DECISION

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

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FILE: B-181223 DATE: APR 30 1976

MATTER OF: Air Traffic Controllers - Retroactive position classification - Agency suspension of allocation activity

DIGEST: Agency suspended classification allocations of air traffic controller positions from September 12, 1973, to July 7, 1974. There is no authority to effect promotions retroactively that would have occurred but for such suspension.

This action involves a request for a Comptroller General ruling on entitlement of certain air traffic controllers employed by the Federal Aviation Administration (FAA) to have their promotions in grade effected retroactively incident to the classification of their positions.

The General Counsel for the petitioner--Professional Air Traffic Controllers Organization (PATCO)--states that it is the duly certified exclusive bargaining representative for the subject employees. The request was the subject matter of two prior communications from this Office on March 13, 1975, and April 23, 1975, to PATCO in response to its letters of September 26, 1974; January 17, 1975; and March 17, 1975.

In the letter of September 26, 1974, it was stated that PATCO had filed a legal proceeding in 1970 against the FAA and the Civil Service Commission (CSC) in which it was alleged that the classification guidelines of the FAA and the classification standards of the CSC were illegal because, inter alia, they caused and permitted the establishment of grade levels for controllers based solely on the volume of traffic handled by the facility in which the individual worked. PATCO stated that the matter had not been brought to trial, nor the legal issues adjudicated, and the matter is still pending before the court. Additionally, it was stated that on or about July 7, 1973, the controllers employed at the FAA facility, Oakland Center, began receiving notices to the effect that they would be demoted to a lower grade level because of "the decrease in air activity" at Oakland. PATCO sought and obtained injunctive relief against these demotions.

In pertinent part the PATCO letter of September 26, 1974, reads as follows:

"Subsequent to the Oakland injunction, on September 12, 1973, the FAA unilaterally and without notice to PATCO issued a directive to all Regional and field offices which ordered that action on level changes, either upgrades or downgrades, be withheld pending an agency 'evaluation' of 'procedures.' A copy of said directive is attached hereto as Exhibit 3. At that time, there were several facilities, employing hundreds of controllers, ready to be upgraded under applicable FAA guidelines. The directive had the effect of barring these upgrades.

"As soon as the directive was made public, PATCO and/or the controllers affected appealed to the Civil Service Commission and asked the Commission to order the FAA to upgrade the facilities, on a theory that the FAA had no right or authority to withhold such upgrades.

"While these appeals were still pending before the CSC, the FAA did an 'about face,' on the upgrades. On June 28, 1974, the FAA issued a 'Guideline on determining proper grade levels of Air Traffic Control Specialist Position.' On the same date, James Dow of the FAA issued a telegraphic message to all regional and center directors, except Oakland Center, that 'regions may now again take action to change facility levels.' A copy of each of these documents is attached hereto as Exhibits 4 and 5. It is noted that the effective date of the upgrades is July 7, 1974, and not a date retroactive to when the facilities would have otherwise been upgraded and the resultant promotions affected.

"As a consequence of the FAA's reversal of position on the upgrades, the CSC did not render decisions on these appeals. The CSC took the position that the FAA's decision to upgrade 'cancelled your appeal.' A copy of one such CSC letter is attached hereto as Exhibit 6*."

The Federal Aviation Administration denied PATCO's request to effect the subject upgradings retroactively. PATCO's position is that:

"* * * there is no legal bar to effecting the upgrades and the related grade level changes, promotions, salary increases, and other employment benefits, retroactive to the date the respective facilities would have been upgraded but for the action of the FAA withholding grade level changes pending its 'evaluation' of its classification procedures."

In our letters of March 13 and April 23, 1975, we advised PATCO that it was not our policy to render decisions in cases where the Government is involved, when the issues in question are under consideration by the court. In response to PATCO's letter of April 25, 1975, to reconsider our position and render a decision on its request, we felt it essential to obtain administrative reports from both FAA and CSC to clarify which matters are still in controversy. Reports were received from FAA on June 23, 1975, and from CSC on March 3, 1976.

The Federal Aviation Administration in its report states in pertinent part as follows:

"Position regradings would not have occurred during the period between September 12, 1973, and July 7, 1974, based solely on volume of air traffic, had there been no suspension of allocation action. The GS-2152-0 Position Classification Standard for the Air Traffic Controller series, which was issued by the U.S. Civil Service Commission, distinguishes grades among the positions of controllers on the basis of the total work situation. Volume of air traffic handled by an installation is but one classification consideration. Highly significant in the classification process are various complexity elements which are considered along with the volume of air traffic.

