

8101



DECISION

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

FILE: B-191801

DATE: October 20, 1978

MATTER OF: James C. Payne - Detail to Higher-Graded
Position

DIGEST: A GS-14 employee who was improperly detailed to GS-15 position for more than 120 days, is entitled to backpay for period commencing 6 years from date his claim for backpay was received at GAO and ending at date the GS-15 position was reclassified to GS-14.

This decision is in response to a claim filed by Mr. James C. Payne, and forwarded to this Office by Mr. Jimmy L. Owens, Civilian Personnel Officer, Hanscom Air Force Base, Massachusetts, seeking a retroactive temporary promotion from grade GS-14 to grade GS-15 for the period August 4, 1971, through July 16, 1977.

On or about May 26, 1970, Mr. Payne, then a grade GS-14, was detailed to assume the duties of Branch Chief, Balloon Research Branch, Aerospace Instrumentation Laboratory, Air Force Cambridge Research Laboratories, which was then classified at grade GS-15. Effective March 7, 1975, Mr. Payne was officially assigned to that position, however, at the same time, the position, pursuant to an agency audit, was reclassified at grade GS-14. The position was again classified to grade GS-15, after an agency audit apparently undertaken in March 1977. Mr. Payne was promoted to grade GS-15 on July 17, 1977.

On August 4, 1977, Mr. Payne filed a claim with the Air Force for backpay for the period he was detailed as a GS-14 to the GS-15 position of Branch Chief. The Air Force denied his claim on the basis that it had not been filed within 6 years of the date it first accrued, September 23, 1970, and, therefore, under 31 U.S.C. § 71a (Supp. V, 1975) was not payable. The Air Force now recognizes Mr. Payne's claim as a continuing claim, and wishes to pay it for the period which commences 6 years from the date it was received by the Air Force, August 4, 1971, and ending at the time Mr. Payne's position was reclassified at grade GS-14, March 7, 1975. Mr. Payne, however, believes he is entitled to backpay for the entire period from 6 years from the time he filed his claim with the agency until he was promoted to

B-191801

grade GS-15, on July 17, 1977, since he feels that the classification of his position as a GS-14, was erroneous. Mr. Payne's claim was first received at the General Accounting Office on March 9, 1978.

In our decision Matter of Reconsideration of Turner-Caldwell, 56 Comp. Gen. 427 (1977), we affirmed our prior holdings that employees who were detailed to higher-graded positions for periods in excess of those permitted by Civil Service Commission (CSC) regulations, were entitled to retroactive temporary promotions and backpay. The permissible period for Mr. Payne's detail, without a temporary promotion, would have ended on or about September 23, 1970.

Section 71a of title 31, United States Code, provides in pertinent part:

"Every claim or demand * * * against the United States cognizable by the General Accounting Office * * * shall be forever barred unless such claim * * * shall be received in said office within 6 years after the date such claim first accrued * * *." (Emphasis added.)

We have consistently held that the filing of a claim with an agency does not satisfy the requirements of section 71a and does not toll the running of this barring act, even though the delay at the agency level was the fault of the agency, not the employee. Matter of Freddie L. Baker, B-190841, February 15, 1978, and Matter of Donald B. Sylvain, B-190851, February 15, 1978. Therefore, the 6-year bar must be applied from the time Mr. Payne's claim was received here, March 9, 1978, not the date it was filed with the Air Force. Accordingly, since Mr. Payne was in fact detailed to a higher-graded position, he is entitled to a retroactive temporary promotion and backpay beginning on March 9, 1972. Matter of Sam Friedman, et al., B-189690, February 16, 1978, and Matter of John R. Moore, B-187427, June 1, 1977.

The Air Force believes, and we agree, that Mr. Payne's right to backpay must terminate on the day he was officially appointed to the downgraded position, March 7, 1975. As a general rule there is no right to backpay for a period of improper classification. United States v. Testan, 424 U.S. 392 (1976). Counsel for Mr. Payne contends that Testan is not controlling because backpay for overlong

B-191801

details is specifically authorized by our decisions, and because the position has now been properly reclassified at the grade GS-15 level. Counsel further contends that Mr. Payne cannot be faulted or barred because he did not appeal the downgrading of his position because permanent promotions within his agency were then barred.

Counsel's contentions fail to properly distinguish between the classification of particular positions and promotions. Employees may receive backpay for overlong details only when the detail is to an established position that has been classified to a particular grade. Matter of Katherine Crump-Wiesner, B-190335, February 14, 1978. When Mr. Payne was officially appointed to the position to which he had been previously detailed, the only proper or legal classification or allocation of that position was grade GS-14.

The only exception to the rule stated in Testan, supra, is stated in 5 C.F.R. § 511 703(a) (1978), which states, in pertinent part, that:

"Downgrading or loss of pay. The effective date of a classification action resulting from an appeal decision reversing in whole or part either a downgrading or other classification action that resulted in a reduction of pay shall be made retroactive to the date of adverse action when the initial appeal to either the agency or the Commission was submitted not later than 15 calendar days after the effective date of the action taken as a result of the classification decision. * * *"

Since, according to the record before us, Mr. Payne did not appeal the downgrading, he is not covered by this exception, and cannot be awarded backpay for the period March 7, 1975, to July 15, 1977.

The basis for Mr. Payne's counsel's contention that Mr. Payne's failure to appeal should not bar his recovery is a memorandum, dated December 13, 1974, to all civilian employees of Mr. Payne's installation advising them that they all may be transferred because of a reorganization. The memorandum concludes by stating that:

B-191801

"* * * For us this means that there will be no hiring of new permanent employees and no permanent promotions until all reassignments are effected."

We are unaware of any authority that would eliminate Mr. Payne's obligation to appeal what he considered to be an improper downgrading of his position for the above reason.

However, we note that 5 C.F.R. § 511.703(c) (1979) provides that:

"Retroactivity when time limits are extended.
The right to a retroactive effective date provided by this section may be preserved, in the discretion of the Commission, on a showing by the employee that he was not notified of the applicable time limit and was not otherwise aware of the limit or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit."

If the CSC were to determine that the above provision applied to Mr. Payne's situation, we would not object to further payment of backpay to Mr. Payne.

Accordingly, Mr. Payne may be given a retroactive temporary promotion and backpay for the period March 9, 1972, through March 6, 1975, unless a finding is made by CSC in accordance with 5 C.F.R. § 511.703(c) (1978), in which case the backpay may be extended to July 17, 1977.

R. Z. Killin
Deputy Comptroller General
of the United States