

DECISION



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

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Ph.M. I
119197

FILE: B-202685

DATE: August 17, 1982

MATTER OF: Erlyn D. Felder - Claim for Retroactive
Classification and Promotion

DIGEST:

1. Civilian employee of the Department of the Army employed in GS-7 position at time of claim seeks retroactive classification and promotion with backpay for performing duties of position subsequently classified as GS-9. Even assuming the correctness of her contention, we hold that this classification action cannot be given retroactive effect, and employee's claim is denied.
2. Employee claims retroactive temporary promotion and backpay under our Turner-Caldwell decisions. However, the Court of Claims ruled in Wilson v. United States, Ct. Cl. No. 324-81C, Order, October 23, 1981, that employees have no entitlement under statute or the Federal Personnel Manual to temporary promotions for overlong details. Since we have recently ruled that we will follow the Wilson decision and no longer follow our prior Turner-Caldwell decisions with respect to pending or future cases, the employee's claim is denied. See Turner-Caldwell III, B-203564, May 25, 1982.
3. Prior to our decision in Turner-Caldwell III, Department of the Army administrative proceeding granted employee's claim under Turner-Caldwell, counting a temporary promotion period as part of detail time. However, such a period cannot count as detail time, and omitting this time from computations. details here were less than 120 days. Employee is thus liable for erroneous payment of compensation in excess of GS-7 level she received during relevant period, but under circumstances of this case, we will grant waiver of Government's claim for it.

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This decision is in response to an appeal by Mrs. Erlyn D. Felder from our Claims Group settlement, Z-2825246, January 16, 1981, which denied her claim for a retroactive classification and promotion with backpay. The issues are (1) whether a classification action can be given retroactive effect, (2) whether she is entitled to a retroactive temporary promotion with backpay incident to an overlong detail to a higher graded position, and (3) whether collection of erroneous compensation she received in an administrative proceeding will be waived. For the following reasons, we decide that Mrs. Felder is not entitled to any retroactive relief, but we grant waiver of the overpayment.

BACKGROUND

Mrs. Felder alleges that while serving in the position of Supervisory Editorial Assistant, GS-7, with the Department of the Army at Fort Gordon, Georgia, she performed all the duties of the subsequently classified position of Management Analyst, GS-9, for the period from August 23, 1976, to December 3, 1978, the date on which she was promoted to the latter position. Mrs. Felder argues that her satisfactory performance of all the duties of the Management Analyst position for the claimed period is supported by statements from two of her supervisors and the Army's own claims investigator. In addition, she asserts that the requirement for the position of Management Analyst, has existed since August 23, 1976, as shown by its authorization in the Army's Table of Distribution and Allowances. She claims that the Civilian Personnel Office (CPO) procrastinated for over 2 years before establishing this new position. She thus seeks a retroactive classification and promotion with backpay for the period in question.

The record in this case shows that the position of Management Analyst, GS-9, was not officially established and classified until July 11, 1978. As shown above, Mrs. Felder contends, with some support from the record, that commencing August 23, 1976, she performed the duties of this subsequently classified position. For

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the purpose of resolving the present case, we will assume the correctness of her contention. The record further shows that she was temporarily promoted to the GS-9 position from August 13, 1978, through October 11, 1978, and was permanently promoted to it on December 3, 1978.

In response to her claims, the Army conducted an investigation. As a result, the deciding official determined that she was not entitled to backpay for the period prior to the establishment of the position in question. Relying on Turner-Caldwell, 55 Comp. Gen. 539 (1975), sustained in 56 Comp. Gen. 427 (1977), the official cited the rule that the detail must be to an established position to be compensable. However, he did allow her a retroactive temporary promotion and backpay from November 8, 1978, the 121st day after the higher grade position was established, until December 2, 1978, the day before she received a permanent promotion to the position.

RETROACTIVE CLASSIFICATION

In her letter appealing the Claims Group's denial of her claim, Mrs. Falder's main contention is that "the establishment of the position should be made retroactive to the time when the requirement was established in 1976." However, the general rule in classification matters is that an employee of the Government is entitled only to the salary of the position to which he is appointed, regardless of the duties he performs. When an employee performs duties normally performed by one in a grade level higher than the grade he holds, he is not entitled to the salary of the higher grade position. Francis J. McGrath, 57 Comp. Gen. 404, 405 (1978). In this regard, we note that an employee can bring a position classification appeal under the procedures in 5 C.F.R. § 511.600 et seq. (1982). However, with an exception not applicable here, classification actions may not be made on a retroactive basis. 5 C.F.R. § 511.701(a)(4) (1982).

Furthermore, the Supreme Court has ruled that neither the Back Pay Act, 5 U.S.C. § 5596 (1976) nor the classification

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statute, 5 U.S.C. § 5101 et seq. (1976), provides a monetary remedy for periods of wrongful classification. Testan v. United States, 424 U.S. 392 (1976). Even assuming an agency unreasonably delays the classification process, there is no remedy in money damages for delay in the reclassification process. Vernon W. Gudkese, B-205641, June 22, 1982.

