

DECISION



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

FILE: B-197631

Claim for
DATE: April 23, 1981

MATTER OF: Charles F. Standiford - Retroactive
Temporary Promotion and Backpay -
Detail to Higher Grade Position

DIGEST:

1. Employee is entitled to retroactive temporary promotion after 120th day of detail to higher-level position for continuous period of detail. Although agency contends higher-level position was abolished during part of detail period, employee has submitted persuasive evidence to the contrary. We find position was a continuing one and that employee performed higher-level duties during entire period of detail. Therefore, employee is entitled to backpay under Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977).
2. Agency submitted claim for backpay to General Accounting Office on December 5, 1977, and it was received on December 12, 1977. Under 31 U.S.C. § 71a (1976), claim against the United States is barred unless presented to this Office within 6 years from date claim accrues. Therefore, we may not consider any element of claim accruing before December 12, 1971.

Mr. Charles F. Standiford, a retired employee of the Department of Health and Human Services, formerly *DL604662* Health, Education and Welfare, appeals the denial of his claim for a retroactive temporary promotion and backpay. Based on our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), he claims that he was detailed to a higher grade position from June 22, 1970, to June 25, 1972. The claim was first received in GAO on December 12, 1977.

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The claim was denied by our Claims Division in Settlement Certificate Z-2788288, dated October 2, 1978. The pertinent facts are as follows.

Effective June 22, 1970, Mr. Standiford was detailed to perform the duties of Refrigeration and Air Conditioning Mechanic, Lead Foreman, WS-5306-8, at the Clinical Research Center, National Institute of Mental Health, Lexington, Kentucky. At the time of this detail the incumbent was placed in a sick leave status and never returned to work. Before this detail was made, Mr. Standiford was a Refrigeration and Air Conditioning Mechanic, WG-5306-12. His job description stated that, in the absence of the Refrigeration and Air Conditioning Mechanic, Lead Foreman, WS-8, he was to perform the duties of that position. Mr. Standiford was given a 60-day temporary promotion to the Lead Foreman, WS-8, position from October 4 to December 2, 1970.

On March 24, 1971, the Chief, Maintenance and Engineering Section, issued a memorandum designating Mr. Standiford as the Acting Chief, Refrigeration and Air Conditioning Shop as provided for in his job description in the absence of the unit chief. The memorandum stated that the action was to have no effect on his grade of WG-12. It appears from the record that the position of "Acting Chief" was synonymous with that of "Lead Foreman" to which Mr. Standiford had been temporarily promoted. The memorandum further indicated that the job would be rewritten, based on forthcoming Civil Service job grading standards for Refrigeration and Air Conditioning Mechanics, and probably would not be classified above WG-12. Finally, it stated that Mr. Standiford would be made permanent Chief when the position became classified under the new standards.

On June 25, 1972, Mr. Standiford was promoted to the position of Air Conditioning Equipment Foreman, LE-969, WS-7.

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By letter dated August 24, 1978, the Director, Division of Personnel Management, Alcohol, Drug Abuse, and Mental Health Administration, advised Mr. Standiford that his claim was being denied since the detail occurred prior to December 1971, which is more than six years from the date the claim was recorded in GAO on December 12, 1977. The letter added the following reason for denial:

"In addition, one of the conditions which must be met for entitlement to temporary promotion and back pay is that there must have existed at the time the detail was made, a specific, officially classified vacant position. A memorandum from the Chief of the Clinical Research Center dated December 10, 1971, indicates that the position was abolished on April 13, 1971, as a result of the annual review of positions."

On October 2, 1978, our Claims Division denied Mr. Standiford's claim for the following reasons. It noted that the claim was not received by the General Accounting Office until December 12, 1977, thereby preventing GAO from considering any portion of the claim which might have occurred prior to December 12, 1971, under the terms of the applicable 6-year statute of limitations (31 U.S.C. § 71a). As to that portion of the claim accruing after December 12, 1971, the Claims Division stated that it was HEW's position that the position in question had been abolished in April 1971. Therefore, since the position did not exist after April 1971, Mr. Standiford had not been detailed to an established position as is required for a retro-active promotion with backpay, and his claim was denied.

In support of his appeal, Mr. Standiford has submitted additional evidence to show that he performed as Acting Chief throughout the period in question and that

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the position in question had not been abolished in April 1971. Counsel requested that HEW forward this additional evidence to our Office along with Mr. Standiford's request for reconsideration. In a letter dated May 24, 1979, John P. Sorg, the Chief, Maintenance and Engineering Section, during the period in question, states:

"I served as Chief of Maintenance and Engineering at the Clinical Research Center from February 5, 1968 to February 16, 1974. During that period of time, the position of Chief of Air Conditioning and Refrigeration was not abolished.

"* * * Mr. Charles Standiford functioned in the position from that time [June 22, 1970] until being officially promoted to the position on June 25, 1972. The delay in promotion was on the advice of the personnel officer because of a pending realignment of WB/WS Grades. During that period, Mr. Standiford was given one 60 day temporary appointment, however, throughout the period he performed all the duties of the chief of the section. At no time, was the position of Chief of Air Conditioning and Refrigeration abolished."

In response, a letter dated October 15, 1979, was sent to counsel for Mr. Standiford on behalf of the Director, Division of Personnel Management, maintaining the agency's view that the position had been abolished. The letter stated the following:

"In considering whether this new proof might be acceptable we consulted with experts at the Department level and at the General

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Accounting Office. The crux of the matter is whether the official position description LE-514 was abolished on April 13, 1971 in accordance with Department policy in effect at the time. The letter that you submitted substantiates only that you performed the duties of Chief. It is the action which was taken during the Annual Review of Positions in 1971 which determines whether the position description LE-514 continued to exist. The agency does not have the HEW 318 form which was completed in 1971 to document action taken during the Annual Review. However, in a memorandum dated December 10, 1971, the Chief of the Clinical Research Center made specific reference to this matter. 'Additionally, I find that the position of Refrigeration and Air Conditioning Mechanic, WS-8, was abolished on April 13, 1971 as a result of the Annual Review of Positions and through no other means. HEW Form 318 was signed and dated by Mr. Cooper, Mr. Sorg and myself.'

