



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Valerie Pannucci Reynolds - Backpay for Period  
of Erroneous Classification

File: B-225918

Date: April 14, 1988

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### DIGEST

An employee seeks backpay for the period during which she performed the duties of a position which was later reclassified to a higher grade. The employee is not eligible for backpay since a federal employee is entitled only to the salary of the position to which the employee is appointed, regardless of duties performed. Even though a position is subsequently reclassified to a higher grade consistent with the duties the employee has been performing, such action may not be made retroactively effective. United States v. Testan, 424 U.S. 392 (1976). We find that the step III grievance decision awarding backpay to the employee is in error and may not be implemented.

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### DECISION

This is a joint request for a decision pursuant to 4 C.F.R. Part 22 (1986) from an agency and a union concerning whether the agency can award backpay pursuant to the decision of management at step III of the negotiated grievance procedure. We conclude that the award may not be implemented since reclassification of a position may not be made retroactively effective and there is no monetary remedy for periods of erroneous classification.

### BACKGROUND

Ms. Valerie Pannucci Reynolds was employed at the Department of Housing and Urban Development in July 1980 as a grade GS-09 Budget Analyst. Ms. Reynolds was promoted to grade GS-11 in August 1981 and to grade GS-12 in April 1983. She then began requesting a promotion to grade GS-13 on a yearly basis but was not promoted.

On January 17, 1985, as part of an office-wide position management review, Ms. Reynold's position description was revised and certified as accurate. The position was not

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reclassified, however, pending the results of a desk audit, conducted as part of the position management review. The desk audit evaluation, prepared March 1, 1985, concluded that the position was properly classified as a grade GS-12 Budget Analyst.

Ms. Reynolds and her supervisors continued to communicate on the issue of her promotion, and on August 7, 1986, Ms. Reynolds filed a grievance requesting retroactive promotion to grade GS-13 with backpay. The agency then advised Ms. Reynolds that since no classified grade GS-13 description for the employee's position existed, an audit of her position would have to be performed. The desk audit was conducted on August 13, 1986, and resulted in her position being classified at the grade GS-13 level. The position description upon which this classification was based is admitted to be, for all practical purposes, identical to the position description prepared on January 17, 1985, but not reclassified at that time.

Ms. Reynolds was promoted to grade GS-13 on September 14, 1986, but she continued to pursue her grievance seeking backpay. Her grievance requesting backpay was denied at steps I and II of the negotiated grievance procedure because there was no position classified at the grade GS-13 level during the relevant period and, therefore, there was no entitlement to backpay. However, on October 28, 1986, at step III of the negotiated grievance procedure, the Assistant Secretary for Community Planning and Development found for Ms. Reynolds and directed backpay retroactive to January 17, 1985, the date the position description was originally certified but not classified. This decision was based on a finding that the agency erred in its failure to comply with the provisions of Article 13, Section 14 of the agency agreement with the American Federation of Government Employees (AFGE). The examiner also found merit in the employee's argument that she was in fact performing at the grade GS-13 level at least as of January 17, 1985.

On December 15, 1986, the Director, Personnel Systems and Payroll Division, requested the Comptroller General to issue a decision as to whether payment can be made based upon the step III grievance decision. On December 17, 1986, the Chief Steward of AFGE Local 476 filed an objection to the submission of the matter to our Office, and the union also advised that the agency's failure to make payment in accordance with the step III decision was the subject of an arbitration hearing scheduled for January 1987.

In our decision, Valerie Pannucci Reynolds, B-225918, Mar. 19, 1987, we held that we would not assert jurisdiction over the agency's request concerning the legality of the payment ordered by the step III negotiated grievance decision since the union had objected to submission of the matter to GAO and had already initiated procedures under 5 U.S.C. chapter 71 to resolve the issue.

The agency and the union have now submitted a joint request for a decision regarding the awarding of backpay pursuant to the step III grievance decision. The union has indicated that it has completed the exercise of its rights under 5 U.S.C. chapter 71 and now wishes to jointly pursue a decision from this Office.

#### OPINION

Generally, the granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. See John W. Godwin, B-202688, Oct. 23, 1981, and cases cited therein. Similarly, the authority to classify general schedule positions is vested by law in the agencies where the positions are located and the Office of Personnel Management (OPM). See 5 U.S.C. §§ 5107, 5110, 5112, and 5115; 5 C.F.R. Part 511 (1986). Each agency is required to initially classify positions under its jurisdiction and to change the classification when circumstances warrant. These actions by an agency are the basis for pay and personnel actions until changed by OPM. 5 U.S.C. § 5107.

