the preparation and publication of standards for classification of positions subject to the General Schedule. Each agency is required by 5 U.S.C. § 5107 to place its positions, unless otherwise provided in chapter 51 of title 5, United States Code, in their appropriate class and grade to conform with the standards published by the CSC. That section also provides that, subject to section 5337 of title 5, United States Code, actions of an agency under the authority of section 5107 are the basis for pay and personnel transactions until changed by certificate of the CSC. Under the provisions of 5 U.S.C. § 5110, the CSC is required to review agency classification actions and correct such actions which are not in accordance with published standards. The CSC correction certifications are binding on all administrative, certifying, payroll, disbursing, and accounting officials.

The proper course of action for Mr. Webb to follow would have been to appeal the classification of his position to the CSC. The criteria for determining the effective date for a reclassification is set forth in 5 C.F.R. § 511.701. When a position is reclassified by CSC, the effective date is not earlier than the date the certificate granting the reclassification is received by the agency, and not later than the beginning of the fourth pay period following the receipt of the certificate in the agency. See 55 Comp. Gen. 515 (1975).

The CSC rule that a reclassification has only prospective effect was affirmed in United States v. Testan et. al., 424 U.S. 392 (1976). There the Supreme Court construed the Classification Act as follows (Id. at 399):

> "We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the 'purpose' section of the Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was 'to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed.' And in subsequent sections, there are set forth substantive

> standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified."

The court concluded "that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification." Id. at 403. See also B-191369, April 3, 1978, 57 Comp. Gen. ____; and B-187234, December 8, 1976.

In United States v. Testan, supra, the court also reaffirmed the rule that one is not entitled to the benefit of a position until he has been duly appointed to it, citing United States v. McLean, 95 U.S. 750 (1878); Ganse v. United States, 180 Ct. Cl. 183, 186, 376 F. 2d 900, 902 (1967). The court stating that "The Classification Act does not purport by its terms to change that rule, and we see no suggestion in it or its legislative history that Congress intended to alter it." There is no claim here that the employee has been denied the benefit of a position to which he was appointed. The claim, instead, is that he has been denied the benefit of a position to which he should have been but was not appointed.

The general rule is that an employee is entitled only to the salary of the position to which actually appointed, regardless of the duties performed. Thus, in a reclassification situation, an employee who is performing duties of a grade level higher than the position to which he is appointed is not entitled to the salary of the higher level position unless and until the position is classified to the higher grade and he is promoted to it. 55 Comp. Gen. 515, 516 (1975); B-180056, May 28, 1974, and B-183218, March 31, 1975.

In the present case, there is nothing to indicate that the employee had been detailed to a position higher than the one to which he had been appointed. He may have been performing duties of a grade at a higher level, but such a determination was for the CSC to make. Thus, 56 Comp. Gen. 427, supra, and 55 Comp. Gen. 539, supra, are not for application since in those cases the claimants had been detailed and were performing duties of a higher position than that to which they had been appointed.

The employee has also cited 55 Comp. Gen. 1443 (1976) and 55 Comp. Gen. 1311 (1976) in support of his claim. In 55 Comp. Gen. 1443, supra, the employee was awarded retroactive pay upon failure of the agency to adjust his pay as a supervisor of a wage board employee whose salary exceeded his in violation of 5 U.S.C. § 5333(b) (1970) and implementing regulations 5 C.F.R. sec. 531.301-531.305. In 55 Comp. Gen. 1311, supra, the employee was awarded retroactive pay when the agency denied him assignment to night shift and the opportunity to earn the night shift differential in violation of a collective bargaining agreement. Thus, neither the factual situation or the statutory and regulatory authority upon which these two decisions were decided are applicable to the present case.

In view of the foregoing, the settlement issued by our Claims Division that disallowed Mr. Webb's claim is hereby sustained. Further, employee's amended claim based upon the additional material submitted on May 31, 1977, and November 21, 1977, are also denied.

R.F. Keller

Deputy Comptroller General
of the United States