

DECISION



M. Valpey 11/17/78

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

8186

FILE: B-192366 **DATE:** October 4, 1978

MATTER OF: Regina Taylor -- Arbitration Award of Backpay
for Misassignment to Higher Grade Duties

DIGEST: Agency and Union agreed that issue to be decided by arbitrator was whether there was violation of article of negotiated agreement in assignment of work to employee. Article covered position descriptions and classification of positions. Arbitrator awarded backpay to employee who performed higher level duties for period of 6 months after finding that employee had been "misassigned." Award may not be implemented since there is no authority to allow retroactive compensation for periods of wrongful position classification.

This action is in response to a request by the Federal Labor Relations Council, dated July 7, 1978, for an advance decision as to the legality of implementing the backpay award of an arbitrator in the matter of Naval Air Station Oceana and Local 1835, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 78A-14. The arbitrator found that an employee, Ms. Regina Taylor, performed a substantial amount of higher level duties during a period of approximately 6 months, and he awarded her backpay as a remedy. The case is before the Federal Labor Relations Council as a result of a petition for review filed by the agency (Navy) alleging that the award violates applicable laws and regulations.

FACTS AND ARBITRATOR'S AWARD

The facts in this case, as presented in the arbitrator's opinion and award dated December 20, 1977, are as follows. The grievant, Ms. Regina Taylor, was hired by the Naval Air Station Oceana as an Accounts Maintenance Clerk, grade GS-3, on July 2, 1974. Ms. Taylor filed a grievance on November 10, 1976, alleging, among other things, that she was compelled

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to perform the duties of a higher graded position, that of Budget Clerk, grade GS-4, during the period from August 28, 1975, through February 29, 1976. It appears that on the latter date the grievant was promoted to a different position, that of Accounts Maintenance Clerk, grade GS-4. The grievant sought retroactive compensation for the period she was performing the higher level duties.

The arbitrator found that while the grievant occupied a grade GS-3 position during the period in question she performed "a substantial amount of the duties described" in the grade GS-4 job description. He then turned to the grievant's allegation that such action by the agency constituted a "misassignment." Under local agency regulations, a "misassignment" is defined as follows:

"A misassignment occurs when an employee is required to perform duties not covered by the official description or definition of his position or rating for periods of time in excess of those authorized in this Instruction. Misassignments are contrary to law and Civil Service regulations and are prohibited."
NAS Oceana Instruction 12340.1A, April 18, 1968.

The arbitrator then concluded as follows (Opinion, pp. 9-10):

"The grievant was required to perform duties not covered by her job description. Her case falls squarely within the Activity's definition of misassignment.* * *

"While compelling an employee to temporarily perform duties outside the scope of her position description, without additional compensation, to meet an emergency or the needs of work programs when necessary services cannot be obtained by other desirable or practical means, such was not the case in this instance. The Grievant performed the duties of the higher grade over a long period of time and there was no showing that it was for emergency or other reasons set forth in the NAS Oceana Instruction 12340.1A.

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"After careful consideration of the evidence adduced at the hearing and the exhibits introduced therein, I find that the Grievant from August 28, 1975, to February 29, 1976, was required to and did actually perform a substantial amount of the duties of a GS-4. This action by the Activity was improper and caused the employee to suffer a denial of compensation for such additional duties.

"If this was a dispute in the private sector, an award for back pay could be properly ordered. However, in the Federal sector the implementation of any back pay award must comply with the provisions of the Back Pay Act of 1966 and the implementing regulations including the decisions of the Comptroller General.

"Simple equity, however, calls for compensation provided the Activity can obtain the necessary authorization from the Comptroller General or other appropriate agency to pay it."

DISCUSSION

On appeal to the Federal Labor Relations Council, the agency argues that while many of the elements of a detail are present, the arbitrator has not determined that there was a detail and has not found that there was an unjustified or unwarranted personnel action which, but for the action, would have resulted in higher compensation for the grievant. The agency contends, moreover, that the arbitrator's finding was one of a misassignment, the remedy for which is a classification appeal as provided in Chapter 51 of title 5, United States Code, and the implementing regulations contained in 5 C.F.R. §§ 511.601 et seq. In this connection the agency and the union agreed that the issue to be decided by the arbitrator was whether Article XV of the negotiated agreement was violated in the assignment of work to Ms. Taylor. That article covers position descriptions and classification of positions.

Our Office has held that the violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay,

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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. See Annette Smith, et al., 56 Comp. Gen. 732 (1977), and decisions cited therein. The Back Pay Act, 5 U.S.C. § 5596 (1976), and the implementing Civil Service Commission regulations contained in 5 C.F.R. Part 550, Subpart H (1978), are the appropriate authorities for compensating employees for such violations of a negotiated agreement assuming there is a finding that the denial or loss of pay or allowances is a result of and would not have occurred but for the unjustified or unwarranted personnel action. Annette Smith, supra.

In the present case the arbitrator linked the performance of higher level duties to the agency regulation concerning misassignments (quoted above) and, therefore, concluded that the grievant had been improperly denied higher compensation. However, as the agency has pointed out, neither the agency regulation nor the appropriate provision in the negotiated agreement concerning position descriptions (Article XV) provide for retroactive compensation for what is essentially a classification action. In this regard, the United States Supreme Court held, in United States v. Testan, et al., 424 U.S. 392 (1976) that neither the Classification Act (5 U.S.C. §§ 5105 et seq.) nor the Back Pay Act creates a substantive right to backpay for a period of wrongful position classification. The decisions of this Office, consistent with Testan, have held that classification actions upgrading a position may not be made retroactive and that an employee is not entitled to the salary of a higher level position until such time as he is promoted to that position. See Dee R. Geddes, B-191153, May 15, 1978; Russell Swain, B-191360, May 10, 1978, and decisions cited therein. Under the rule of Testan, notwithstanding the arbitrator's finding of a violation of the negotiated agreement dealing with classification and position descriptions (Article XV), that violation does not provide a basis for retroactive pay.

While the facts in the present case might lead one to the conclusion that the grievant had been detailed to the higher level position without the benefit of a temporary promotion, two elements essential to an award of backpay under those

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circumstances are missing. First, there is no evidence of acceptable proof to substantiate the detail such as official documents, written statements from supervisors or knowledgeable management officials, or a decision under established grievance procedures. See Federal Personnel Manual Bulletin No. 300-40, May 25, 1977. The arbitrator has not found that the grievant was detailed to the higher level position, but rather that she was misassigned. Secondly, there has been no finding that the mandatory provision in the negotiated agreement regarding details (Article XIX) has been violated. Instead, as noted above, the parties agreed prior to arbitration that the issue to be decided was whether there had been a violation of Article XV of the negotiated agreement dealing with position descriptions and classifications.

Accordingly, the arbitrator's award may not be implemented.

R. G. K. 11/11/77
Deputy Comptroller General
of the United States