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DECISION

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

FILE: B-200817

DATE: April 27, 1981

[Claim Based on]

MATTER OF: Melvin Ackley, Jr. Salary
Protection Benefits

DIGEST: Civil Service Reform Act repealed some salary protection benefits for downgraded employees and enacted new ones. FAA Air Traffic Controller, downgraded after effective date of changes but erroneously advised he was entitled to more liberal repealed benefits, claims unjustified personnel action and backpay. Claim must be denied. Government is not bound by erroneous advice and it does not constitute unjustified personnel action. FAA had no authority to grant repealed benefits and no alternative but to apply law in effect at time of downgrading.

The Professional Air Traffic Controllers Organization (PATCO) and the Federal Aviation Administration (FAA) have jointly submitted to the Comptroller General for decision the claim of Mr. Melvin Ackley, Jr., an Air Traffic Control Specialist. PATCO contends Mr. Ackley suffered an unjustified or unwarranted personnel action entitling him to backpay because FAA misinformed him about salary protection benefits incident to a change to lower grade. For the reasons hereinafter explained, the claim may not be allowed.

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This case arose because title VIII of the Civil Service Reform Act of 1978, Public Law 95-454, October 13, 1978, 92 Stat. 1218, made some changes in the provisions of title 5, United States Code, relating to the protection of employees who are reduced in grade. Among these were the repeal of section 5337, Pay savings, and the enactment of a new section, 5363, Pay retention. As applicable to the case at hand, the difference between these provisions is as follows. Under the repealed section an eligible employee would have continued to receive the rate he was receiving before downgrading plus full comparability increases in that rate for up to 2 years. Under the new section the employee continues to receive the rate he was receiving before downgrading

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plus 50 percent of the comparability increases in the maximum rate of the grade to which reduced until he becomes entitled to an equal or higher rate by operation of law. The effective date of these changes was January 11, 1979.

Although the record does not specify the date, it was apparently early in 1979 when Mr. Ackley, then a journeyman Air Traffic Control Specialist GS-14, step 5, at FAA's Indianapolis Air Route Traffic Control Center (ARTCC), applied for a transfer to the Seattle ARTCC and a change to lower grade, GS-13, the journeyman level there, under a program called the National Seniority Opportunities Program. This program provided for salary protection for those changed to lower grade under its provisions. Mr. Ackley was advised of his tentative selection for the Seattle position on March 9, 1979, and his selection was confirmed by a letter to him dated April 5, 1979. However, the FAA Northwest Region which issued this letter had not yet received instructions concerning the changes made by the Reform Act and this letter erroneously informed Mr. Ackley that he was entitled to the "pay savings" benefits provided by section 5337 which, as has been indicated, had been repealed nearly 3 months earlier on January 11, 1979.

The reassignment from Indianapolis to Seattle and the change from grade GS-14 to GS-13 was effective June 17, 1979. The personnel action reiterated the erroneous information but Mr. Ackley's pay was properly continued at the rate for grade GS-14, step 5, \$36,766, the rate he was receiving immediately prior to his change to lower grade. This was in accord with both the repealed and the new section. However, before the next comparability increase became effective on October 7, 1979, the FAA Northwest Region became aware that there was some question concerning the amount of the increase due Mr. Ackley. Therefore, the adjustment of his pay was delayed.

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Subsequently, some time in November 1979, instructions on the Reform Act changes were received from FAA headquarters and it then became apparent that Mr. Ackley was and since his reassignment and change to lower grade on June 17, 1979, had been entitled only to the "pay retention" benefits provided by the new section 5363. Thereupon, a corrective personnel action retroactive to June 17, 1979, was issued, Mr. Ackley's pay was adjusted in accordance with the provisions of section 5363 retroactive to October 7, 1979, and he was notified by letter dated December 13, 1979.

The adjustment in Mr. Ackley's pay resulted in his being placed in step 10 of grade GS-13 at \$38,186 per annum and the termination of his "pay retention" effective October 7, 1979. Under the repealed section 5337, his pay would have been adjusted to the new rate for grade GS-14, step 5, \$39,341 per annum, which is \$1,155 more than he actually received, and his "pay savings" would have continued for up to 2 years from the date of his change to lower grade, June 17, 1979.

PATCO alleges that Mr. Ackley was induced by the erroneous information to accept the change to lower grade and that the erroneous information and FAA's corrective action constituted an unjustified or unwarranted personnel action resulting in the loss of pay under the Back Pay Act, 5 U.S.C. 5596. Therefore, he is entitled to have his pay adjusted effective October 7, 1979, and his "pay savings" continued in accordance with the provisions of the repealed section 5337. FAA, while acknowledging that Mr. Ackley was inadvertently misinformed, asserts that there has been no unjustified or unwarranted personnel action within the purview of the Back Pay Act and that it has no alternative but to apply the new law which was in effect at the time of Mr. Ackley's transfer and change to lower grade.

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We find in the foregoing no unjustified or unwarranted personnel action and no entitlement to backpay under 5 U.S.C. 5596 and the implementing regulations, 5 C.F.R. 550.801, et seq. For entitlement to relief under this law and these regulations there must have been an act or omission which violated or improperly applied a nondiscretionary, mandatory requirement imposed by law, regulation, established policy, or binding agreement, and which resulted in the withdrawal, reduction, or denial of pay otherwise due the employee. See B-196107, December 31, 1979.

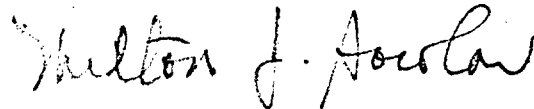
The erroneous information furnished by FAA, while unfortunate, does not meet the foregoing requirements and it is well established that the Government is not bound by information furnished by its agents which proves to be erroneous. James A. Shultz, 59 Comp. Gen. 28 (1979). Moreover, there may be some question as to how much Mr. Ackley relied upon this information since the record before us indicates that he had applied for the transfer and change to lower grade before he received it.

Neither was the corrective action taken by FAA an unjustified or unwarranted personnel action since it was mandatory under the law to apply the salary protection benefits in effect at the time of the action in question. Contrary to what may be the perception of both parties to this controversy, Mr. Ackley never acquired entitlement to any benefits under the repealed section 5337 since, with one exception not here applicable, these had been put out of existence by an act of the Congress well before Mr. Ackley's change to lower grade. Clearly they could not be resurrected and bestowed merely by erroneous information that they continued in effect. Therefore, Mr. Ackley was never denied pay that was otherwise due him. As the United States Supreme Court stated in Utah Power & Light Co. v. United States, 243 U.S. 389 (1917):

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"The United States is neither bound nor estopped by acts of its officers or agents in entering into arrangements or agreements to do or cause to be done what the law does not sanction or permit."

Accordingly, it is our opinion that FAA properly adjusted Mr. Ackley's pay in accordance with the provisions of section 5363 of title 5, United States Code, and that he is not entitled to any backpay.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States