

DECISION



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

FILE: B-206235

DATE: November 30, 1982

MATTER OF: Dick Burney

DIGEST:

Employee's claim for backpay for a 1-year period as a grade GS-13 beginning when he was promoted from grade GS-11 to GS-12 may not be allowed, although he performed duties of the higher grade. While, in the circumstances, the agency may have had the option, as an exception to the "Whitten Amendment" to promote him from grade GS-11 to GS-13, it did not do so. Also, the Comptroller General no longer follows Turner-Caldwell decisions which authorized backpay for overlong details to higher grade positions. Therefore, he is entitled only to the pay of the grade he held, GS-12.

Mr. Dick Burney has appealed our Claims Group's disallowance of his claim for retroactive promotion to grade GS-13 and backpay for the period of August 18, 1975, to August 15, 1976. For the reasons explained below, his claim may not be paid.

Mr. Burney, a civilian technician with the Mississippi Air National Guard, while in grade GS-10, on August 18, 1974, was selected for a position as a Supply Management Officer which was then classified as grade GS-13. However, he was promoted only to grade GS-11 effective that date since grade GS-11 was in the normal line of promotion at the activity where he was employed. One year later, on August 17, 1975, he was promoted from Supply Management Officer, 64-06B, grade GS-11, to Supply Management Officer, 64-06A, grade GS-12. After completion of 1 year in grade GS-12, on August 15, 1976, he was promoted to Supply Management Officer, 64-06, grade GS-13.

Mr. Burney questioned why he was not promoted directly from grade GS-11 to grade GS-13 in 1975 since there was no grade GS-12 in the normal line of promotion in the activity where he was employed. The agency responded that based on its interpretation of applicable Civil Service Commission (now Office of Personnel Management) regulations, candidates

for advancement to positions at grade GS-12 or higher must have had completed at least 1 year in positions no more than one grade lower than the position to be filled. These were the regulations implementing the statutory time in grade requirements of the so-called "Whitten Amendment," 5 U.S.C. § 3101 note (1976). However, because of Mr. Burney's concern, the agency referred the matter to the National Guard Bureau in September 1976 for their view. By letter of October 4, 1976, the National Guard Bureau stated:

"1. Federal Personnel Manual 300, Subchapter 6, paragraph 6-27(3) does allow for a two grade promotion, if there is no position at the next lower grade which would be in the normal line of promotion. Therefore, a GS-11 could be promoted to a GS-13 if there is no intervening GS-12 in the organization structure which would be in the normal line of promotion. As you are aware, a State has the discretion to determine the grade within certain parameters, at which a position is to be filled unless the State limits its discretion through regulation or negotiated agreement.

"2. In view of your decision to fill the position at the GS-12 level, there is no authority to correct the action of 17 August 1975 to reflect a promotion from GS-11 to GS-13. Reference FPM Supplement 990-2, Book 531, paragraph S2-5b(1) as pertains to retroactive promotions."

Mr. Burney was dissatisfied with that interpretation, and his claim for retroactive promotion and backpay was forwarded to our Claims Group for settlement.

The Claims Group, by settlement dated August 12, 1981, disallowed Mr. Burney's claim. The basis for this action was that, although the agency may make exceptions to the 1-year time-in-grade requirement, such exceptions are permissive and not mandatory, and therefore the agency was not required to promote Mr. Burney to grade GS-13 in August 1975.

By letter of December 29, 1981, Mr. Burney appealed the Claims Group's settlement. The basis he asserted for his appeal is that during the period in question he did in fact perform service at the GS-13 level, his duties were not limited in any manner, and his performance was rated as outstanding. Thus, he believes that in fairness and equity he should be compensated at the GS-13 level.

The general rule is that 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. United States v. Tasthan, 424 U.S. 392, 406 (1976); and Matter of McGrath, 57 Comp. Gen. 404, 405 (1978). While as an exception to the 1-year in grade requirement of the Whitten Amendment, the Civil Service Commission regulations (5 C.F.R. § 300.603(b)), authorized the employing agency to promote an employee 2 grades if the intervening grade was not in the normal line of promotion, the exercise of that authority was discretionary with the agency. In this case it appears that regardless of what the normal line of promotion was at his activity, Mr. Burney was promoted in August 1975 to Supply Management Officer, 64-U6A, grade GS-12, and, he was not promoted to Supply Management Officer, 64-06, grade GS-13 until August 1976. Therefore, Mr. Burney's agency did not exercise its discretion to promote him to grade GS-13 in August 1975, and his claim for backpay may not be allowed on that basis.

We have previously held that backpay could be granted in certain circumstances for a detail in excess of 120 days to a higher graded position. See Matter of Turner-Caldwell, 55 Comp. Gen. 539 (1975), sustained in 56 Comp. Gen. 427 (1977). However, the United States Court of Claims decided in Wilson v. United States, Ct. Cl. No. 324-81C, Order, October 23, 1981, that neither the applicable statute (5 U.S.C. § 3341) nor the Federal Personnel Manual authorizes a retroactive promotion and backpay in cases involving overlong details.

In our decision Turner-Caldwell III, B-203564, May 25, 1982, 61 Comp. Gen. _____, on the basis of the Wilson decision, we held that, with respect to all pending and future claims before our Office, we would no longer follow our previous Turner-Caldwell decisions. Thus, since

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Mr. Burney's claim falls into this category, his claim may not be paid on the basis of its being for backpay for a retroactive temporary promotion.

Accordingly, the disallowance of the claim is sustained.

for Milton J. Fowler
Comptroller General
of the United States

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