"The fact that you may have performed duties which your supervisor felt were those of position LE-514 is not sufficient to prove that the official position description, the document which authorizes payment of salary, existed until June 25, 1972. The agency must rely on the December 10 memorandum as proof that position LE-514 was abolished during the Annual Review

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of Positions on April 13, 1971.
Therefore, we cannot allow your
claim as requested."

In a further effort to substantiate his position that the job in question was not abolished as alleged by HEW, counsel for the claimant has provided our Office with statements made by Mr. Standiford's supervisors. Mr. Robert C. Cobb, who was the Deputy Chief for Maintenance and Engineering, states in a letter of May 21, 1980, that at no time was there any consideration of abolishing the Foreman/Chief position and that Mr. Standiford served in that capacity continuously until he was permanently appointed to the position. Mr. William W. Cooper, the immediate supervisor of Mr. Standiford, explains by letter dated May 16, 1980, that it was part of his job to make an annual review of all the jobs in the area and that "[t]he position of Chief of Air Conditioning and Refrigeration was never abolished and the responsibility and duties of this position were never changed in anyway." Mr. Cooper adds that this position was a very necessary one and was never considered for abolishment. He further states that the "position was not abolished on the Annual Review of Positions and there was no HEW Form No. 318 signed by me abolishing this job."

Finally, the claimant submits a copy of a letter dated May 1, 1979, from Noel B. Bascom, the Personnel Officer at the Federal Correctional Institution in Lexington, Kentucky, the agency that assumed operation of the facility, where Mr. Standiford was employed, in February 1974, replacing the Clinical Research Center, HEW. Mr. Bascom certifies "that no records exist in this office indicating that the Air Conditioning and Refrigeration Supervisor, WS-8, position ever was abolished."

The burden is on the claimant to prove that he or she assumed the full range of duties, authority, and

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responsibility set forth in the description of the position to which the detail is alleged. Vernon P. Humphries, B-194890, March 28, 1980; George Quintal, B-194745, April 8, 1980; 4 C.F.R. § 31.7.

We believe that Mr. Standiford has adequately established that he was detailed to a classified, higher level position in 1970 and that he continued to perform the full range of duties of that position until he was permanently promoted to the WS-7 position in June 1972. As to the agency's statements that the position was abolished in April 1971, we are persuaded by the additional evidence submitted by Mr. Standiford that the agency was mistaken. The contrary statements of Mr. Standiford's supervisors and Mr. Bascom, together with the fact that the agency does not have the form (HEW Form No. 318) which would have been used to formally abolish the position, are strong indications that the position was not in fact abolished. We find, therefore, for the purposes of this decision, that the position was a continuing one throughout the period in question.

Therefore, since under the detail provisions of the Federal Personnel Manual in effect at the time in question, an agency head's discretion to make a detail to a higher grade position lasted no longer than 120 days, without CSC approval, a violation of these provisions was an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1976). The corrective action under these circumstances is a retroactive temporary promotion and backpay. 55 Comp. Gen. 539, supra.

Accordingly, we find that Mr. Standiford was continuously detailed to the grade WS-8 position from the first day of his detail, June 22, 1970, to the day of his permanent promotion to the WS-7 position, June 25, 1972. Hence, he would be entitled to a

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retroactive temporary promotion and backpay beginning on the 121st day of that detail but for the time limitation, referred to above, and explained as follows.

Section 71a(1) 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 Bar-ring Act, even though the delay at the agency level was the fault of the agency, not the employee. Donald B. Sylvain, B-190851, February 15, 1978. Therefore, the 6-year bar must be applied from the time Mr. Standiford's claim was received here, December 12, 1977, not the date it was filed with HEW.

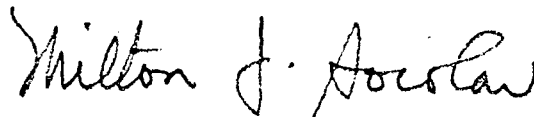
Our Office has held that the date of accrual of a claim for the purpose of the above-cited statute is to be regarded as the date the services were rendered and that the claim accrues upon a daily basis. 29 Comp. Gen. 517 (1950). Since Mr. Standiford's claim was not received in our Office until December 12, 1977, we may not consider any element of the claim which accrued before December 12, 1971. Beulah A. Walker, B-189384, September 22, 1977. Accordingly, Mr. Standiford, who had then served more than 120 days on the detail, is entitled to backpay beginning December 12, 1971.

In his letter to our Claims Division of September 1, 1978, Mr. Standiford has claimed, in addition to backpay for the period of the detail, additional amounts based

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on the theory that he should have been promoted to the WS-7, step 4 level when the vacancy occurred on June 22, 1970, and that as a result he has lost step increases for the entire period from June 22, 1970, to February 1978, totalling \$5,476.64 in lost wages. We find no basis upon which to allow this portion of the claim. The agency was under no duty to fill the vacancy on June 22, 1970. Moreover, the agency's letter of August 24, 1978, states that the personnel action effecting his permanent promotion to the Foreman position was correct and that the delay in the promotion was not a factor in determining the appropriate step rate upon promotion.

In accordance with the foregoing, Mr. Standiford is entitled to a retroactive temporary promotion to the WS-8 position with backpay for the period of December 12, 1971, to June 25, 1972.



Acting Comptroller General
of the United States