We note, as Mrs. Felder acknowledges, that an authorization for a position in an Army Table of Distribution and Allowances does not, by itself, officially establish that position. William F. Murray, B-193737, March 14, 1979. In her appeal, however, Mrs. Felder attempts to distinguish that case on the ground that the record there failed to support Mr. Murray's contention that he was actually detailed to a higher graded position. That fact, however, merely constituted a separate and independent ground for decision in that case which was based on our rule in Raymond F. Kennedy, B-185730, June 1, 1977, that the position must be officially established and classified.

In connection with her claim, Mrs. Felder has requested that our Office conduct an investigation, including possibly interviewing the personnel concerned. However, 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 his or her right to payment. 4 C.F.R. § 31.7 (1982). Where there is a dispute between an employee claiming backpay and his agency which this Office cannot resolve from the written record, the claim will not be allowed. Gilbert T. Breer, B-195583, December 3, 1980, George W. Lovill, B-196465, April 16, 1980.

OVERLONG DETAIL TO HIGHER GRADE POSITION

Mrs. Felder's alternate basis for her claim to a retroactive promotion and backpay rests upon our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which held that employees detailed to

higher graded positions more than 120 days without prior approval by the former United States Civil Service Commission are entitled to temporary promotions and backpay beginning on the 121st day of the detail. As explained below, however, these decisions cannot be applied to grant the relief requested in this case.

In the first place, both the Army and our Claims Group have correctly stated that the Turner-Caldwell remedy only applies to a detail to an established and classified position. See Willie W. Cunningham, 55 Comp. Gen. 1062 (1976), and William F. Murray, B-193737, March 14, 1979. Moreover, subsequent to the Army's administrative decision in this case, the United States Court of Claims decided in Wilson v. United States, Ct. Cl. No. 324-81C, Order, October 23, 1981, that neither the applicable statute (5 U.S.C. § 3341) nor the Federal Personnel Manual authorizes a retroactive temporary promotion and backpay in cases involving overlong details. In Turner-Caldwell III, B-203564, May 25, 1982, on the basis of the Wilson decision, we held that we would no longer follow our prior Turner-Caldwell decisions. Accordingly, Mrs. Felder's claim on the basis of these decisions is denied.

WAIVER OF ERRONEOUS PAYMENT OF BACKPAY

Mrs. Felder's receipt of an erroneous payment of backpay came about in the following manner. The Army's administrative decision applied the Turner-Caldwell decisions, supra, to the present case and thus allowed Mrs. Felder backpay for the period from November 8, 1978, the 121st day after July 11, 1978, to December 2, 1978. It is clear, however, that the Turner-Caldwell decisions should not have been used to grant that relief because the temporary promotion period from August 13, 1978, through October 11, 1978, does not count as detail time. Donald L. Bressler, 50 Comp. Gen. 401 (1979). Since the temporary promotion interrupted the detail, and the remaining detail periods (July 11, 1978, to August 12, 1978, and October 12, 1978, to December 2, 1978) are not

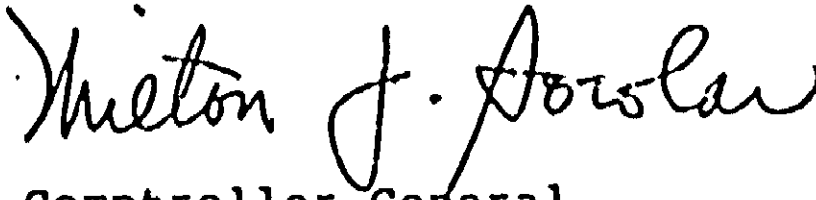
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In excess of 120 days, Mrs. Felder was not entitled to recover backpay under our previous Turner-Caldwell decisions.

Thus, Mrs. Felder is liable to repay the amount of compensation in excess of the GS-7 level she received for the period from November 8, 1978, to December 2, 1978, which the Army, as shown above, mistakenly interpreted as part of a detail period under our prior Turner-Caldwell decisions. We believe, however, that Mrs. Felder's liability for the overpayment should be waived in this case on the following grounds.

The provision of law authorizing the waiver of claims of the United States against employees arising out of erroneous payments of pay, 5 U.S.C. § 5584 (1976), permits waiver when the collection of an erroneous payment would be against equity and good conscience and not in the best interests of the United States and when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. See 4 C.F.R. § 91.5(c) (1982). In this case, Mrs. Felder received a payment pursuant to a decision of her agency in an administrative proceeding. She was entitled to rely on that decision and she did so in good faith. Under these circumstances, we believe that the statutory conditions for waiver have been fulfilled.

Accordingly, Mrs. Felder's claims for retroactive classification and promotion with backpay are denied. The collection of the erroneous compensation which she received from the Army for the period from November 8, 1978, to December 2, 1978, is hereby waived.

for 
Comptroller General
of the United States