



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

Brown
14589
PLM II

August 11, 1980

In reply refer to:
B-196983

[REQUEST for BACKPAY]

The Honorable Jesse Helms
United States Senate

Dear Senator Helms:

This responds to your letter of May 12, 1980, on behalf of your constituent, Mr. Benton E. Jones. We have thoroughly reviewed Mr. Jones' file including the information supplied by your office and must inform you that there is no authority to award Mr. Jones backpay for the period May 12, 1974, to September 23, 1978. However, in order that you may assist Mr. Jones in understanding the decision Matter of Benton E. Jones, B-196983, April 7, 1980, we are addressing the questions raised by Mr. Jones in his letter to you of May 7, 1980.

First, Mr. Jones states the desk audit of his position, referred to in the decision, did not take place. Our statement regarding the desk audit was based on a letter to Mr. Jones dated July 3, 1979, from Donald F. Harris, Acting Director, Personnel Division, Agricultural Stabilization and Conservation Service, which stated in part:

"* * * On June 12, 1978, you requested a desk audit of your position in a memorandum to the State Executive Director. Based on an audit of your position, you were promoted to a GS-1145-13 Agricultural Program Specialist effective September 24, 1978. * * *"

Since Mr. Jones requested a desk audit of his position and his agency indicated that the position was audited, we may have incorrectly assumed that his position was evaluated by a desk audit. The manner in which his position was evaluated and reclassified, however, has no bearing on his entitlement to backpay. It is pertinent only that his position had not

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B-196983

been reclassified as a GS-13 during the period for which he claims backpay.

Second, Mr. Jones is concerned that GAO stated he was detailed to his position when he did not indicate or claim a detail in his correspondence to GAO. The Jones decision does not state that Mr. Jones was detailed to another position but concludes that Mr. Jones was not detailed to a GS-13 position.

The documents and correspondence furnished this Office in connection with Mr. Jones' claim suggested that he based his claim on one of two legal arguments. For this reason our decision addressed the argument that he was improperly detailed to a higher grade GS-13 position as well as the argument that his position was misclassified as a GS-12 rather than a GS-13 during the period of his claim. While Mr. Jones is correct in stating that he did not specifically claim he was detailed, the record clearly suggested that he felt he might be entitled to backpay under our holding in B-183086, March 23, 1977. That decision, published at 56 Comp. Gen. 427 (1977), holds that an employee detailed to a position established and classified at a higher grade for in excess of 120 days is entitled to backpay beginning with the 121st day of the detail. In fact, the following statement from his letter to you dated April 1, 1980, copy enclosed, indicates that he believed he was entitled to backpay under this decision and implementing instructions issued by the Department of Agriculture.

"I know that certain personnel in Washington, D.C. have received back pay as per Notice PM-1004 (copy attached), GAO Decision (B-183086) for time since January 1977. In all of my correspondence I have been unable to obtain an answer applicable to my case.* * *

"I am also attaching a copy of a page of Handbook 3-PM, which appears to have been generated since my request for back pay was filed. This leads me to believe the pay was due under the old ruling."

B-196983

Third, Mr. Jones stated that United States v. Testan, 424 U.S. 392 (1976), is not applicable to his case. This statement is apparently based on Mr. Jones' belief that because the facts in Testan are different from the facts in his situation the Testan case does not apply. Mr. Jones wrote to us on August 3, 1979, stating:

"The Supreme Court Case of United States Versus TESTAN 424 U.S. 399 is not applicable in my case. This appears to be a situation where the employee was already in the grade the position called for and he appealed for a reclassification of the position to a higher grade. In my case the grade of the position was GS-13; when I was assigned to the same position with the same duties and responsibilities the grade was changed to GS-12."

While Mr. Jones is correct in stating that the facts are different, the underlying principles of law addressed by the court in the Testan case are applicable to Mr. Jones' case. In Testan the Supreme Court held that neither the Classification Act, 5 U.S.C. 5105-5115, nor the Back Pay Act, 5 U.S.C. 5596, provide a remedy for periods of wrongful classification. Since Mr. Jones' basic complaint is that between May 12, 1974, and September 23, 1978, his position was wrongfully classified at grade GS-12 instead of GS-13, the Testan case is applicable to his situation in that it holds there is no backpay remedy for an employee whose position is classified in a lower grade than is proper for the duties performed.

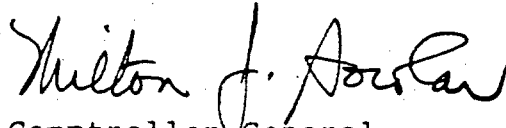
Fourth, Mr. Jones states that job descriptions NC 762 and NC 781, GS-12 positions, were identical to NC 594, a GS-13 position. Regardless of the validity of Mr. Jones' contention, the position to which he was appointed was established at grade GS-12 for the period for which he claims backpay. Accordingly, he was entitled only to the salary of that GS-12 position. Although the position may have been wrongfully classified, Mr. Jones apparently delayed nearly 4 years in questioning the classification of his position. Since there is no backpay remedy for periods of wrongful classification under

B-196983

existing statutes, until an employee successfully appeals an erroneous classification action and is promoted to the higher grade, he is not entitled to the salary of the higher grade.

We hope this information will be of assistance in responding to Mr. Jones and will help to reassure him that his claim has been fully considered in light of the applicable legal precedents.

Sincerely yours,



For the Comptroller General
of the United States

Enclosure