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DECISION



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

FILE: B-204551

DATE: April 7, 1982

MATTER OF: Department of Agriculture Board of
Contract Appeals

DIGEST: Individuals designated to serve on Department of Agriculture's board of contract appeals prior to March 1, 1979, the effective date of the Contract Disputes Act of 1978, claim backpay from March 1, through August 12, 1979, when they were promoted to supergrade positions. While subsection 8(b)(1) of Disputes Act provides that members of agency boards are to be compensated at supergrade rates, that subsection contemplates appointment to the respective supergrade positions. Claim is denied since individuals were not promoted until August 12, 1979, following allocation of four supergrade positions to the Department pursuant to 5 U.S.C. § 5108(c).

The Deputy Assistant Secretary for Administration, Department of Agriculture has requested an advance decision as to whether Mr. Paul H. Rapp, Ms. Jewel F. Lewis, and Mr. Sean Doherty, the chairman, vice chairman and a member of the Department's board of contract appeals, may receive backpay from the effective date of the Contract Disputes Act of 1978, March 1, 1979, to August 12, 1979, the date they were promoted from grade GS-15 to supergrade positions. The board members claim that because they were designated to serve on the Department's board of contract appeals prior to March 1, 1979, their entitlement to the higher rates of compensation arises on the effective date of the Disputes Act by virtue of subsection 8(b)(1) thereof. For the reasons set forth below, we are unable to agree with the claimants' construction of subsection 8(b)(1) and we hold that they are not entitled to backpay for the period prior to their promotions on August 12, 1979.

Effective March 1, 1979, section 8 of the Disputes Act 92, Stat. 2383, established a statutory basis for agency boards of contract appeals which had previously been constituted under agency regulation. Subsection 8(a)(1) provided for the establishment of an agency board of contract appeals as follows:

"* * * an agency board of contract appeals may be established within an executive agency

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when the agency head, after consultation with the Administrator [for Federal Procurement Policy], determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties.* * *

Subsection 8(i) required existing agency boards to develop workload studies for approval by the agency head as specified in subsection 8(a)(1).

The Disputes Act gave the Administrator for Federal Procurement Policy duties in addition to those specified in subsection 8(a)(1), above. Subsection 8(h) authorizes the Administrator to issue guidelines with respect to criteria for the establishment, functions and procedures of the agency boards of contract appeals and subsection 14(g) gives the Administrator responsibility for the allocation of seventy supergrade positions specifically authorized for those boards. In particular, subsection 14(g) of the Disputes Act amended 5 U.S.C. § 5108 by adding the language now codified in subsection c(4) as follows:

"the heads of executive departments and agencies in which boards of contract appeals are established pursuant to the Contract Disputes Act of 1978, and subject to the standards and procedures prescribed by this chapter, * * * may place additional positions, not to exceed seventy in number, in GS-16, GS-17, and GS-18 for the independent quasi-judicial determination of contract disputes, with the allocation of such positions among such executive departments and agencies determined by the Administrator for Federal Procurement Policy on the basis of relative case load."

The seventy supergrade positions were authorized to accommodate the need for additional supergrade positions created by the following provision of subsection 8(b)(1) of the Disputes Act:

"* * * the members of agency boards shall be selected and appointed to serve in the same manner as hearing examiners appointed pursuant to section 3105 of title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this Act shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, [title 5] United States Code, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the numbers of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law."

By Policy Letter 79-2, sixty-one of the seventy supergrade positions established under subsection 14(g) were allocated to the various department and agency boards by the Administrator for Federal Procurement Policy on June 26, 1979. Four of those supergrade positions were allocated to the Department of Agriculture and thereafter, effective August 12, 1979, the three claimants were promoted to the appropriate supergrade positions.

The three board members claim that subsection 8(b)(1) establishes rates of pay for persons serving on agency boards of contract appeals after the effective date of the Disputes Act without regard to the actual promotion of incumbents and without regard to the allocation of supergrade positions by the Administrator for Federal Procurement Policy. This argument focuses on the next to the last sentence of the subsection.