Ordinarily, an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. See Susan E. Murphy, 63 Comp. Gen. 417 (1984), and cases cited therein. Similarly, there is no entitlement to backpay for the period prior to reclassification of a position. We have found that alleged delays by an agency in processing job descriptions used to support a higher grade position do not provide a basis for backpay. See Gordon L. Wedemeyer, B-200638, Oct. 9, 1981, and cases cited therein.

The United States Supreme Court has held that a reclassification action upgrading a position may not be made retroactively effective for purposes of awarding backpay under the Back Pay Act, 5 U.S.C. § 5596. United States v. Testan, 424 U.S. 392 (1976). The employees in Testan unsuccessfully argued for the retroactive reclassification of their positions and backpay on the principle of equal pay for equal work, contending that their positions were the same as positions in another agency which were classified in a higher grade. In rejecting these arguments, the Court in

Testan took note of the fact that in the "purpose" section of the Classification Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was "to provide a plan for the classification of positions whereby . . . the principle of equal pay for equal work will be followed." However, the Court went on to say that no place in the Classification Act was there an express provision for the award of backpay to a person who has been erroneously classified. The Court concluded that the "Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification" and that "neither the Classification Act (5 U.S.C. § 5101 et seq.) nor the Back Pay Act (5 U.S.C. § 5596) creates a substantive right in the respondents to backpay for the period of their claimed wrongful classification." Id., at 407. The Court in Testan also stated that ". . . the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade." Id., at 406.

Thus, consistent with the Testan decision, we have held that the fact that a position is reclassified to a higher level and the employee is promoted does not entitle him to retroactive pay at the rate of the higher level position, even though he may have performed the duties of that position prior to its reclassification. See Connie V. Marcum, B-204521, Apr. 26, 1982; Gerald V. Mann, B-195132, Aug. 6, 1981; David A. Webb, B-190695, July 7, 1978.

In this case, Ms. Reynolds seeks backpay to cover the period of time she believes her position was erroneously classified as a grade GS-12 position since there was no change in her position description between January 1985 when it was certified and August 1986 when it was classified as a grade GS-13 position. However, as discussed above, the general rule in classification matters 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.

Ms. Reynolds' position was classified at grade GS-12 until it was reclassified at grade GS-13 in August 1986. Therefore, Ms. Reynolds was not entitled to the salary of the higher grade level until she was promoted to the higher grade position on September 14, 1986. Under the principles discussed in Testan, above, this is so even though the grade GS-12 classification may have been erroneous, as evidenced by the fact that the position was reclassified to a grade GS-13 without changing the position description. The agency has the discretion to make the classification

determination and change it when the agency deems it is appropriate to do so.

Moreover, this discretion is not encumbered by the provision of the agency and union agreement upon which the step III grievance examiner based his decision to award backpay to Ms. Reynolds. That provision, section 13.14 of the HUD/AFGE Agreement, reads as follows:

"Section 13.14 - Career Ladder Promotion.

Management will make prompt determinations regarding career-ladder promotions of their employees. A career ladder promotion is dependent on:

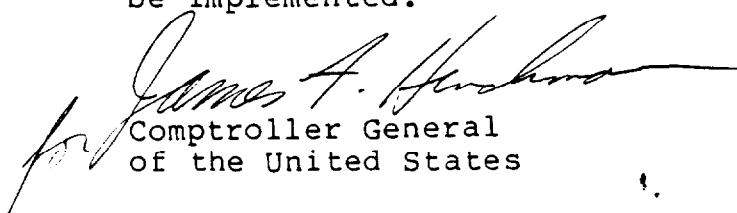
"(1) The employee's demonstration of the ability to perform the duties of the next higher grade to the satisfaction of his/her supervisor. A copy of the promotion criteria will be given to an employee as he/she enters each level of a career ladder.

"(2) The availability of enough work at the next higher grade.

"(3) Meeting the minimum qualifications and time-in-grade requirements."

This provision does not refer to the agency's determination as to the classification of a position. The facts in this case concerned the classification of Ms. Reynolds' position at grade GS-13, and the timing of classifications is within the discretion given to the agency under the Classification Act.

Accordingly, since there is no monetary remedy under either the Back Pay Act or the Classification Act for periods of work at a higher level prior to reclassification of a position at that higher level, we hold that the step III grievance decision awarding backpay to Ms. Reynolds may not be implemented.

  
Comptroller General  
of the United States