

DOCUMENT RESUME

02588 - [A1812866]

[Arbitration Award of Backpay for Excessive Details to Higher Grade Positions]. B-183903. June 22, 1977. 7 pp.

Decision re: Annette Smith, et al.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation (300)
Contact: Office of the General Counsel; Civilian Personnel.
Budget Function: General Government; Central Personnel Management (805).

Organization Concerned: Federal Labor Relations Council; General Services Administration; American Federation of Government Employees.

Authority: Back Pay Act (5 U.S.C. 5596); 5 C.F.R. 550(H). 55
Comp. Gen. 539. 54 Comp. Gen. 312. 54 Comp. Gen. 403. 54
Comp. Gen. 435. 54 Comp. Gen. 538. 55 Comp. Gen. 629. 54
Comp. Gen. 760. 54 Comp. Gen. 763. 52 Comp. Gen. 920. 55
Comp. Gen. 785. Executive Order 11491. B-183086 (1977).
Bielec v. United States, 197 Ct. Cl. 550 (1972). Ganse v.
United States, 180 Ct. Cl. 183, 186 (1967).

The Federal Labor Relations Council requested a decision on the legality of an arbitration award of backpay for the difference in pay between grades WG-1 and WG-2 for custodial employees detailed for extended periods to the higher grade positions between October 10, 1972, and November 11, 1973. The award may be implemented if it is modified to conform with the requirements of GAO's Turner-Caldwell decisions, which were issued subsequent to the date of the award. (Author/SC)

Johnnie Lupton
Civpers.



DECISION

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

FILE: B-183903

DATE: June 22, 1977

MATTER OF: Annette Smith, et al. -- Arbitration award of
backpay for excessive details to higher grade
positions

DIGEST: Federal Labor Relations Council requests
decision on legality of arbitration award of
backpay for difference in pay between
grades WG-1 and WG-2 for custodial em-
ployees detailed for extended periods to
WG-2 positions between October 10, 1972,
and November 11, 1973. Award may be
implemented if modified to conform with
requirements of our Turner-Caldwell
decisions, 55 Comp. Gen. 539 (1975) and
B-183086, March 23, 1977, 56 Comp.
Gen. ___, which were issued subsequent
to the date of the award.

I.

This action involves a request dated May 9, 1975, for a decision from the Federal Labor Relations Council (FLRC) as to the legality of paying backpay awarded by an arbitrator in the matter of General Services Administration, Region 3 and American Federation of Government Employees, Local 2456, AFL-CIO (Lippman, Arbitrator), FLRC No. 74A-58. The case is before the Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations.

We regret that we were unable to rule on the legality of this arbitration award on a more timely basis. However, because this case involves excessive detailing of employees to higher grade positions, we found it necessary to delay this decision until after we had reconsidered our decision on that issue in Everett Turner and David Caldwell, 55 Comp. Gen. 539 (1975). We so advised the Federal Labor Relations Council by letter of September 29, 1976. Our decision on reconsideration of Turner-Caldwell was issued on March 23, 1977, B-183086, 56 Comp. Gen. ___.

American Federation of Government Employees Local 2456, hereinafter referred to as the union, represents the approximately 2,300 custodial employees and elevator operators employed in the Metropolitan Washington, D. C., area by the Public Buildings Service, General Services Administration (GSA), Region 3, hereinafter referred to as the agency.

02588

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B-183903

On September 12, 1973, the union filed a grievance in its own name and on behalf of Mrs. Annette Smith and all other employees similarly affected. The grievance alleged that the agency had violated certain provisions of the negotiated labor-management agreement in denying increases in pay to an unknown number of employees in the bargaining unit after they were assigned work that entitled them to higher rates of pay. The union requested that the grievance be adjusted by awarding promotions to Mrs. Smith and other similarly situated employees retroactively to the first day they were qualified for such under the provisions of the agreement after having been assigned higher-level duties.

Attempts by the parties to informally adjust the grievance were unsuccessful and the dispute, framed as a class action, was submitted to binding arbitration in accordance with Article 14 of the agreement. The first of a series of hearings was held on January 2, 1974. The arbitrator, with agency acquiescence, adopted the union's statement of the issue, which is as follows:

"Did the Employer violate the Labor-Management Agreement when Mrs. Annette Smith and other employees were assigned higher graded work for long and sustained periods without benefit of promotion?"

II.

