

DECISION



I kindly P.H.E.
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

8162

FILE: B-192640

DATE: October 27, 1978

**MATTER OF: Stella P. Rasp - Claim for Retroactive
Promotion and Backpay**

- DIGEST:**
1. Civilian employed by the Department of the Army as a licensed vocational nurse at the GS-3 and GS-4 grade levels between 1972 and 1974, who was given responsibilities ordinarily reserved to grade GS-5 registered or vocational nurses during that period of time, is not entitled to a retroactive temporary promotion to grade GS-5 with backpay, since Federal employees are entitled only to the salaries of the positions to which they are actually appointed regardless of the duties performed. United States v. Testa, 424 U. S. 392 (1975).
 2. The principles set forth in 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), concerning the promotion of Federal employees on official temporary details to higher grade level positions, have no application to a claim for retroactive promotion by an employee who was not officially detailed to a higher grade position.

This action is in response to correspondence received from Mrs. Stella F. Rasp, 5464 Ketchikan Street, El Paso, Texas 79924, in which she requested reconsideration of Settlement Certificate Z-2785833 dated June 14, 1978, issued by our Claims Division, disallowing her claim for a retroactive temporary promotion and backpay for the period October 17, 1972, to May 31, 1974, incident to her employment with the Department of the Army.

Mrs. Rasp was hired by the Army on October 15, 1972, as a licensed vocational nurse (LVN), grade GS-3, at the William Beaumont General Hospital, Fort Bliss, Texas. Two days later she was assigned a variety of important responsibilities involving patient care, which responsibilities included the measuring and administering of medications orally, intramuscularly and sometimes intravenously.

It appears that Mrs. Rasp performed all of her duties in a satisfactory and competent manner, even though some of the work she

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was asked to do (i. e., administering medications) was reserved for registered nurses in higher grade levels under established administrative guidelines. It is indicated that LVN's were given some of the duties ordinarily performed by registered nurses as the result of personnel shortages and patient overloads at Beaumont General Hospital at the time. This situation prompted Mrs. Rasp to make inquiries to appropriate governmental authorities, and eventually, in May 1974, the practice of using LVN's at the GS-3 and GS-4 levels to perform some of the more sophisticated duties usually performed by registered nurses was stopped at the hospital.

With respect to Mrs. Rasp's grade classification during this period, it is indicated that in April 1973 she was promoted from grade GS-3 to grade GS-4, and that she remained in grade GS-4 through May 1974. She was apparently dissatisfied with her grade classification during this time, and in response to her general inquiries concerning her correct classification the Civil Service Commission advised her of her entitlement to file a formal classification appeal. It is not indicated, however, that she ever did submit such an appeal.

On May 23, 1977, Mrs. Rasp did file a claim with the Department of the Army for retroactive temporary promotion to grade GS-5 and backpay for the period October 1972-May 1974. She suggested that during that time she had performed the duties of a registered nurse at the GS-5 grade level, and that she was therefore entitled to a retroactive promotion to that position in accordance with Comptroller General Decision B-183086 of March 23, 1977.

Upon a review of the matter, Army authorities concluded that Mrs. Rasp had in fact performed duties commensurate with those of a grade GS-5 LVN between October 1972 and May 1974. However, on July 25, 1977, the Army denied her claim for a temporary retroactive promotion for the reason that no grade GS-5 LVN position existed or had been established to which she could have been detailed.

Mrs. Rasp disagreed with the Army's denial of her claim and submitted the matter to the Claims Division of this Office. However, as previously indicated, our Claims Division also disallowed her claim on June 14, 1977, for substantially the same reasons as those assigned by the Army and for the further reason that she had

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not met the minimum Civil Service Commission qualification standards for promotion to the higher grade.

Mrs. Rasp has questioned the correctness of the Claims Division settlement. In particular, she has suggested that she had met the basic qualifications for appointment to a grade GS-5 LVN position at the time in question, despite a contrary determination evidently made by the Army in July 1973.