In support of their claim, the board members rely on the holding in Selman v. United States, 204 Ct. Cl. 675 (1974) in which the Court of Claims awarded backpay to two Navy captains serving as Assistant Judge Advocates General. They seek to draw an analogy between subsection 8(b)(1) and 37 U.S.C. § 202(1), the provision in issue in the Selman case, which authorized payment of the basic pay of a rear admiral to lower ranking officers "serving" as Assistant Judge Advocates General. They rely on the Secretary of Agriculture's memorandum dated January 29, 1979, as establishing their right to the higher rates of compensation. That memorandum confirmed Mr. Rapp's earlier designation as chairman of the agency board established under 7 C.F.R. 24.2 and, effective February 26, 1979, removed two part-time members and designated Ms. Lewis and Mr. Dougherty as vice chairman and a board member, respectively. The Secretary's January 29th memorandum supplemented a memorandum dated seven months earlier by which he had designated the membership of the administratively established agency board.

Having reviewed the statutory language in issue, we are unable to agree that the question of backpay is controlled by Selman. Rather, we find that the applicable principle, confirmed in Testan v. United States, 424 U.S. 392 (1975) and Peters v. United States, 208 Ct. Cl. 373 (1975), is that a Government employee is entitled only to the rights and salary of the position to which he has been appointed.

Unlike 37 U.S.C. § 202(1) which authorized payment of the salary of a higher rank to a lower ranking officer "serving" in a particular position, subsection 8(b)(1) contemplates the selection and appointment of members of agency boards of contract appeals. The language of the next to the last sentence of subsection 8(b)(1) must be read in the context of the entire subsection which makes it clear that payment of the rates of compensation thereby authorized is dependent upon appointment to the respective positions. As distinguished from 37 U.S.C. 202(1), subsection 8(b)(1) is not addressed exclusively to the subject of pay. It is the authority by which members of agency boards of contract appeals are appointed.

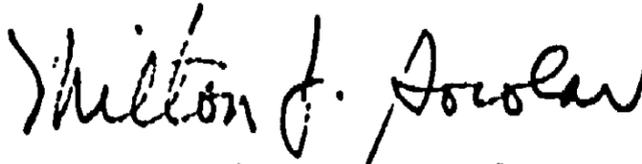
The last sentence of subsection 8(b)(1) and its implicit reference to subsection 14(g) support this interpretation, for

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both would be largely superfluous if we were to adopt the claimants' view that entitlement to the higher pay is not dependent upon appointment to the position. As amended by subsection 14(g) of the Disputes Act, 5 U.S.C. § 5108(c) gives the heads of departments and agencies authority to place up to seventy positions in GS-15, GS-17 and GS-18 for the purpose of staffing the boards of contract appeals. Those positions are in addition to the supergrade positions that may be established under 5 U.S.C. § 5108(a) and are to be allocated by the Administrator for Federal Procurement Policy. If subsection 14(g) is to have any meaning, it must be viewed as limiting an agency's authority under subsections 8(a)(1) and 8(b)(1) of the Act to appoint members to boards of contract appeals.

The Administrator did not allocate positions to the various departments and agencies until June 26, 1979, by the issuance of Policy Letter 79-2. Since there is nothing in the record to suggest that supergrade positions otherwise allocated to the Department of Agriculture were made available to staff its board no action could have been taken to appoint members to the board in January 1979, or on the effective date of the Disputes Act. As in the case of Government employees generally, their entitlement to the salaries of those higher grade positions is dependent upon their having been appointed to the positions. As evidenced by the Forms AD-350, "Notification of Personnel Action," appointments of the members of the Agriculture Department's contract appeals board did not occur until August 12, 1979.

For the reasons stated above, the backpay claims of the three board members are denied.

for 
Comptroller General
of the United States