

DECISION



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

FILE: B-206181.2

DATE: November 29, 1982

MATTER OF: Noel W. Campbell - Retroactive
Temporary Promotion and Backpay

DIGEST: A grade GS-12 Aircraft Pilot who was on call to perform GS-13 flight duties for 90 days claims retroactive temporary promotion and backpay under a provision in negotiated agreement requiring temporary promotion when an employee is assigned to a higher grade position for 30 or more calendar days. The claim is denied since the employee actually performed the higher grade duties only on 25 calendar days, and, therefore, did not serve in a detail for the requisite period. Additionally, since during period when employee was on call to perform higher graded duties, he was available to, and actually did perform only duties of his proper grade the majority of the time, period in on call status cannot be considered to be detail to the higher graded position.

This decision is in response to a joint submission from the Chief of Labor Management Relations, U.S. Customs Service, Los Angeles, California, and the National Treasury Employees Union (NTEU), concerning the claim of Mr. Noel W. Campbell for a retroactive promotion and backpay. This case has been handled as a labor relations matter under our procedures in 4 C.F.R. Part 22 (1982).

The issue presented is whether Mr. Campbell is entitled to a retroactive promotion with backpay based on Article 10 of the U.S. Customs Service Region VII - NTEU collective bargaining agreement requiring that employees detailed to a higher grade position for a period exceeding 30 calendar days be temporarily promoted. For the reasons set forth below, the claim is denied. Additionally, certain questions relating to the National Agreement between the parties, which became effective on June 30, 1980, will be discussed below.

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Mr. Campbell is employed by Customs' Air Support Branch at North Island, California, as a grade GS-12 Aircraft Pilot. On October 27, 1978, he completed a training program which qualified him to fly the high performance aircraft used by Customs, as pilot-in-command, a duty reserved for grade GS-13 pilots by their position description.

During the period beginning on October 31, 1978, and allegedly ending on May 21, 1980, Mr. Campbell was scheduled to fly 90 days in a "response mode." On those days, he was on call, depending upon the needs of the agency, to perform in any one of three capacities: (1) as pilot-in-command of high performance aircraft; (2) as copilot of high performance aircraft; and (3) as pilot-in-command of light or medium performance aircraft. A work schedule prepared by Mr. Campbell and verified by the agency indicates that, during the period October 31, 1978, to January 2, 1980, he actually performed as pilot-in-command of high performance aircraft for 1 to 4 hour missions on 25 nonconsecutive days, for a total flight time of 50 hours. During the same period, he flew 19 missions, totalling 35.3 hours, as copilot of high performance aircraft.

NTEU has submitted position descriptions for the grade GS-12 and GS-13 Aircraft Pilot positions, alleging that the only difference between the two is that a grade GS-13 pilot is required to fly high performance aircraft as pilot-in-command. The union has also submitted various memoranda evidencing the agency's awareness that the San Diego Air Support Branch was assigning grade GS-13 flight duties to grade GS-12 pilots.

As noted previously, Customs concedes that Mr. Campbell performed grade GS-13 duties for approximately 50 hours during the period October 31, 1978, to January 2, 1980. Nevertheless, the agency maintains that the 50 hours of flight time break down into approximately 6 working days, and, therefore, Mr. Campbell has not served 30 days in a detail as is required by Article 10, Section 1, of the negotiated agreement that was then in effect.

We have consistently recognized that an agency may bargain away its discretion, and thereby make a provision of a collective bargaining agreement a nondiscretionary

agency policy, if the provision is consistent with applicable Federal law and regulations. See John Cahill, 58 Comp. Gen. 59 (1978). On this basis, we have held that an agency's violation of a provision in a negotiated agreement requiring temporary promotions for extended details to higher grade positions may constitute an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1976), thus, entitling the aggrieved employee to backpay. See, for example, Roy F. Ross and Everett A. Squire, 57 Comp. Gen. 536 (1978). The negotiated agreement in effect during the period of Mr. Campbell's alleged detail provides, in Article 10, Section 1, that an employee who is assigned to a higher grade position for 30 or more calendar days will be temporarily promoted.

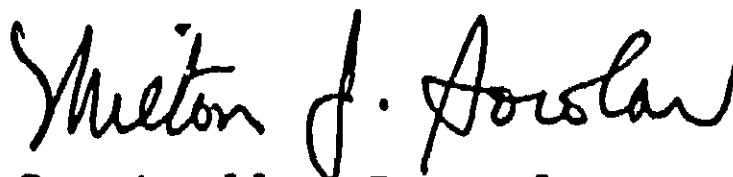
Based on our review of the position descriptions submitted in support of Mr. Campbell's claim, we are unable to find that he was detailed to the GS-13 position for the 90-day period he was scheduled to fly in a "response mode." It appears that the critical distinction between the grade GS-12 and grade GS-13 positions is that the pilot-in-command of a high performance aircraft is required to be a grade GS-13, whereas the pilot of light and medium performance aircraft and the copilot of high performance planes may be either a grade GS-12 or GS-13. The work schedule submitted by Mr. Campbell indicates that, although he was assigned to act as pilot-in-command of high performance aircraft on 25 days, the majority of his assignments required him to perform only those duties included in the grade GS-12 position description. Under these circumstances, it cannot be said that the employee performed the full range of duties of the grade GS-13 position during the entire period he served in a "response mode," since, during that period, he was assigned to, and usually performed, only those duties included within his grade GS-12 position description.

With respect to the 25 days on which Mr. Campbell was required to fly high performance aircraft as pilot-in-command, it is not clear whether Article 10, Section 1, of the negotiated agreement permits aggregation of nonconsecutive days for purposes of determining the length of a detail. In any event, Mr. Campbell is not entitled to a retroactive temporary promotion since he performed the higher grade duties for less than 30 days.

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NTEU further contends that certain provisions in the current negotiated national agreement, effective June 30, 1980, may be construed to require handling of Mr. Campbell's claim for retroactive promotion under the current grievance-arbitration procedures. Also, the union asserts that the agency's action discontinuing Mr. Campbell's duties at the grade GS-13 level violated the merit promotion principles contained in the current agreement. We decline to consider these contentions since they involve issues of contract interpretation which are more appropriately resolved pursuant to grievance-arbitration procedures set forth in the negotiated agreement. See 4 C.F.R. § 22.8 (1982); and Ira Schoen and Melissa Dadant, 61 Comp. Gen. 15 (1981).

In view of the above, Mr. Campbell's claim for retroactive promotion with backpay is denied.

for 
Comptroller General
of the United States