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DECISION



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

FILE: B-169101 DATE: November 30, 1977

**MATTER OF: Air Traffic Controllers - Suspension of
classification activity**

**DIGEST: Department of Transportation and Civil
Service Commission entered into "moratorium
agreement" suspending classification
activities affecting positions in series
GS-2152, air traffic controller, pending
issuance of new classification standards.
Temporary suspensions of classification
allocations do not constitute basis for
retroactive promotion in view of CSC's
broad authority over classification
matters. "Moratorium agreement" does
not provide basis for retroactive
promotions since there is no authority
for retroactive promotions to correct
classification errors. Supreme Court
has so held.**

This decision involves the legality of the "moratorium agreement" on the position classification of air traffic controllers entered into by the Department of Transportation (DOT) and the Civil Service Commission (CSC). The request was submitted by William B. Peer, General Counsel of the Professional Air Traffic Controllers Organization (PATCO), which is the duly certified exclusive bargaining representative for the concerned employees.

In a letter dated May 1, 1977, Mr. Peer states:

"On March 8 and 9, 1976, the two agencies [DOT and CSC] entered into a so-called 'moratorium agreement' on classification of air traffic controller positions. See attachment 1. The net effect of this agreement was to prevent controllers at many facilities from being upgraded, at times when they would have otherwise been. This has a drastic impact on their salaries, bidding and promotion rights."

Mr. Peer asks for our legal opinion on the propriety of the actions taken by DOT and CSC.

B-189101

The moratorium agreement in full is as follows:

"A. PURPOSE & OBJECTIVE

"The purpose of this agreement is to place a moratorium on classification activities relating to positions in the GS-2152 series in Federal Aviation Administration (FAA) installations pending the study, development and issuance of a revised GS-2152 position classification standard. The objective of this moratorium is to provide that position classification decisions are held in abeyance until the decision(s) can be addressed using the results of the standards study.

"B. PROVISIONS

- "1. The moratorium covers all positions classified in the GS-2152 series.
- "2. The moratorium will remain in effect until the issuance of a revised GS-2152 position classification standard or upon written notification by either the Commission or DOT that the agreement is terminated.
- "3. During CSC personnel management evaluation reviews of FAA installations, GS-2152 positions will not be included in terms of position classification coverage, i.e., will not be audited or covered by job description review.
- "4. Any GS-2152 positions currently under classification question resulting from CSC personnel management evaluation review will not be certified.
- "5. CSC offices will not issue advisory opinions to DOT on GS-2152 positions.
- "6. DOT will not take action on its own initiative to change the grade of existing GS-2152 positions. This includes suspending the use of the classification portion of FAA's Organization and Classification Guidelines for Air Traffic Control dated

B-189101

September 23, 1968, which assesses its facilities and can result in the upgrading or downgrading of positions,-

- "7. DOT will advise and counsel their employees and officials regarding the moratorium, and its meaning, spirit and intent. In no way, however, is this intended to abridge any employee rights.
- "8. DOT will insure that positions in the GS-2152 series which have formally been questioned as to grade level under current CSC position classification standards are filled to the maximum extent possible, at a lower grade. In situations where DOT finds it necessary to fill the position at its current grade level temporary promotions will be used to effect the action."

The moratorium agreement was signed by a representative of CSC on March 8, 1976, and by a representative of DOT on March 9, 1976.

In responding to a letter from Mr. Peer, in which PATCO challenged the legality of the above-quoted moratorium, the General Counsel, CSC, by letter of April 20, 1977, stated in pertinent part:

"* * * I am unaware of any objection to the moratorium during its effective period, March 1976 until January 1977. I believe it is important to keep this matter in its proper perspective and realize that there were many Air Traffic Controllers that would have been down-graded if it had not been for the benefit of the moratorium: Kansas City being a prime example.

"While it may appear at first glance that there is no specific statutory authority for such a moratorium, I call to your attention the Commission's statutory responsibility under 5 U.S.C. 5105 (Standards for classification of positions) and 5 U.S.C. 5106 (Basis for classifying positions). Because 5101 requires the Civil Service Commission after consulting the agencies, to prepare standards for placing positions in their

B-189101

proper classes and grades, and because the history of this matter indicated that the standard needed review with possible modification and/or revision, it was determined that both the agency and Commission would refrain from the classification evaluation process until a final determination could be made as to the proper standard. These statutory provisions provide authority for the Commission to suspend classification action until a new classification standard is determined. Moreover, it must be remembered that no employee's appeal rights were denied during the moratorium, since full classification appeals rights were in force.

"However, we need not debate our views on statutory interpretations, since the Supreme Court in Testan v. U.S., 424 U.S. 392 (1976) puts this matter to rest by clearly precluding back pay to federal employees who have been wrongfully classified* * * * *

The "moratorium agreement," on its face, purports to do no more than suspend classification actions relating to positions in the GS-2152 series in the Federal Aviation Administration (FAA), pending the issuance of new classification standards for that series. In view of the Commission's broad authority over classification matters under the Classification Act, including the authority to publish standards and to revise, supplement, or abolish existing standards under 5 U.S.C. § 5105, we find no basis to question the legality of the agreement.

In addition, any claim for a retroactive promotion based on the alleged illegality of the subject "moratorium agreement" would have to be considered as an alleged wrongful classification action. In that regard, this Office has consistently denied requests for retroactive promotions to correct errors in classification. See 55 Comp. Gen. 715 (1975). This long-established rule was recently upheld by the U.S. Supreme Court in United States v. Testan, 424 U.S. 392 (March 2, 1976). The Court held that neither the Classification Act of 1949, as amended, 5 U.S.C. § 5101 et seq. (1970), nor the Back Pay Act, 5 U.S.C. § 5596 (1970) creates a substantive right to backpay for a period of improper classification.

Finally, we note the discussion in Matter of Air Traffic Controllers, B-181223, April 30, 1976, of the

B-189101

legality of temporary suspensions of classification actions due to administrative imperatives. In that case, we found that such temporary suspensions by an agency of classification actions did not provide a basis that would permit employees to be allowed retroactive promotions.

P. A. K. 11/14
Deputy Comptroller General
of the United States