

DECISION

18598
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

PLM-1
Botsford

FILE: B-195029

DATE: June 22, 1981

MATTER OF: Abraham Frankel - [Claim for retroactive temporary promotion and backpay]

DIGEST: Employee's claim for retroactive promotion and backpay for overlong detail under Turner Caldwell line of cases was denied by Claims Group on basis that position to which employee was detailed was never established. On appeal employee disputes agency's contention that subject position was never properly established and classified. Disallowance is sustained since employee has not submitted evidence sufficient to controvert agency's position and therefore has not satisfied his burden of proof.

This decision is in response to the appeal of Mr. Abraham Frankel from our Claims Group's Settlement Certificate of April 17, 1979 (Z-2711516). Mr. Frankel's claim is based on our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975), affirmed at 56 id. 427 (1977). In those decisions we held that if an employee is detailed to a position classified at a higher grade for a period in excess of 120 days without prior Civil Service Commission (now Office of Personnel Management) approval, he is entitled to a retroactive temporary promotion and backpay for such period provided all qualifications and other requirements for promotion are met. See paragraph 8C, Federal Personnel Manual (FPM) Bulletin No. 300-40, May 25, 1977.

Mr. Frankel claims that he was detailed from his position as a GS-14 Mathematical Statistician in the Statistical Methods Branch, Division of Survey Operations, National Center for Educational Statistics, Office of Education, to the position of Acting Chief of the Statistical Methods Branch, which he claims was an established GS-15 position. Mr. Frankel states that his detail lasted from July 24, 1972, to August 7, 1975.

Our Claims Group denied Mr. Frankel's claim after finding that he was not detailed to an established position classified at a higher grade. We hereby sustain the determination of our Claims Division on the basis that Mr. Frankel

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has not satisfied his burden of proof with regard to his claim that he was detailed to an established, higher-graded position.

Mr. Frankel alleges that the position of Chief of the Statistical Methods Branch was created when that Branch was formed during a reorganization of the National Center for Educational Statistics, Office of Education. Apparently, this reorganization was approved on January 17, 1969, by the Secretary of Health, Education and Welfare. A Mr. Charles Lauthers, Mathematical Statistician, GS-1529-15, was assigned as Acting Chief and served as such until July, 1972. By memorandum dated August 8, 1972, and August 10, 1972, the Acting Director of the Division of Survey Operations designated and notified the staff that Mr. Frankel was to succeed Mr. Lauthers as Acting Chief of the Statistical Methods Branch, effective July 24, 1972.

On July 21, 1975, Mr. Frankel initiated a grievance under the informal grievance procedures of the Department of Health, Education and Welfare, seeking a retroactive promotion and backpay for his service as Acting Branch Chief. The Acting Administrator for the National Center for Educational Statistics denied his claim stating that the Branch Chief position was never formally established. At the time his claim was denied, Mr. Frankel's status as Acting Branch Chief was terminated, effective August 7, 1975.

Mr. Frankel proceeded to file a formal grievance. The grievance examiner ruled in his favor, finding that he had been detailed to a higher graded, established position. The grievance examiner based his finding that the GS-15 position was established on the memoranda designating Mr. Frankel as Acting Branch Chief and on various other documents which listed the Branch Chief position and showed Mr. Lauthers or Mr. Frankel as Acting Branch Chief. The Deputy Assistant Secretary for Personnel and Training, to whom the grievance was forwarded for formal decision, did not follow the recommendations of the grievance examiner and denied Mr. Frankel's claim stating,

"We believe that in order for Mr. Frankel's claim to be valid he would have had to be detailed to a position for which there existed a properly classified position description at the GS-15 level.

The grievance record does not establish that such a position description existed. We are unable to conclude with you that the Secretary's reorganization approval of January 17, 1969, constituted a classification decision. Rather, the Secretary's decision authorized the establishment of a Statistical Methods Branch for which a Branch Chief at the GS-15 level was also authorized dependent upon the actual establishment and classification of that position at the GS-15 level."

