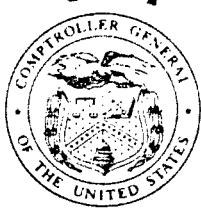


DECISION



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

FILE: B-195583

[Claim For] DATE: December 3, 1980

MATTER OF: Gilbert J. Breer - Retroactive Temporary
Promotion and Backpay] - Whitten Amendment -
Burden of Proof

- DIGEST:
1. Claim of employee for retroactive temporary promotion and backpay based on alleged extended detail to higher grade may not be allowed where employee has not met time-in-grade requirement for promotion imposed by Whitten Amendment.
 2. The General Accounting Office decides claims against the United States on the basis of the written record. Reasonable doubts are resolved in favor of the Government since the claimant has the burden of proving the liability of the United States and the claimant's right to payment. Therefore, where there is a dispute between an employee claiming backpay and his agency as to material facts which this Office cannot resolve from the written record, the claim will not be allowed here.

Mr. Gilbert J. Breer requests reconsideration of the disallowance by our Claims Division of his claim for a retroactive temporary promotion and backpay. For the reasons discussed subsequently the disallowance must be sustained.

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Mr. Breer, an employee of the U.S. Department of Commerce, contends that from April 26, 1976, to November 1, 1977, he was detailed to the position of Priorities Officer GS-14 (the organizational title of the position of Industrial Specialist (General) GS-1150-14, Position No. OE750465) in the Mobilization Operations and Plans Division (MOPD) from his position in Industrial Resources Division (IRD). Both of these divisions were in the Office of Industrial Mobilization. For the first 111 days of this period, April 26 to August 15, 1976, he was a grade GS-12. On August 15,

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he was promoted to grade GS-13 in IRD, the division to which he was assigned. While this is not entirely clear, it appears that this promotion resulted from a reclassification of the position to which he was officially assigned based on the duties he was performing prior to the claimed detail.

In support of his claim Mr. Breer submitted statements from a former supervisor and two associates, excerpts from which follow:

"On April 26, 1976, for administrative purposes, I assigned Gilbert J. Breer to the Mobilization Operations and Plans Division from the Industrial Resources Division. This assignment lasted until November 1, 1977, at which time Mr. Breer was directed to return to his position of record in the Industrial Resources Division. * * * During his assignment, Mr. Breer performed, essentially, all the duties normally assigned to the Priorities Officer. * * *" (Major General John L. Klingenhagen, former Director of the Office of Industrial Mobilization.)

"When the Office of Industrial Mobilization Priorities Officer moved to a higher office in the Fall of 1975, I continued to work with Mr. Breer as before, even though several other persons, with higher GS levels, were subsequently assigned in the Mobilization Operations and Plans Division (Priorities Office). Therefore, since the Fall of 1975 until I retired (October 1976) I considered Mr. Breer to be the Priorities Officer because he continued to perform the same functions just as the preceding Priorities Officers had done." (Milton J. Friedman, Department of Defense Priorities Officer.)

Personal name

"The purpose of this letter is to state and verify that from April 26, 1976

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through November 1, 1977 Mr. Gilbert J. Breer performed the duties of the Priorities Officer in the Office of Industrial Mobilization, U.S. Department of Commerce. * * * To the best of my knowledge, at no time between April 26, 1976 and November 1, 1977 did any person other than Mr. Breer perform the duties of the Priorities Officer." (George H. Selvin, Defense Coordinator, Alaska Pipeline Office, Department of the Interior.)

Mr. Breer also submitted an organization chart showing him as Priorities Officer. However the origin of this chart is not clear and it is dated December 16, 1977 - after the expiration of the claimed detail. In addition Mr. Breer alleges that he made repeated requests, without success, to have his detail documented.

On the other hand, the agency, supported by another of Mr. Breer's supervisors, John A. Richards, Deputy and Acting Director of the Office of Industrial Mobilization, disputes his claim with the following contentions. While Mr. Breer was requested to assist in carrying out the responsibilities of MOPD, he was not detailed to any position. During the period claimed, April 26, 1976, to November 1, 1977, employees other than Mr. Breer were acting in the capacity of Priorities Officer and signing correspondence as Acting Priorities Officer or Priorities Officer. No correspondence was issued by Mr. Breer under these titles. Many of the specific duties which Mr. Breer claims to have performed were actually performed by other employees. The position of Priorities Officer GS-14 was cancelled on November 19, 1976, and the functions formerly assigned to that position were incorporated in several other positions. (A copy of the cancelled position description has been submitted for the file - however, the claimant has submitted letters which indicate that at least the title, Priorities Officer, was used in correspondence as late as May 1978.) Finally in response to Mr. Breer's written request for a desk audit of his position, dated

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August 24, 1977, in which he listed the duties he contended he was performing, a position classification specialist advised him by memorandum dated November 8, 1977:

"You allege * * * to have been performing duties outside the scope of your position description of record. There is, however, no established position which reflects those duties to which you refer and no formal reassignment action or request for detail have been submitted for you. Your supervisors were requested, therefore, to resolve the issue of your alleged detail by developing, certifying, and submitting through channels a new position description covering the functions you were to perform."

