



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

Mr. Pool

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OFFICE OF GENERAL COUNSEL

B-196633 (RCP)

June 15, 1981

The Honorable Thomas S. Martin
Acting Assistant Attorney General
Civil Division
United States Department of Justice

Attention: Donnie Hoover, Assistant Director
Commercial Litigation Branch

Dear Mr. Martin:

Subject: Oscar G. Adams, Jr. v. United States of
America, et al
USDC D Utah, Civil Action No. C-81-0214W

On March 30, 1981, we received the Complaint and Summons in the above-captioned case which names "The Comptroller General, ELMER B. STAATZ [sic]" as a defendant to the action. By letter dated April 17, 1981, we requested that the Department of Justice represent the Comptroller General in this action, and we enclosed copies of the Complaint and Summons. We also advised that we would be forwarding a substantive litigation report, and that is the purpose of this letter.

Initially of a procedural nature, we believe an objection may be made to the jurisdiction of the district court to entertain this cause. The plaintiff seeks money damages (backpay) from the Government in excess of \$10,000 (see paragraph 3 of the complaint). Under 28 U.S.C. § 1346(a)(2) (the Tucker Act), the district court does not have jurisdiction over claims against the United States exceeding \$10,000; rather, the Court of Claims has exclusive jurisdiction. (See 28 U.S.C. § 1491.) See generally, Polos v. United States, 556 F. 2d 903, 905 (8th Cir., 1977). While 5 U.S.C. § 5596 (the Back Pay Act) generally addresses

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certain wrongful personnel actions, it does not in itself confer jurisdiction on the district court. Since plaintiff did not submit his claim to the Merit Systems Protection Board under 5 U.S.C. § 7701, that statute would appear to be an inappropriate jurisdictional postulate. Finally, considering that plaintiff has coupled his claim for declaratory relief with his claim for money damages, we believe it is inappropriate for plaintiff to predicate district court jurisdiction upon either Federal question jurisdiction (28 U.S.C. § 1331), or the Declaratory Judgment Act (28 U.S.C. § 2201). We believe the only proper jurisdictional base for consideration of plaintiff's cause is 28 U.S.C. § 1491 (in the Court of Claims). See Cook v. Arentzen, et al., 582 F.2d 870 (4th Cir., 1978); and Polos, supra.

Two additional procedural points are apparent. As we view plaintiff's cause of action as one for money damages against the United States, we believe that the Comptroller General is not a proper defendant to the action. In addition, the 6-year limitations period for filing actions in the Court of Claims prescribed by 28 U.S.C. § 2501 (28 U.S.C. 2401 for the district courts), serves as an affirmative defense for that portion of plaintiff's claim arising before March 24, 1975.

Briefly, in regard to the substantive merits of plaintiff's action, our records show that Mr. Adams occupied a GS-7 position classified as a Civil Engineering Technician at the Marine Corps Air Station, Beaufort, South Carolina. He states that he performed the higher-graded duties of a GS-9 during the period August 26, 1974, to January 1, 1978. Thus, he contends he is entitled to a temporary promotion and back-pay on the basis of our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 id. 427 (1977), which held that employees are entitled to temporary promotions for extended details to established, classified higher-level positions, provided they meet certain requirements. See Federal Personnel Manual Bulletin No. 300-40, dated May 25, 1977.

Plaintiff's claim for retroactive temporary promotion and backpay was considered and denied by our Claims

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Division's settlement dated August 23, 1979 (Z-2811309) which determined that plaintiff had failed to show that he was detailed to an established, higher-graded position.

In large measure the subsequent decisions of this Office sustaining the Claims Division's adjudication in plaintiff's case speak for themselves. See B-196633, May 19, 1980; and B-196633, January 4, 1980, copies attached, as well as the explanatory correspondence sent to Senator Orrin G. Hatch, B-196633, July 9, 1980; B-196633, May 19, 1980; and B-196633, January 4, 1980, copies attached.

In the circumstances of plaintiff's claim, in addition to showing that there was an established higher-grade classified position, it is also necessary for plaintiff to prove that he was detailed to such a position and performed the higher grade duties during the period of the claim. The employing Department has denied such a fact and we can find nothing in the administrative record of the claim to dispute its findings. Plaintiff continually failed to sustain his burden of proof in accordance with our claims settlement procedures (4 C.F.R. § 31.7 (1978)), and, having failed to establish the liability of the United States, the claim has been continually denied.