The Turner-Caldwell line of cases applies only where an employee is detailed to a position which is established and classified in a higher grade by competent authority. Civil Service Commission Bulletin No. 300-40, dated May 25, 1977, which contains implementing guidance concerning Turner-Caldwell, supra, provides at paragraph 4 that: "For purposes of this decision, the position must be an established one, classified under an occupational standard to a grade or pay level." (Emphasis in original.) The Turner-Caldwell cases do not apply to a detail involving the performance of the duties of a higher-graded position not yet officially classified.

Mr. Frankel's attorney, Mr. James D. Hill, has made a number of arguments that the Branch Chief position was established. First of all, he contends that the Secretary's approval of the reorganization and of the Branch Chief position, constituted establishment of that position. He points out that soon after the reorganization, an order of mass transfer was issued which lists the Branch Chief position. No position description number appears, however, and a note indicates that new position descriptions were to be issued. Mr. Hill admits that no new description was issued, but states that Mr. Lauthers' Mathematical Statistician GS-1529-15 position description was altered to show his new function. Although the name of Mr. Lauthers' former division was crossed out and his new division inserted, there does not appear to have been any change in the description to reflect the duties of a Branch Chief. This alteration of the Mathematical Statistician position description does not constitute the preparation of a description for the Branch Chief position.

Mr. Hill argues that the primary issue in this case is not whether a position description existed but rather, whether

the position existed. To support his contention that the position did in fact exist, he points out that since 1969 the HEW telephone book listed the Branch Chief position, and that monthly lists of units and employees for the National Center for Educational Statistics showed the Statistical Methods Branch with Mr. Lauthers as Acting Branch Chief. Furthermore, he points out that in preparation for a union election the Department gave a union official a memorandum listing employees designated as acting in higher graded jobs as of May 9, 1975. Although Mr. Frankel is shown as serving as Acting Branch Chief, GS-15, there is a notation - "Pending Reorganizational Approval."

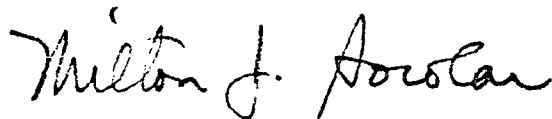
We are unable to agree with Mr. Hill's apparent belief that the absence of a position description has no bearing on whether or not the position was established. Paragraph 4-1, Subchapter 4 of the Federal Personnel Manual, Chapter 511, provides that:

"In carrying out its responsibilities under chapter 51 of title 5, United States Code, each agency must prepare a written description of the duties and responsibilities of each position that is established or changed, and classify the position the description represents."

Agency officials have repeatedly stated that the position of Branch Chief was never established. Dr. Virginia Y. Trotter, Assistant Secretary for Education, stated in a memorandum to the Deputy Assistant Secretary for Personnel and Training, that the position "was never fully realized to the point where it warranted classification at the GS-15 level even though it was originally projected at that level." Dr. Trotter went on to state that the position was projected at the GS-15 level on the assumption that the responsibility of the Branch would increase but that it in fact never did. She pointed out that most of the projected functions were never performed and that the size of the Branch was significantly reduced at the time Mr. Frankel became Acting chief.

As is the case with any claim against the United States, the burden is on the claimant to establish the liability of the United States and the claimant's right to payment. See 4 C.F.R. 31.7 (1980). We decide cases involving claims

against the Government on the basis of the written record. Therefore, if the written record before us presents a material dispute of fact that cannot be resolved without an adversary hearing, it is our long-standing practice to decide such disputes in favor of the Government. See Louis Osbourne, B-197980, May 9, 1980, and cases cited therein. We do not feel that the evidence Mr. Frankel has submitted controverts the agency's statements that the Branch Chief position was never established. Therefore, we conclude that Mr. Frankel has not met his burden of proving his claim, and we hereby sustain our Claims Group's disallowance.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States