

PL II

DECISION



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

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FILE: B-194251

DATE: April 23, 1979

MATTER OF: Mrs. M. Virginia Conklin

DIGEST: ^{for} A retired civilian employee of the Air Force claims retroactive temporary promotion and accompanying backpay under Turner-Caldwell, 56 Comp. Gen. 427 (1977), incident to details to higher grade military positions. There is no entitlement to backpay as the employee could not have been temporarily promoted into the military position. The Turner-Caldwell remedy is only available where the employee was able to satisfy requirements for a retroactive temporary promotion.

This action concerns an appeal by Mrs. M. Virginia Conklin, a retired civilian employee of the Department of the Air Force, of the action of our Claims Division on September 13, 1978, which disallowed her claim for retroactive promotion and backpay incident to details to higher grade positions.

During the period in question Mrs. Conklin was employed in the Housing Referral Office at George Air Force Base, California, as a clerk stenographer GS-4. Mrs. Conklin states that during the period from September 2, 1971, to February 2, 1972, she was detailed to the position of NCOIC (Non Commissioned Officer in Charge) in the Housing Referral Office and that for the periods February 2, to March 3, 1972, and July 1 to July 23, 1972, she was detailed to the position of Housing Referral Officer.

The record supports her contention that, at least for most of the period she claims backpay, she was either detailed to or performing the functions of the NCOIC or Housing Referral Officer while in grade GS-4. However, during those periods both the NCOIC and Housing Referral Officer positions were allocated, graded and assigned as military positions only. While Mrs. Conklin recognizes that fact, she has claimed a retroactive promotion and accompanying backpay on the basis of an evaluation of the equivalent civilian grade of the positions, GS-8 and GS-9, for the military positions NCOIC (senior master

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sergeant) and Housing Referral Officer (captain) respectively. Her claim is based on decisions of our Office and implementing Civil Service Commission guidance, that employees who are detailed to higher grade positions for more than 120 days without Civil Service Commission approval are entitled to a retroactive temporary promotion with backpay for the period beginning with the 121st day of the detail until the detail is terminated. Matter of Marie Grant, 55 Comp. Gen. 785 (1976); Matter of Reconsideration of Turner-Caldwell, 56 Comp. Gen. 427 (1977); and CSC Bulletin No. 300-40, May 25, 1977.

On March 20, 1978, the Air Force denied Mrs. Conklin's claim on the basis that the position involved had not been classified to a grade or pay level. On September 13, 1978, our Claims Division also disallowed Mrs. Conklin's claim on the basis that the positions for which she claims a retroactive temporary promotion and backpay were military positions and were not established or classified to a civilian grade or pay level.

Mrs. Conklin has appealed this denial of her claim on the basis that both the NCOIC and Housing Referral Officer positions were officially established and classified military positions and that there is no requirement for entitlement under Turner-Caldwell or CSC Bulletin No. 300-40 that the detailed position be a civilian position.

Our decision in Turner-Caldwell was construing 5 U.S.C. § 5596 (1976) which provides backpay for an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of all or a part of an employee's pay. That decision is applicable only in those extended detail situations where there exists a properly classified and established position to which the detailed employee may be promoted. It is a well established rule that an employee may not be promoted to a position which has not been classified. Matter of Walter F. Ray and Joseph D. Elam B-187847, January 25, 1977; and United States v. Testan, 424 U.S. 392 (1976). Furthermore, the employee must have been able to satisfy other applicable requirements for a retroactive temporary promotion. Reconsideration of Turner-Caldwell.

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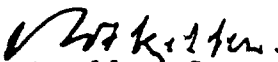
In this regard CSC Bulletin No. 300-40, May 25, 1977, which was issued by the Civil Service Commission to provide assistance to agencies in the proper application of our Turner-Caldwell decisions, provides in paragraph 4 in part as follows:

"* * * For purposes of this decision, the position must be an established one, classified under an occupational standard to a grade or pay level. As the decision notes, the Supreme Court recently ruled in United States v. Testan that classification actions upgrading a position may not be made retroactive so as to entitle an incumbent to backpay. Care must be taken to distinguish between employee claims based on details to higher graded positions, and to claims based on a classification action; only the former may be considered for retroactive correction under the decision." (Emphasis in the original).

We are aware of no statutory authority which would allow an employee in the civil service who is temporarily assigned to perform the duties of a military position to be promoted into that military position. Thus, we have held that since civilian employees who are temporarily assigned to a military position could not have been temporarily promoted to those positions, corrective action under our Turner-Caldwell line of decisions would not be applicable. B-183086, July 12, 1977. Thus, employees temporarily assigned to higher grade military positions may not be given retroactive temporary promotions to the equivalent civilian grade. Id. and Matter of Donald R. Konrady, B-193555, January 26, 1979.

The remedy which was available to Mrs. Conklin while she was performing the duties of the military positions was to file a position classification appeal to have her position classification reviewed and possibly upgraded. See 5 Code of Federal Regulations, Part 511, Subpart F. However, that remedy is available only while the employee is performing the higher level duties and may not be applied retroactively.

In view of the above, there is no authority to grant Mrs. Conklin a retroactive temporary promotion and backpay. Accordingly, Mrs. Conklin's claim is denied and the action taken by our Claims Division is sustained.


Deputy Comptroller General
of the United States