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**DECISION**



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

FILE: B-198402

DATE: November 3, 1980

MATTER OF: Garrick Gedarro - *[Claim For]* Retroactive Temporary  
Promotion and Backpay *]*

**DIGEST:** Employee of Pearl Harbor Naval Shipyard was denied retroactive promotion and backpay under Turner-Caldwell decisions by our Claims Group on basis that neither of two separate details was in excess of 120 days. Employee now contends that shipyard's failure to follow regulation requiring use of competitive promotional procedures for details in excess of 60 days was unwarranted personnel action remediable under Back Pay Act (5 U.S.C. § 5596). Claims Group denial is sustained since subject instructional regulation protects employees in general and does not contain any provision creating additional entitlements.

Mr. Garrick Gedarro, through his authorized representative, requests reconsideration of his claim for retroactive temporary promotion and backpay under our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 id. 427 (1977), which was denied by our Claims Group's settlement dated January 17, 1980. Consistent with the following analysis we are sustaining our Claims Group's adjudication.

The record shows that Mr. Gedarro, a civilian employee at the Pearl Harbor Naval Shipyard, filed a claim dated August 25, 1978, seeking retroactive temporary promotion and backpay in connection with an alleged overlong detail to a higher-grade position. Specifically, Mr. Gedarro contended that as a Nuclear Mechanical Systems Inspector (WG-6201, Grade 13, Step 3, \$10.38/hr.), he was detailed for 117 days between May 2, and August 26, 1977, to perform the work of a "Planner and Estimator-Pipefitter (WD-4204, Grade 8, Step 1, \$11.03/hr.)" in the Planning and Estimating Division at the shipyard. Mr. Gedarro further contended that

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he was again detailed to the same division to perform the same type of work between January 30 and April 9, 1978. On the latter date, April 9, 1978, Mr. Gedarro was officially promoted to the grade 8 position.

Agency authorities denied Mr. Gedarro's claim whereupon Mr. Gedarro presented his claim to this Office. Our Claims Group concurred with the formulation of the agency's denial, stating as follows:

"Decisions authorizing retroactive temporary promotions for employees detailed in excess of 120 days are based on the requirement, found in the Federal Personnel Manual, chapter 300, subchapter 8, paragraph 8-4f, that agencies must obtain prior approval from the CSC for any detail that will exceed 120 days. Because neither of your details was in excess of 120 days and the periods of detail were separated, they cannot be considered one detail for the purpose of meeting the requirement that the detail must have been for more than 120 days. See CSC Bulletin 300-43, October 30, 1978."

In appealing the conclusion of our Claims Group Mr. Gedarro acknowledges that the factual basis of his claim does not constitute a violation of the then applicable 120 day detail provisions of paragraph 8-4(f), chapter 300 of the Federal Personnel Manual (FPM). However, Mr. Gedarro now contends that the circumstances of his claim outlined above do constitute violations of the provisions of paragraph 8-4(e) of chapter 300, and paragraph 4-1(e) of chapter 335 of the FPM, as implemented by paragraph 4(c)(3) of Naval Shipyard Pearl Harbor Instruction 12340.1C, which require that details in excess of 60 days to higher-grade positions or to positions with promotion potential be made through competitive procedures. Thus, Mr. Gedarro contends that the agency's failure to use competitive promotional procedures after the 60th day of each of his separate details was a violation of a nondiscretionary agency regulation constituting an unwarranted personnel action remediable in his case by the award

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of retroactive temporary promotion and backpay under the Back Pay Act, 5 U.S.C. § 5596 (1976).

We have in the past stated that, although the remedy of retroactive temporary promotion recognized by the Turner-Caldwell line of decisions is based on the Civil Service Commission's (CSC) (now Office of Personnel Management) instructions at FPM chapter 300, subchapter 8, requiring the Commission's approval of certain details in excess of 120 days, an agency, by its own regulation or by the terms of a collective-bargaining agreement may establish a shorter period under which it becomes mandatory to promote an employee who is detailed to a higher-grade position. Thus, in Kenneth Fenner, B-183937, June 23, 1977, we noted that, under 5 U.S.C. § 301 and FPM chapter 171, an agency may promulgate supplemental personnel regulations and policies for its employees within the general framework of and consistent with Civil Service Commission regulations. That case involved a Customs Service regulation requiring the temporary promotion of an employee detailed to a higher-grade position beyond 60 days. We found that the policy of the Customs Service regarding details beyond 60 days was nondiscretionary, and that the agency had a mandatory duty to promote the person detailed on the 61st day of the detail. Therefore, Mr. Fenner was entitled to a retroactive temporary promotion beginning on the 61st day of his detail with backpay under 5 U.S.C. § 5596.

The Customs Service policy noted above requiring the temporary promotion of the person detailed to the higher-grade position on the 61st day of the detail contrasts sharply with the shipyard's instruction here as reflected in the following comprehensive provision of paragraph 4(c)(3) of Naval Shipyard Pearl Harbor Instruction 12340.1C:

"(3) No detail to a higher grade position or a position with known promotional potential will exceed sixty (60) days. Competitive promotional procedures must be used for details exceeding sixty (60) days. This requirement is not to be circumvented by a series of temporary assignments. Therefore, competitive

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promotional procedures must be used if after completing the detail the employee will have spent more than sixty (60) days (prior service under previous details and temporary promotions included) in higher grade position(s) or in position(s) with known promotional potential during the preceding year."

Unlike the more restrictive regulations discussed in the Fenner case noted above, the shipyard instruction here does not purport to bind the agency by requiring the promotion of the detailed employee at the end of 60 days. Rather, the instruction requires that competitive promotional procedures must be used for specific details exceeding 60 days. It is based upon and supplemental to paragraph 8-4e of FPM chapter 300 and paragraph 4-1e of FPM chapter 335. Both of those paragraphs provide for the use of competitive promotion procedures for details of more than 60 days to higher-grade positions. The requirement for competition is for the purpose of insuring that employees are not arbitrarily excluded from consideration for details which enhance the employee's promotion potential. Since the regulations are designed to protect employees in general by maintaining the integrity of the competitive system and do not contain any provision creating additional entitlements, failure to fully follow procedural or instructional regulations standing alone is not sufficient to be considered an unjustified or unwarranted personnel action so as to entitle the employee to retroactive promotion and backpay.

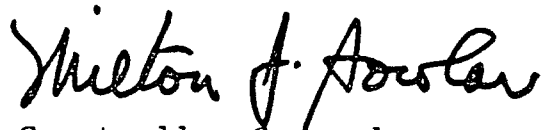
Additionally, we note that the two FPM paragraphs requiring competitive procedures for details of more than 60 days were on the books and were considered in our Turner-Caldwell decisions. They were not found to entitle employees to a backpay remedy after 60 days.

Accordingly, our Claims Group's denial of Mr. Gedarro's claim is sustained.

Finally, Mr. Gedarro has inquired as to his right of appeal. Decisions of the Comptroller General are

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binding on executive agencies of the United States. See 54 Comp. Gen. 921, 926 (1975). However, independent of the jurisdiction of this Office, the United States Court of Claims and District Courts have jurisdiction to consider certain claims against the Government if suit is filed within 6 years after the claim first accrued. See 28 U.S.C. §§ 1346(a)(2), 1491, 2401, and 2501 (1976).

A handwritten signature in cursive script that reads "Milton J. Fowler".

For the Comptroller General  
of the United States