The disposition Mr. Breer's claim will be governed by Turner-Caldwell, 55 Comp. Gen. 539 (1975), affirmed 56 Comp. Gen. 427 (1977), and some of the implementing decisions. Turner-Caldwell holds that if an employee is detailed to a position classified in higher grade than his or her assigned grade for a period in excess of 120 days without Civil Service Commission (CSC) approval, he or she is entitled to a retroactive temporary promotion and backpay for such period provided the employee would have met all qualifications and other requirements for such a promotion. Implementing decisions hold that when an employee is detailed for a period in excess of 120 days without CSC approval to a position classified two or more grades higher than his or her assigned grade for which he or she did not meet all qualifications and other applicable requirements, the employee is entitled to a retroactive temporary promotion and backpay for such period to the highest intervening grade for which he or she did meet all qualifications and other applicable requirements.

In both of these situations the burden is on the claimant to prove beyond a reasonable doubt that he or she assumed the full range of duties, authority, and responsibility set forth in the description of the

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position to which the detail is alleged. In the former situation the claimant must have met all qualifications and other requirements for promotion to the position to which the detail is alleged. In the latter situation, the claimant must have met all qualifications and other requirements for promotion to the intervening position. Thomas L. Tyburski, B-196175, August 6, 1980, and cases cited therein.

Assuming for the moment, but not deciding, that Mr. Breer has met the burden of proving that he was detailed for the claimed period, April 26, 1976, to November 1, 1977, to a classified position in grade GS-14, we consider first the 111 days at the beginning of the period, April 26 to August 15, 1976, during which he was a grade GS-12. As has been indicated, had this period been in excess of 120 days, Mr. Breer would have been entitled to a retroactive promotion to grade GS-13 and backpay beginning on the 121st day since, as will be subsequently explained, he did not meet the requirements for promotion to grade GS-14. However, because he was in fact promoted to grade GS-13 on August 15, 1976, well before 120 days elapsed, no entitlement to backpay would have arisen prior to this promotion.

Continuing the foregoing assumption, we next consider the period beginning with Mr. Breer's promotion to grade GS-13 on August 15, 1976. As has been indicated, one of the conditions for a retroactive temporary promotion and backpay under Turner-Caldwell is that the employee must have met all statutory and regulatory requirements for such a promotion. One such requirement at the time in question was that imposed by the Whitten Amendment, section 1310 of the Act of November 1, 1951, as amended, printed as a note following 5 U.S.C. § 3101 (1976), which provided:

"* * * No person in any executive department or agency whose position is subject to the Classification Act of 1949, as amended, [now section 5101 et seq. of title 5, U.S.C.] shall be promoted or transferred to a higher grade subject to

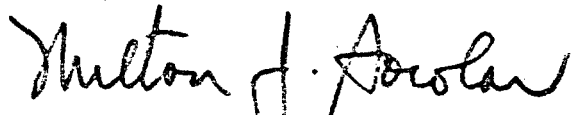
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such Act without having served at least one year in the next lower grade* * *."

Accordingly, since Mr. Breer was not eligible for promotion to grade GS-14 until he had served a year in grade GS-13, no entitlement to backpay for the period August 15, 1976, to August 15, 1977, would have arisen.

Having determined that even if Mr. Breer has met the burden of proving that he was detailed to a classified position in grade GS-14 he would not be entitled to backpay for the period beginning April 26, 1976, and ending August 14, 1977, we now consider the remaining period of his claim, August 15 to November 1, 1977, and the question of proof. To resolve this question it must be recognized that the General Accounting Office decides claims against the United States on the basis of the written record. Reasonable doubts are resolved in favor of the Government since the claimant has the burden of proving the liability of the United States and the claimant's right to payment. 4 C.F.R. § 31.7. Therefore, where, as here, there is a dispute between an employee claiming backpay and his agency as to material facts which this Office cannot resolve from the written record, the claim will not be allowed here. George W. Lovill, B-196465, April 16, 1980.

Accordingly, it is our opinion that Mr. Breer is not entitled to backpay for any part of the period claimed and that the disallowance of his claim by our Claims Division must be sustained.



For the Comptroller General
of the United States