The facts, as brought out in the arbitration hearings, are as follows. Mrs. Smith is representative of a class consisting of an unknown number of, similarly situated employees within the bargaining unit. She was hired by the agency on July 3, 1972, as a wage grade (WG) 1 custodial laborer and assigned zone cleaning duties on the fifth floor of the Pentagon Building. About 3 months later, on October 10, 1972, Mrs. Smith was informally assigned WG-2 toilet cleaner duties in the same building. On January 22, 1973, the agency prepared a Standard Form (SF) 52 officially detailing her to such duties for a 60-day period. Several weeks thereafter, Mrs. Smith inquired whether she was entitled to a promotion and was informed by an agency official that President Nixon had, on December 11, 1972, imposed a freeze on hiring and promotions and therefore the agency was unable to promote her. By its terms, the presidential freeze was scheduled to expire when the administration's budget was transmitted to Congress, which occurred on January 29, 1973. However, many agencies, including GSA, retained certain personnel

B-183903

ceiling restrictions in effect past the expiration date of the presidential freeze. The GSA, by memorandum of February 12, 1973, continued the freeze on hiring and promotions, and it was not lifted until April 2, 1973. Two weeks later, on April 16, 1973, the agency prepared a second SF 52 officially detailing Mrs. Smith to WG-2 duties for another 60-day period.

As a result of budgetary constraints, the Acting Commissioner, Public Buildings Service, on August 8, 1973, imposed a total freeze on all Public Buildings Service hiring, promotions, or reassignment personnel actions. The freeze remained in effect until October 1, 1973. Subsequently, on November 11, 1973, Mrs. Smith was promoted to a WG-2 position. Throughout the period from October 10, 1972, until November 11, 1973, Mrs. Smith had performed WG-2 toilet cleaning duties while being paid as a WG-1.

The union presented evidence concerning 13 employees who had been assigned to higher grade positions for periods in excess of 30 days while being paid their regular rate of pay. The evidence also indicated that, frequently, the agency assigned employees to higher grade positions without processing personnel action documents required for an official detail.

III.

The arbitrator focused his attention on Article 27.9 of the agreement concerning allocation of staffing allowances to provide for substitutes to cover absenteeism. This provision was the result of a compromise that the agency and the union had reached during negotiation of the agreement to insure that staffing levels of custodial workers were maintained at about 20 percent above actual manpower requirements to cover absentees. This was intended to alleviate the need to detail workers to higher grade positions. With regard to the issue of whether the agency maintained appropriate staffing allowances as required by Article 27.9, the arbitrator found that the evidence demonstrated a general pattern of manpower shortages. Therefore, he concluded that the excessive detailing to compensate for manpower shortages resulted largely from the failure to maintain proper staffing allowances.

In reference to whether the presidential freeze and the subsequent agency-imposed freeze on hiring and promotions excused the agency

B-183903

from abiding by the provisions of the agreement, the arbitrator noted that under section 12(a) of Executive Order 11491 only regulations and policies subsequently promulgated by "appropriate authorities" may provide such relief. Since "appropriate" is defined to mean an authority outside of the agency, the arbitrator found that the agency-imposed freeze was not issued by an appropriate authority and, therefore, could not serve to excuse the agency from performance under the agreement. Also, although he found that the freeze imposed by the President was issued by an appropriate authority, he interpreted the presidential freeze as being inapplicable to prior commitments contained in collective-bargaining agreements, such as the staffing allowances provision in Article 27.9.

Moreover, the arbitrator found that the agency had on numerous occasions violated Civil Service Commission regulations governing employee details by assigning employees to perform higher grade duties for extended periods and by not officially recording such details. He also found that the agency had not followed competitive procedures in making details as required by Commission regulations.

The arbitrator found that class action relief was appropriate because the 13 employees who testified or were referred to in the record did not exhaust the class of employees adversely affected by the detailing. Further, he noted that class actions have the advantage of avoiding multiple proceedings and of preserving employee rights to obtain relief that might otherwise become barred by time limitations on presenting grievances under the agreement.

Finally, the arbitrator considered the proper remedy for the excessive use of details resulting from the agency's violation of Article 27.9 of the agreement obligating it to maintain staffing at certain prescribed levels. The arbitrator accepted GSA's argument that he could not grant retroactive promotions because such relief would be a violation of the merit system. However, he concluded that he had authority to grant backpay to employees for performing duties of the next higher grade. Therefore, he directed the agency to compensate Annette Smith, who was detailed prior to the freeze, and other similarly situated employees, in an amount equal to the difference in the rate of pay for WG-1 and WG-2 beginning on the 31st day of the detail until it was terminated. He further determined that employees who were first detailed during the presidential freeze were entitled to backpay commencing with the 61st day of their detail or from the end of the freeze period, whichever occurred sooner.

B-183903

In applying this relief, details were to be cumulated to avoid abuse. The arbitrator gave all employees 60 days to file their claims with the agency for backpay. He retained jurisdiction of the case for the purpose of resolving any impasses that might develop in applying the opinion and award.

IV.

In our recent decisions, we have held that a violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974), 54 id. 403 (1974), 54 id. 435 (1974), 54 id. 538 (1974), and B-180010, January 6, 1976, 55 Comp. Gen. 629. The Back Pay Act, 5 U.S.C. § 5596 and Civil Service Commission implementing regulations contained in 5 C.F.R. Part 550, subpart H, are the appropriate statutory and regulatory authorities for compensating an employee for such violations of a negotiated agreement.

