

00779

JOHN E. LUPTON
Civ. Serv.

DECISION



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

FILE: B-187234

DATE: December 8, 1976

MATTER OF: Mr. Edward Rothenberg - Backpay for alleged improper classification

- DIGEST:**
1. General Services Administration employee claims backpay from August 3, 1962, for alleged improper position classification at grade GS-12 instead of at grade GS-13 level. Since questions regarding classification of positions are solely within jurisdiction of employing agency and the Civil Service Commission (5 U.S.C. § 5107 et seq.), this Office lacks authority to consider propriety of classification actions or to entertain claims for backpay based on contentions that position classification was improper. Employee should have appealed alleged improper classification to Commission.
 2. Employee filed his claim with this Office on March 6, 1976, for backpay due as a result of an alleged improper classification of his position to grade GS-12 instead of grade GS-13 on August 3, 1962. Under 51 U.S.C. § 712 (Supp. IV, 1974), claims against the United States are barred unless presented to this Office within 6 years from date claim accrues. Therefore, we may not consider any element of claim accruing before March 8, 1970.

This decision is in response to Mr. Edward Rothenberg's appeal of our Claims Division's denial of his claim for backpay from August 3, 1962, to the present, allegedly due because of an improper position classification as a grade GS-12.

Mr. Rothenberg is employed as the Chief, Research and Testing Branch, Quality Control Division, Federal Supply Service, General Services Administration, New York, New York. During the period from August 3, 1962, through November 1, 1969, he occupied the position of a Supervisory Chemist grade GS-12. On November 2, 1969, his position was reclassified to grade GS-13 level. Mr. Rothenberg contends that his grade GS-12 position should have been reclassified to grade GS-13 level on or about August 3, 1962,

B-187234

when Mr. C. E. Boyles, then Regional Director of the Federal Supply Service, signed a new position description form recommending that Mr. Rothenberg's position be upgraded to the grade GS-13 level, and submitted it to the Acting Director, Regional Manpower Resources. The latter returned the Regional Director's request without action on September 27, 1962, stating that the position did not meet the criteria for reclassification to grade GS-13 level at that time.

Subsequently, Mr. Rothenberg submitted several requests through channels to have his position upgraded, pointing out that similar positions in other General Service Administration activities had been reclassified to the grade GS-13 level. None of these requests were approved. Finally on July 18, 1966, his immediate superior, Mr. J. M. Culverwell, Chief, Quality Control Division, sent Mr. Rothenberg a memorandum concerning his efforts to have his position reclassified, which reads in part as follows:

"I am very concerned about an aspect of this overall matter which directly affects you as Branch Chief and me as Division Chief. It is my firm opinion that you have allowed yourself to become so preoccupied with the matter of your personal classification and grade that it has begun to affect your performance and the discharge of your regular duties; I recommend you do not permit this to persist. You have already appealed the matter properly through Regional and then through Central Office channels in GSA. Your next recourse, if you so choose, is to appeal the matter to the Civil Service Commission. When and until you take this course, I direct you to drop the matter, and to devote your efforts to the management of the Branch as it is authorized and classified at this time. I also direct you to be most discreet in proposing reclassifications and possible upgradings of your subordinates' morale and the effectiveness of the Laboratory."

Mr. Rothenberg did not elect to appeal his position classification to the Civil Service Commission but continued to request his agency to upgrade his position. Ultimately, in November 1969, his request was granted when he was promoted to grade GS-13.

The employee filed a claim with our Claims Division on March 8, 1976, for a retroactive promotion to grade GS-13 from August 3, 1962, and backpay for the added increment of pay to the present

B-187234

time, alleging that his agency improperly failed to reclassify and upgrade his position between 1962 and 1969, on the basis that such action would have excessively increased the cost of his laboratory. He further states that he intentionally delayed the filing of his claim to avoid possible reprisals against himself and his colleagues.

Pursuant to 31 U.S.C. § 71e (Supp IV, 1974), any claim or demand against the United States is barred unless it is presented to the General Accounting Office within 6 years from the date such claim accrues. Since Mr. Rothenberg's claim was not received by this Office until March 8, 1976, any element of the claim accruing before March 8, 1970, is barred.

Moreover, under the provisions of 5 U.S.C. § 5105 (1970), the Civil Service Commission (CSC) has the authority and responsibility for the preparation and publication of standards for classification of positions subject to the General Schedule. Each agency is required by 5 U.S.C. § 5107 to place its positions, unless otherwise provided in chapter 51, of title 5, United States Code, in their appropriate class and grade to conform with the standards published by the CSC. That section also provides that, subject to section 5337 of title 5, United States Code, actions of an agency under the authority of section 5107 are the basis for pay and personnel transactions until changed by certificate of the CSC. Under the provisions of 5 U.S.C. § 5110, the CSC is required to review agency classification actions and correct such actions which are not in accordance with published standards. The CSC correction certifications are binding on all administrative, certifying, payroll, disbursing, and accounting officials.

The proper course of action for Mr. Rothenberg to follow would have been to appeal the classification of his position to the CSC. The criteria for determining the effective date for a reclassification is set forth in 5 C.F.R. § 511.701. When a position is reclassified by CSC, the effective date is not earlier than the date the certificate granting the reclassification is received by the agency, and not later than the beginning of the fourth pay period following the receipt of the certificate in the agency.

The CSC rule that a reclassification has only prospective effect was affirmed in *United States v. Testan et. al.*, 424 U.S. 392 (1976). There the Supreme Court construed the Classification Act as follows (*Id.* at 399):

E-187234

"We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the 'purpose' section of the Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was 'to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed.' And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified."

The Court concluded "that Congress has not made available to a party wrongfully classified the remedy of money damages through retro-active classification." Id. at 403.

In view of the foregoing, the settlement issued by our Claims Division that disallowed Mr. Rothenberg's claim is hereby sustained.


Deputy Comptroller General
of the United States