"FAA had no reasonable alternative other than to prohibit acting on facility level changes during the suspension period due to the August 9, 1973, court injunction issued for the Oakland Air Route Traffic Control Center. That injunction challenged our entire classification system used to determine the levels of air traffic control specialists. It was,

therefore, inappropriate to act upon facility level grade changes, either up or down, until we were assured that such actions could be accomplished without any further questions as to the propriety of the classification system. Our suspension was necessary in order to evaluate our procedures in documenting air traffic control upgradings and downgradings. The agency believes that the suspension was totally valid.

"We are unable to determine whether position upgradings would have occurred during the suspension period. No complexity evaluations for the purpose of facility level changes were conducted pending the issuance of guidelines. Therefore, it is not possible to determine the grade change and date for each position at issue that would have occurred but for the suspension. A guide on determining proper grade level of air traffic control specialist positions was issued by FAA Headquarters to our field offices on June 28, 1974, a copy of which is enclosed, which outlined factors to consider in analyzing, evaluating, and documenting complexity considerations prior to implementing grade level changes. Very soon after the development and issuance of the guide (July 7, 1974), facility level changes were implemented where appropriate."

The Federal Aviation Administration could see no basis for retroactive promotion. It cited 52 Comp. Gen. 631 (1973). That decision held that FAA acted properly in not making delayed promotions of developmental controllers retroactively effective to the dates when the controllers satisfied promotion criteria where the delay occurred as a result of the President's December 11, 1972 freeze on hirings and promotions.

The Civil Service Commission in its report, in pertinent part, states as follows:

"At the outset it must be stressed that there is no requirement in statute or regulation that either the employing agency or the Civil Service Commission initiate classification action concerning a particular

position at any specific point in time. Moreover, the mere existence of a Commission or agency classification standard is clearly not a basis for an obligatory classification action at the moment the duties of the job in question meet the criteria of the standard for a higher grade. Management, of course, must cope with administrative imperatives that intrude themselves in the course of its operations. And, factors of this sort may, as was apparently the case here, cause an agency temporarily to suspend its own initiation of classification actions.

"At the same time, however, such a decision by the agency would in no way affect the employee's right to challenge the propriety of his or her classification at any point in time. That is, while there is no obligation that the agency initiate classification upgradings (or downgradings) upon the occurrence of specified events (e.g., a position's accrual of specified duties and responsibilities), the employee may compel attention to the question by invoking the classification review mechanism which has been established for that purpose. In other words, the employee has a right to initiate the classification review process, and this right cannot be diminished by an agency's decision to suspend its own initiation of such action.

"This right on the part of the employee is made clear by Commission regulations which provide at 5 CFR § 511.605 that '(a)n employee * * * may submit a classification appeal at any time' (emphasis added).

"In addressing the question which PATCO has presented for your consideration, one point should be kept in mind. First, while FAA had no obligation to reclassify positions during the period of the suspension, the affected employees did have the right to cause a review of their respective positions through the mechanism of a classification appeal under 5 CFR § 511.605.

"However, as reference to sections 511.605, 511.702 and 511.703 discloses, the benefit of retroactivity may

be sought only in instances of downgrading or loss of pay. In short, the concept of retroactivity does not apply to employees' appeals from their agency's failure to promote them.

"As pointed out in the decision at 39 Comp. Gen. 583 (1960) at page 585, '[the Comptroller General has held] -- in a case not involving correction of an erroneous downgrading -- that when a position classification is raised there is involved not only a change in the classification of the position but a promotion of the incumbent of the position if he otherwise is qualified for promotion to the higher grade and continues to occupy the position. However, in such a case the promotion may be made effective only from the date of administrative action. See 35 Comp. Gen. 153.'

"The materials we have reviewed make it clear that a number of controllers who found themselves affected by the suspension did exercise their classification appeal rights. As it turned out, these appeals did not reach the decision stage because the appellate office in effect found the appeals 'moot' in view of FAA's assurance that the upgrading would be effectuated. (For example, the Commission's letter of July 3, 1974 to Mr. Livesey, Exhibit 6 submitted by Mr. Peer of PATCO and presumably typical of the letters received by all of the air traffic controllers who appealed to the Commission, states that the appeal requesting upgrading was being cancelled on the ground that FAA had informed the Commission of its intent to promote the individuals involved.)

