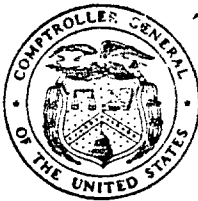


DECISION



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

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FILE: B-196178

DATE: August 25, 1981

MATTER OF: Phillip Swart - Retroactive Temporary
Promotion and Backpay

CLAIM for

- DIGEST:**
1. In claim for detail under Turner-Caldwell, 55 Comp. Gen. 539 (1975), affirmed 56 id. 427 (1977), questions of existence of position, and of whether employee performed full scope of duties and responsibilities of higher-grade position are factual in nature.
 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. 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.

This decision is in response to an appeal by Mr. Phillip Swart from our Claims Division (now Claims Group) Settlement Certificate No. Z-2795443, dated May 29, 1979, which denied his claim for a retroactive temporary promotion and backpay.

Mr. Swart contends that while officially appointed to the position of Electric Power Representative GS-14 with the Department of the Interior (the Department) he was detailed to the higher-grade position of Assistant to the Administrator GS-301-15, Defense Electric Power Administration (DEPA), for the period from January 2, 1977, to September 30, 1977, without prior Civil Service Commission approval. A principal function of this position was to act in the absence of the Administrator. Since there was no Administrator at that time, Mr. Swart's allegation continues, he assumed that position's duties and functioned as the Acting Administrator and, after a reorganization, as the Acting Director, Electric Power Unit.

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The record in this case demonstrates that on May 6, 1973, the Schedule C position of Administrator, DEPA, GS-301-15, became vacant. On May 9, 1973, Mr. George W. Penebaker, who then occupied the position here in question, Assistant to the Administrator GS-301-15, Position No. S68-27, was designated by the then Assistant Secretary for Energy and Minerals as Acting Administrator, DEPA. Subsequently, the Civil Service Commission (CSC) abolished the position of Administrator, DEPA, and revoked its Schedule C authority on June 30, 1973. Mr. Penebaker continued to serve in the capacity of Acting Administrator, DEPA, however, for a subsequent period of time, the length of which is in dispute.

The Department contends the period ended on November 30, 1976, when DEPA was abolished. Mr. Swart, supported by Mr. Penebaker, contends the period lasted until Mr. Penebaker was reassigned, the date of which is also in dispute. In any event, Mr. Swart alleges that from January 2, 1977, to September 30, 1977, he performed the duties and responsibilities of Mr. Penebaker's previous position.

In regard to the position of Assistant to the Administrator, DEPA, GS-301-15, Position No. S68-27, the Department concedes that it was established and classified in 1968. From May 9, 1973, to at least November 30, 1976, Mr. Penebaker was the incumbent in that position. The Department maintains that this position was abolished on November 30, 1976, when DEPA was abolished, but Mr. Swart maintains that it remained as an established and classified position until at least the end of his service with the Department on September 30, 1977.

The first legal issue which we must address is whether our decisions in Turner-Caldwell, 55 Comp. Gen. 539 (1975), affirmed 56 id. 427 (1977) are applicable to the instant case. Our Turner-Caldwell decisions apply only where an employee is detailed to a position which is classified in a higher grade by competent authority since there can be no promotion to a position which is not classified. Charles E. Wassner, B-187249, June 17, 1977; Hubert J. Buteau, B-187287, May 13, 1977.

The question of whether a position has been abolished is a question of fact. See 55 Comp. Gen. 1062, 1064 (1976); Robert G. Luttman, B-195301, October 19, 1979. Rather than attempt to resolve this factual dispute on the basis of the record before us (which would seem to support Mr. Swart's contention), we will assume, arguendo, that we are dealing with an established and classified position.

In light of our Turner-Caldwell line of decisions, we now turn to the question of whether Mr. Swart can establish beyond reasonable doubt that he assumed the full scope of duties and responsibilities of the position in question. As has been indicated, he contends he was informally detailed to the position of Assistant to the Administrator GS-301-15 from January 2, 1977, to September 30, 1977, and functioned as the Acting Administrator of the Defense Electric Power Administration and subsequently Acting Director of the Electric Power Unit during this period. He signed documents as Acting Director and statements of his former supervisor, Mr. Penebaker, and two other associates support his contentions.

However, the Department maintains that Mr. Swart could not have functioned as Assistant to the Administrator, DEPA, or Acting Administrator, DEPA, since DEPA was abolished November 30, 1976. Whatever was left of its functions was transferred to a new organization, the Electric Power Unit, in the immediate office of the Assistant Secretary for Energy and Minerals. There was no classified position of Director, Electric Power Unit. This unit, along with others, was under the supervision of an Energy and Minerals Emergency Preparedness Coordinator, Mr. Robert L. Presley. Mr. Presley, responding to an "informal grievance" filed by Mr. Swart on September 29, 1977, informed him as follows:

"You were not assigned as acting Administrator, DEPA. You were assigned to act as immediate supervisor of Mrs. O'Neill and Miss Rich until a decision was made regarding the replacement of Mr. Penebaker. At that time you indicated that you didn't think that the position

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needed to be filled. * * * You have not been detailed to any position."

Thus the record reflects a dispute between Mr. Swart and his agency, not only as to whether the position to which the detail is claimed did exist as a classified position, but also, assuming that it did, as to whether he did or could have performed the full range of duties and responsibilities of that position. 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. Gilbert J. Breer, B-195583, December 3, 1980; George W. Lovill, B-196465, April 16, 1980.

Accordingly, the disallowance of Mr. Swart's claim for retroactive temporary promotion and backpay by our Claims Division is hereby sustained.


Acting Comptroller General
of the United States