However, before any monetary payment may be made under the provisions of 5 U.S.C. § 5596 and backpay regulations, there must be a finding that the withdrawal, reduction, or denial of pay, allowances, or differentials was the clear and direct result of and would not have occurred but for the unjustified or unwarranted personnel action. See 5 C.F.R. § 550.803(a), as amended March 25, 1977, 42 Federal Register 16125. See 54 Comp. Gen. 760, 763 (1975); and B-180010, January 6, 1976, 55 Comp. Gen. 629. Therefore, in order to make a valid award of backpay, it is necessary for the arbitrator to find not only that the negotiated agreement has been violated by the agency, but also that such improper action directly caused the grievants to suffer a loss, reduction or deprivation of pay, allowances, or differentials.

In this case, the arbitrator found that the agency violated the agreement by failing to maintain staffing at prescribed levels which resulted in excessive detailing of employees. Hence, he awarded the employees detailed during the period backpay for performing the higher level duties, but he did not award them retroactive promotions. However, promotion is the sine qua non

B-183903

to entitlement to additional pay, for it is a well-settled legal principle that service by a Government employee in an acting capacity does not entitle him to permanently occupy that position nor to receive the salary incident thereto, since his rights and salary are based solely on the position to which he has been officially appointed. See Bialec v. United States, 197 Ct. Cl. 550 (1972); Ganse v. United States, 180 Ct. Cl. 183, 186 (1967). See also 5 U.S.C. § 5535.

At the time the arbitrator made his award on July 19, 1974, there was no mandatory requirement upon an agency to grant a temporary promotion to an employee for an extended detail to a higher grade position. We so held in our decision 52 Comp. Gen. 920 (1973). Also, there was no such requirement in the collective bargaining agreement. Hence, the arbitrator did not then have the authority to award retroactive promotions in this case. However, after the arbitrator's award was issued, we reversed our holding in 52 Comp. Gen. 920, *supra*, and held in our Turner-Caldwell decision, 55 Comp. Gen. 539 (1975), that employees detailed to higher grade positions for more than 120 days, without prior Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated, provided they are otherwise qualified for such promotions. We affirmed this holding in Reconsideration of Turner-Caldwell, B-183086, March 23, 1977, 56 Comp. Gen. _____. It was made retroactively effective, subject to the statute of limitations on claims, in Marie Grant, 55 Comp. Gen. 785 (1976).

Accordingly, we are of the opinion that the arbitrator's award may be sustained if modified to conform to the requirements of our Turner-Caldwell line of decisions, cited above. Those decisions were issued subsequent to the date of the award and, therefore, were not available to guide and assist the arbitrator in fashioning his remedy.

Annette Smith and the other grievants covered by this award may be given retroactive temporary promotions and backpay consistent with the holdings of our Turner-Caldwell decisions. For example, Annette Smith was detailed to a WG-2 position on October 10, 1972, and no extension of the detail was obtained from the Commission. Thus she became entitled to a temporary promotion to the higher grade position on the 121st day of the detail, which occurred on

B-183903

February 7, 1973. It should be noted that the presidential freeze on promotions, as distinguished from an agency-imposed freeze, would serve to bar any promotions for the duration of such freeze pursuant to section 12(a) of Executive Order 11491, as amended. However, the presidential freeze only covered the period from December 11, 1972, until January 29, 1973, which was well within the initial 120-day period of Annette Smith's detail and thus would not cause her retroactive temporary promotion incident to this award to be delayed.

Arthur Kellum
Deputy Comptroller General
of the United States



Johnnie P. Lupton
Civ. Pers.

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

B-183903

June 22, 1977

Mr. Henry B. Frazier III
Executive Director
Federal Labor Relations Council
1900 E Street, NW.
Washington, D.C. 20415

Dear Mr. Frazier:

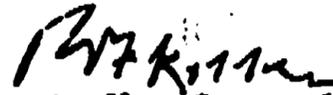
Further reference is made to your letter of May 9, 1975, re: General Services Administration, Region 3 and American Federation of Government Employees, Local 2456, AFL-CIO (Lippman, Arbitrator), FLRC No. 74A-58, which requested a decision as to whether the arbitrator's award of backpay may be implemented.

On September 29, 1976, we advised you that our decision would be delayed pending a review by the Civil Service Commission and this Office of the issue of extended details to higher grade positions.

In Reconsideration of Turner-Caldwell, B-183086, March 23, 1977, 56 Comp. Gen., we affirmed our earlier opinion that employees detailed to higher grade positions for more than 120 days, without Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated.

Enclosed is our decision of today applying the holding of Turner-Caldwell to the arbitration award in this case.

Sincerely yours,


Deputy Comptroller General
of the United States

Enclosure