"To be sure, since the promotions were effected as promised, the concern is no longer with the upgrading but, rather, with the question whether those promotions may be given a retroactive effective date. Nevertheless, the appeals were correctly cancelled because the issue of the promotions became truly moot upon FAA's initiation of action to effectuate them, for the appeals could not form a predicate for granting retroactivity or mark a date from which to measure retroactivity, and the appellate office could do nothing of greater benefit to the

appellants than their agency would. Section 511.702 of the Commission's regulations, 5 CFR § 511.702, specifically, at the time of the filing of the appeals read:

> 'Subject to § 511.703 [limited to downgrading or loss of pay] the effective date of a change in the classification of a position resulting from an appeal to either an agency or the Commission is not earlier than the date of decision on the appeal and not later than the beginning of the fourth pay period following the date of decision, unless a subsequent date is specifically stated in the decision by the agency or the Commission.'

"* * * There is a well known principle, for application here, that an employee is entitled only to the compensation of the position to which he has been appointed, regardless of any extra duties or responsibilities which he undertakes. Hence, in no event would the upgradings which FAA later effectuated 'reach back' to the date upon which the employees filed their appeals. The appeals were correctly cancelled in recognition of that principle.

"For the same reasons, those employees who did not appeal, but whose positions were, nevertheless, subsequently upgraded, and were themselves promoted, likewise have no valid claim to retroactivity. Hence, they have not 'lost out' on any rights, privileges or benefits which might be accorded to those employees who did appeal the imposition of the moratorium.

"It appears that the decision to forego use of the classification appeals procedure was a conscious one which was apparently made for tactical reasons. Union officials were apprised at the time of the suspension that the classification issues raised by the suspension could be

dealt with through the appeals process, and were further advised that if they wished to avail themselves of this opportunity they should do so in a timely manner. It appears that on advice of PATCO, a large number of controllers decided to eschew the Commission's procedures and endeavor to gain an advantage it apparently perceived it would have at the General Accounting Office. As it turns out, if well settled principles are properly applied, there is no advantage to be gained by the tactic. * * *"

Our decisions are consistent with the above discussion, for example, in 55 Comp. Gen. 515 (1975) we stated at 516 in pertinent part as follows:

"The classification of positions in the Government is governed by the Classification Act of 1949, as amended, 5 U.S.C. §§ 5101-5115. Section 5107 of title 5 directs each agency to classify its positions in accordance with the Civil Service Commission's published standards and, when warranted, to change a position from one class or grade to another class or grade. The Civil Service Commission is given authority under section 5110 to review the classification of positions and to require changes by a certificate which is binding on the agency and on the General Accounting Office. The Commission is empowered to prescribe regulations by section 5115.

"The Commission's regulations for position classification under the Act are set out in part 511 of title 5 of the Code of Federal Regulations, and 5 C.F.R. § 511.701 (1975), states that '[t]he effective date of a classification action taken by an agency is the date the action is approved in the agency or a subsequent date specifically stated.' With respect to appeals within an agency, 5 C.F.R. § 511.702 states that the effective date of a change in classification resulting from an appeal 'is not earlier than the date of decision on the appeal and not later than the beginning of the fourth pay period following the date of the decision* * *.' These regulations are

amplified in Federal Personnel Manual chapter 511, § 7-1a, which flatly states that '[an] agency may not make the [classification] action retroactively.' See also FPM chapter 531, § 2-7(a); Dianish v. United States, 183 Ct. Cl. 702, 707-709 (1968). The only provision for a retroactive effective date in a classification action is when there is a timely appeal from classification action which resulted in a loss of pay and on appeal the prior decision is reversed at least in part. See 5 C.F.R. § 511.703.

"The general rule is that an employee is entitled only to the salary of the position to which actually appointed, regardless of the duties performed. Thus, in a reclassification situation, an employee who is performing duties of a grade level higher than the position to which he is appointed is not entitled to the salary of the higher level position unless and until the position is classified to the higher grade and he is promoted to it. B-180056, May 28, 1974."

The Supreme Court in a recent decision, United States v. Testan, 44 U.S.L.W. 4245 (March 2, 1976), held that neither the Classification Act (5 U.S.C. § 5101, et seq. (1970)), nor the Back Pay Act (5 U.S.C. § 5596 (1970)), creates a substantive right to backpay for claimed wrongful classifications.

On review of the record we find no basis that would permit effecting retroactively the promotions in grade that occurred after the suspension period of the subject controllers.

R. F. Keller

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of the United States