The general rule long followed by this Office and the courts of the United States in cases of this nature is that an employee of the Government is entitled only to the salary of the position to which he is actually appointed, regardless of the duties he performs. When an employee performs duties normally performed by one in a grade level higher than the one he holds, he is not entitled to the salary of the higher grade level until such time as he is promoted to that grade. United States v. McLean, 95 U.S. 750 (1877); Coleman v. United States, 100 Ct. Cl. 41 (1943); Dianish v. United States, 183 Ct. Cl. 702 (1968); 52 Comp. Gen. 631 (1973); and Matter of Elizabeth McLaughlin, B-186556, July 27, 1976. In Coleman v. United States, *supra*, a claimant sued to recover money allegedly owed him because he had been required to perform duties at a grade level higher than the one he held. The Court of Claims stated:

"There are innumerable instances in the Government service where employees of a lower classification perform duties of a higher classification * * * The salaries fixed by Congress are the salaries payable to those who hold the office and not to those who perform the duties of the office. One may hold the office only by appointment by his superior, and the law vests in the superior the discretion as to whether or not appointment to the office shall be made. Where the plaintiff has received the salary of the office to which he is appointed he has received all to which he is entitled under the law * * *" 100 Ct. Cl. at 43. (Emphasis supplied.)

The classification of positions in the Government is now controlled by the Classification Act of 1949, as amended, 5 U.S.C. §§ 5101-5115 (1976), under which the Civil Service Commission is empowered to prescribe regulations and engage in supervisory review of an agency's

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classifications. An employee who wishes a review of the grade of his position may file a classification appeal at any time, either with the employing agency or the Commission. In that connection, the Classification Act does provide that in the classification of positions, "the principle of equal pay for substantially equal work will be followed." 5 U.S.C. § 5101(1)(A). However, neither that provision nor any other provision of the Classification Act creates a right to backpay for a period of improper classification, nor does it change the long established rule that an employee is not entitled to the benefits of a position until he has been duly appointed to it. United States v. Testan, 424 U.S. 392 (1976).

Hence, Mrs. Rasp is not entitled to the salary of a grade GS-5 LVN for the period October 1972-May 1974 simply on the basis that she performed some duties commensurate with those of the higher grade classification, since she was never actually appointed to the higher grade. If she believed that she was improperly classified after undertaking employment with the Department of the Army in October 1972, an appropriate remedy was available to her through the means of the classification appeal provided by the Classification Act and implementing regulations prescribed by the Civil Service Commission. It may be that had she submitted such an appeal, she would have then secured a reclassification of her position at the grade GS-5 level and prospective entitlement to the grade GS-5 salary. However, as previously mentioned, there is no indication that she ever filed a classification appeal or that the Civil Service Commission was afforded an opportunity to investigate the matter and issue a formal ruling pursuant to such an appeal.

Finally, Mrs. Rasp has referred to decision B-183086 of this Office as possibly substantiating her claim for retroactive promotion. In B-183086, of December 5, 1975, and March 23, 1977, published in 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), we held that employees officially detailed to higher positions for more than 120 days, without Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. The rationale of this rule in such limited circumstances is that an agency has no discretion to continue employee details beyond 120 days without the Commission's approval. When an agency continues a detail without authority, corrective action in the form of

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a retroactive temporary promotion with backpay is required as of the 121st day of the detail, provided the employee was otherwise qualified and could have been promoted to the position at that time.

In the present case, the record does not show that Mrs. Rasp was ever officially detailed to the position of registered nurse, grade GS-5, or that she was qualified for appointment to a registered nurse position. Also, the record does not show that Mrs. Rasp was officially detailed to a grade GS-5 LVN position or even that a vacant, established grade GS-5 LVN position existed to which she could have been detailed. As was noted in the settlement of our Claims Division, a detail does not occur merely through an employee's performance of a set of duties, but requires assignment of the employee to a particular position. Since there is no indication that Mrs. Rasp was ever actually temporarily appointed or detailed to fill an established grade GS-5 position, the decision to which she refers, B-183086, is not for application in her claim. Compare Matter of Thomas Davis, B-189673, February 23, 1978.

It is therefore unnecessary for us to consider the disputed question of whether Mrs. Rasp was eligible for promotion to a grade GS-5 LVN position under minimum Civil Service Commission qualification standards between October 1972 and May 1974, since she was, in any event, not detailed to fill a grade GS-5 LVN position. However, we note that if Mrs. Rasp disagreed with the Army's 1973 determination that she was then not qualified for promotion to grade GS-5 as an LVN, the dispute was one that could have best been resolved through an appeal to the Civil Service Commission at that time.

Accordingly, the settlement of our Claims Division is sustained.


Deputy Comptroller General
of the United States