As we have indicated, copies of pertinent documents have been attached to this letter. In addition, we are attaching suggested answers to the allegations in like numbered paragraphs contained in the complaint. We request that you keep this Office advised of developments in this case. In that regard, and should you require any further assistance, the attorney responsible for this matter is Mr. Robert C. Pool, telephone 275-6404.

Sincerely yours,



Robert L. Higgins
Assistant General Counsel

Attachments

ATTACHMENT

SUGGESTED ANSWERS TO ALLEGATIONS IN COMPLAINT

We suggest the following answers to the like-numbered paragraphs of the petition.

I.

Admit only to the extent our records show that Mr. Oscar G. Adams resides at 242 Fifth Street, West, Dugway, Utah 84022; and from August 25, 1974, until December 31, 1977, plaintiff was employed at Marine Corps Air Station at Beaufort, South Carolina, as an engineering technician, GS-802-07, in the Public Works Department.

II.

Admit only to the extent that Elmer B. Staats is the former Comptroller General of the United States. Plaintiff's claim has been considered and denied three times by the U.S. General Accounting Office. Exhibits attached.

III.

Deny. The district court does not have jurisdiction to entertain this cause. The plaintiff seeks money damages (backpay) from the Government in excess of \$10,000. Under 28 U.S.C. § 1346(a)(2) (the Tucker Act), the district court does not have jurisdiction over claims against the United States exceeding \$10,000; rather, the Court of Claims has exclusive jurisdiction. (See 28 U.S.C. § 1491). While 5 U.S.C. § 5596 (the Back Pay Act) generally addresses certain wrongful personnel actions it does not in itself confer jurisdiction on the district court. Since plaintiff did not submit his cause to the Merit Systems Protection Board under 5 U.S.C. § 7701, that statute would appear to be an inappropriate jurisdictional postulate. Finally, considering that plaintiff has coupled his claim for declaratory relief with his claim for money damages, we believe it is inappropriate for plaintiff to predicate district court jurisdiction upon either Federal question jurisdiction (28 U.S.C. § 1331), or the Declaratory Judgment Act (28 U.S.C. § 2201). Here again, we believe

the proper jurisdictional base for consideration of plaintiff's cause is 28 U.S.C. § 1491 (in the Court of Claims).

IV.

Admit to the extent our records contain a photostated copy of an appointing order submitted by plaintiff which substantiates the allegation.

V.

Admitted as to the first sentence only to the extent that our records show that on August 25, 1974, plaintiff was hired by defendants at Engineering Division, Public Works Department, MCAS, Beaufort, South Carolina, and assigned and/or promoted to the position of Civil Engineering Technician (Drafting) GS-802-7. The balance of the first sentence is denied. Plaintiff alleges that the position he held was classified as a GS-9 immediately prior to his being hired. However, the documents furnished by him support the information provided by his employing agency. The Department states in its report that Mr. Adams was assigned to Position Description 2552, which was at the GS-7 level in 1974, recertified at that level in 1977, and remained at that grade until it was replaced on February 14, 1978, Civil Engineering Technician (Drafting), GS-802-9. Mr. Adams has furnished copies of Position or Job Description 2676 and 2552. Both Position Descriptions correspond in all respects to the information previously provided by the Department of the Navy. Position Description 2552 is dated August 7, 1974, and is for a GS-802-07 Civil Engineering position. Mr. Adams' Notification of Personnel Action is effective August 25, 1974, and shows that he was employed at a GS-7 level to fill this position. Thus, the position was classified at grade GS-7 prior to his being hired.

Defendant does not have sufficient knowledge or information to either admit or deny the final two sentences of the allegation.

VI

Admitted as to so much of the first sentence that provides that plaintiff worked at the level GS-802-7 until

December 31, 1981. The balance of the first sentence is denied as to the alleged propriety of promotion. The defendant does not have sufficient information to either admit or deny the last sentence of the allegation. Defendant regards the words "obvious injustice" in the last sentence as plaintiff's perception, and not a conclusion of law - in which case it is denied.

VII

The allegations in the first sentence relate to matters peculiarly within the knowledge of the plaintiff, and consequently are neither admitted or denied. The balance of the allegation is admitted.

