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PLM-1
Mr. Volpe

DECISION



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

[Entitlement to Retroactive Temporary Promotions]

FILE: B-194484

DATE: September 21, 1979

MATTER OF: Israel Warshaw - Detail to National Science
Foundation Excepted Position

- DIGEST:
1. National Science Foundation employee was detailed more than 120 days from competitive service position to NSF excepted service position established under 42 U.S.C. § 1873(a). Employee is not entitled to retroactive temporary promotion and backpay under our Turner-Caldwell decisions. 55 Comp. Gen. 539 (1975), affirmed at 56 id. 427 (1977). Employee is not eligible for temporary promotion under these circumstances since provisions in Federal Personnel Manual for change from competitive to excepted appointment were not met.
 2. National Science Foundation employee was detailed more than 120 days between positions in NSF's excepted service. Employee is not entitled to retroactive temporary promotion and backpay under our Turner-Caldwell decisions. 55 Comp. Gen. 539 (1975) affirmed at 56 id. 427 (1977). Remedy under Turner-Caldwell decisions applies only to details within competitive service or within excepted service under the General Schedule.

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This decision is in response to the request of the Honorable Richard C. Atkinson, Director, National Science Foundation (NSF), concerning the entitlement of Dr. Israel Warshaw, an NSF employee, to retroactive temporary promotions for two periods during which he was detailed to a position within the NSF excepted service established under 42 U.S.C. § 1873(a). The issue is whether Dr. Warshaw is entitled to retroactive promotions under our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975), affirmed at 56 id. 427 (1977).

The report from NSF states that Dr. Warshaw was detailed from a position in the competitive service, GS-801-15, to serve as Acting Director of the Engineering Division, a position in NSF's excepted service, EE-801-II (equivalent in pay range to grade GS-17). This detail ran from August 1, 1971, to March 27, 1972. During the detail Dr. Warshaw left the competitive service effective January 23, 1972,

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to occupy the position of Deputy Director, Engineering Division, in NSF's excepted service, EE-801-I (equivalent in pay range to grade GS-16). Dr. Warshaw was later detailed from his EE-801-I position to be the Acting Division Director during the period from May 15, 1973, to June 11, 1974.

The agency argues that the requirement for advance approval of a detail lasting more than 120 days applies only to employees serving in competitive positions or in positions under the General Schedule. Thus, the agency concludes that while Dr. Warshaw was detailed between positions in the excepted service (January 23 to March 27, 1972, and May 15, 1973, to June 11, 1974), he had no entitlement to retroactive temporary promotions incident to the details.

As for the period of detail (August 1, 1971, to January 22, 1972) when Dr. Warshaw was in the competitive service but detailed to a position in NSF's excepted service, the agency also argues that Dr. Warshaw has no entitlement to a retroactive temporary promotion. The agency contends that a "temporary promotion" cannot be accomplished between competitive and excepted positions without a conversion action in which the employee is informed of the nature of the action and agrees in writing to leave the competitive service. In addition, the agency argues that since NSF abided by the time-in-grade restriction of the Whitten Amendment for positions in NSF's excepted service, Dr. Warshaw could not be temporarily promoted between a GS-15 position and a GS-17-equivalent position.

At the outset, we must note that any claim for the first detail from August 1971, to January 1972, is barred by 31 U.S.C. § 71a since it was not filed with GAO until March 30, 1979, more than 6 years after the claim accrued. However, in order to provide guidance to the agency on the question of details from competitive positions to excepted positions, we shall discuss that detail also in this decision.

The Civil Service Commission (CSC) issued instructions to provide agencies with guidance in implementing our Turner-Caldwell decisions, and these instructions, contained in CSC Bulletin No. 300-40, dated May 25, 1977, provides in paragraph 8, as follows:

- "B. Scope of Commission instruction. The Commission's instruction for securing prior approval for continuation of details beyond 120 days relates only to details within the same agency of employees serving in competitive positions and, in the excepted service, positions

under the General Schedule. Since the GAO decision follows the Commission's instructions, it would not apply to positions beyond that scope, e.g., Postal Service jobs."

In the present case, Dr. Warshaw was detailed for part of the time between positions which were within NSF's excepted service. Since our decisions apply only to details within the competitive service or between positions in the excepted service which are under the General Schedule, we agree with NSF that Dr. Warshaw has no remedy under our Turner-Caldwell decisions for the period he was detailed between positions in NSF's excepted service.

With regard to the earlier period when Dr. Warshaw was detailed between the competitive service and NSF's excepted service, we note that, under Civil Service Commission regulations, an agency may not appoint or convert an employee from the competitive service to the excepted service until the employee has been informed of the nature of the action and he has submitted a written statement to that effect. See Federal Personnel Manual, Chapter 302, S2-10. This regulation was not followed when Dr. Warshaw was detailed from his competitive service position.

Our decisions following Turner-Caldwell have held that the employee must first satisfy the statutory and regulatory requirements for a temporary promotion or there will be no remedy for an improperly extended detail. See Merle H. Morrow, 58 Comp. Gen. 88 (1978); and William Rankin, Jr., 56 Comp. Gen. 432 (1977). Since Dr. Warshaw's detail from his competitive service position did not comply with the regulations governing appointment to the excepted service, Dr. Warshaw is not entitled to a retroactive temporary promotion for his overlong detail. In view of the above, it is not necessary to consider the effect of the NSF time-in-grade requirement.

Accordingly, we conclude that Dr. Warshaw may not receive a retroactive temporary promotion for either of the two details to the higher graded excepted position of Acting Division Director.

R. F. Kistner
Deputy Comptroller General
of the United States