

DECISION



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

FILE: B-180010.04

DATE: NOV 28 1975

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MATTER OF: Marion McCaleb: Retroactive Promotion - Position
Reclassification

DIGEST: Employee's GS-12 position was reclassified administratively to GS-13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 C. F. R. § 511.703.

By letter dated August 25, 1975, the National Labor Relations Board (NLRB) requested our decision as to the possible retroactivity of a promotion by reclassification of an NLRB employee. The pertinent facts are stated in the letter as follows:

"Marion McCaleb, a Management Analyst under the jurisdiction of the General Counsel, upon learning that two coworkers had been promoted (reclassified) from GS-343-12 to GS-343-13 effective October 11, 1974, grieved management's failure to similarly promote her through reclassification from her position of GS-343-12 to a GS-343-13.

"The promotions in question are reclassifications based upon accretion of duties and not competitive actions. The General Counsel, hearing the entire grievance upon appeal, determined in part that grievant was performing GS-13 work at the time of the reclassification of the other two Management Analysts and that sufficient basis existed for concluding grievant performed GS-13 work thereafter to present.

"Having determined grievant was classified wrongfully at the GS-12 level, the General Counsel thereupon reclassified grievant to the GS-13 level, effective June 2, 1975." (Footnote omitted.)

The Board states that it adheres to the principle of "equal pay for substantially equal work," set forth in the Classification Act of 1949, 5 U. S. C. § 5101(1)(A) (1970). The Board believes the situation here is similar to that reported in 54 Comp. Gen. 69 (1974). In that case the agency involved had a nondiscretionary agency policy which required

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that newly hired attorneys be appointed at GS-11 if they met certain criteria in the Federal Personnel Manual. Through administrative error, two employees had been appointed at GS-9, and we permitted retroactive adjustment of the appointments to GS-11 with backpay. The Board also invokes 54 Comp. Gen. 312 (1974) in which we granted a retroactive promotion with backpay to an NLRB employee pursuant to an arbitration award involving a violation of a collective-bargaining agreement. It argues that the fact that the employee here was not in a collective-bargaining unit, and therefore was subject to the agency's regular grievance system, should not preclude the payment of backpay. The Board concludes that equity and our prior decisions require a favorable result.

We are unable to agree with the position taken by the NLRB or to grant the relief requested for the following reasons.

The classification of positions in the Government is governed by the Classification Act of 1949, as amended, 5 U.S.C. §§ 5101-5115. Section 5107 of title 5 directs each agency to classify its positions in accordance with the Civil Service Commission's published standards and, when warranted, to change a position from one class or grade to another class or grade. The Civil Service Commission is given authority under section 5110 to review the classification of positions and to require changes by a certificate which is binding on the agency and on the General Accounting Office. The Commission is empowered to prescribe regulations by section 5115.

The Commission's regulations for position classification under the Act are set out in part 511 of title 5 of the Code of Federal Regulations, and 5 C.F.R. § 511.701 (1975), states that "[t]he effective date of a classification action taken by an agency is the date the action is approved in the agency or a subsequent date specifically stated." With respect to appeals within an agency, 5 C.F.R. § 511.702 states that the effective date of a change in classification resulting from an appeal "is not earlier than the date of decision on the appeal and not later than the beginning of the fourth pay period following the date of the decision * * *." These regulations are amplified in Federal Personnel Manual chapter 511, § 7-1a, which flatly states that "[an] agency may not make the [classification] action retroactively." See also FPM chapter 531, § 2-7(a); Dianish v. United States, 183 Ct. Ct. 702, 707-709 (1968). The only provision for a retroactive effective date in a classification action is when there is a timely appeal from classification action which resulted in a loss of pay and on appeal the prior decision is reversed at least in part. See 5 C.F.R. § 511.703.

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The general rule is that an employee is entitled only to the salary of the position to which actually appointed, regardless of the duties performed. Thus, in a reclassification situation, an employee who is performing duties of a grade level higher than the position to which he is appointed is not entitled to the salary of the higher level position unless and until the position is classified to the higher grade and he is promoted to it. B-180056, May 28, 1974.

Since the NLRB's submission states that the promotion of Marion McCaleb involved herein is a reclassification based upon accretion of duties and not a competitive action, it falls squarely within the regulations of the Civil Service Commission cited above and may not be made retroactive. We have ruled that when a position once has been classified in accordance with regulations, an employee may not be promoted retroactively, even though the employing agency may subsequently reconsider its classification determination and reclassify the position upwards. B-183218, March 31, 1975; B-170500, October 29, 1970.

The cases cited by the NLRB are not in point because none of them involved the issue of position classification. The prior case involving the Board (54 Comp. Gen. 312) concerned the improper filling of a vacancy from outside the agency and did not concern classification. With respect to the Board's point about treating unit and non-unit employees equally, we point out that Executive Order 11491, governing labor-management services in the Federal service expressly provides, in section 13(a), that a negotiated grievance procedure may not cover matters for which statutory appeals procedures exist, thereby excluding position classification actions.

Accordingly, the NLRB may not retroactively adjust Marion McCaleb's promotion with backpay.

Acting PAUL G. DEMBLING
Comptroller General
of the United States