VIII

The entire comprehensive allegation - including items advanced in subparts (a) through (i) - is denied.

The comprehensive allegation is directed toward classification issues concerning the position plaintiff occupied during the period of his claim. This contrasts sharply with the claim for an overlong detail to a different higher-graded position which plaintiff pressed before the U.S. General Accounting Office. Generally, the Classification Act, 5 U.S.C. § § 5101, et seq., governs classification of Federal positions in the General Schedule. Under 5 U.S.C. § 5107, individual agencies have authority to place positions in appropriate classes and grades in conformance with standards published by the Civil Service Commission (now Office of Personnel Management). See regulations contained in Part 511, Title 5, Code of Federal Regulations (1979). Further, under authority provided in 5 U.S.C. § § 5110-5112, the Office of Personnel Management (OPM) reviews agency classifications and may revoke or suspend the agency's classification authority. Thus, an employee should appeal any alleged improper classification to his or her agency or to OPM. See 5 C.F.R. §§ 511.603, et seq. (1979). As a result, because statutory authority to establish appropriate classification standards and to allocate positions subject to the General Schedule rests with the agency concerned and OPM, this Office has no authority to settle claims on any basis other than the agency or OPM classification. Plaintiff

could have appealed his job classification in accordance with these procedures, but there is no evidence he did so. And in any event had he been successful, the higher classification would have applied prospectively only. United States v. Testan, 424 U.S. 392 (1976).

IX

The entire comprehensive allegation - including items advanced in subparts (a) through (c) - is denied. Plaintiff bases his claim to a temporary promotion and backpay on our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975), and 56 id. 427 (1977), which held that employees detailed to higher-grade positions for more than 120 days, without Civil Service Commission (now Office of Personnel Management) approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. However, that rule is predicated upon the employee being detailed formally or informally to an existing position. See 56 Comp. Gen. 427, supra, at 430.

The Civil Service Commission has promulgated instructions implementing our Turner-Caldwell decisions in its Federal Personnel Manual (FPM) Bulletin No. 300-40, dated May 25, 1977. Paragraph 4 of the Bulletin defines a detail as follows:

"A detail is the temporary assignment of an employee to a different position within the same agency for a brief, specified period, with the employee returning to regular duties at the end of the detail. 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.)

Paragraph 8F of the FPM Bulletin requires agencies, in accordance with FPM Supplement 296-31, Book II, subchapter S3-13, to record details in excess of 30 calendar days on Standard Form 52 or other appropriate form and to file it on the permanent side of the employee's Official Personnel Folder. However, in the absence of this form of documentation, paragraph 8F further

allows the employee to provide other forms of acceptable proof of his detail. Such acceptable documentation included (1) copies of Standard Forms 50 or 52 or official memoranda of assignment (2) a written statement from the person who supervised the employee during the period in question, or other management official familiar with the work, certifying that to his or her personal knowledge the employee performed the duties of the particular established, classified position for the period claimed, or (3) a decision under established grievance procedures.

Mr. Adams claimed he was detailed during the period August 26, 1974, to January 1, 1978. The Department states in its report that Mr. Adams was assigned to Position Description 2552, which was at the GS-7 level in 1974, re-certified at that level in 1977, and remained at that grade until it was replaced on February 14, 1978, by Position Description 2676, Civil Engineering Technician (Drafting), GS-802-9. Thus, a higher-grade classified position was not established until 1-1/2 months after the alleged higher-grade detail of Mr. Adams. The remedy of temporary promotion and backpay prescribed in Turner-Caldwell is not available where an employee has been detailed to or has performed the duties of a higher-grade position which has not been classified. This is so because of the well established rule that an employee may not be promoted to a position which has not been classified. In addition to showing that there was an established higher grade classified position, it is also necessary for Mr. Adams to prove that he was detailed to such a position and performed the higher grade duties. The Department has denied such a fact and we can find nothing in the record to dispute its findings. This Office settles claims on the basis of the written record and does not hold adversary hearings. 4 C.F.R. § 31.7 (1978). Plaintiff's unsupported allegations do not constitute sufficient documentation establishing that Mr. Adams was officially detailed to and performed the full range of duties of a higher-grade classified position. He has still not sustained his burden of proof and his claim must be denied by this Office.