

Pd 1-11

21 APR 1959

STATINTL



As we indicated in our 18 March letter, we have made a careful study of your letter of 11 March in which you make claim for additional salary payments. Since the problem is essentially legal in nature, we referred it to the Agency's lawyers, and after their research they reported to us as follows:

There is a considerable body of law on the problem you raise. Apparently, this establishes the principle that an employee of the Federal Government is entitled only to the salary of the position to which he is appointed regardless of the duties actually performed. The appointment is conclusively established by the personnel action not by the slot or Table of Organization position in which the employee may be placed.

The personnel records show that your appointment to a grade GS-16 position continued in effect until your resignation on 4 March 1959. We are bound by the record, therefore, and can consider only the pay authorized for a grade GS-16.

As you know, in administrative matters of this sort common to Government generally, we are in no different position from other Government agencies and have no authority to make exceptions to the general rule. Consequently, we are unable to consider making any additional payments in your case. Should you feel that you cannot take our position as final and want to go to the General Accounting Office to pursue your claim, we would be glad to make our records available to GAO for its consideration. I regret to say, however, that the Agency's position is that your claim must be denied.

OGC:LRH:jeb
Orig & lcc-Addressee
lcc-Comptroller
lcc-Director of Personnel

Very truly yours,

lcc-Subject's Personnel file w/ background Gordon M. Stewart

lcc-C/SWD/Personnel

lcc-General Counsel

Pd 1-11

STATINTL




This is to acknowledge our receipt of your letter of 11 March 1959 in which you make claim for additional salary payments. This matter is under study and we shall advise you when a decision has been made.

Very truly yours,

Gordon M. Stewart
Gordon M. Stewart
Director of Personnel


Distribution:

- Orig. - Addressee
- 1 - Resignee File.
- 1 -  OGC ✓
- 1 - C/SWD/OF
- 1 - D/Pers Reader/Chrono

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OD/Pers/  (17 Mar 59)

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**CENTRAL INTELLIGENCE AGENCY
OFFICIAL ROUTING SLIP**

TO	NAME AND ADDRESS	INITIALS	DATE
1	Director of Personnel		
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Remarks:
 Gordon: An earlier note in the file indicates that the General Accounting Office says they would have to turn the claim down. However, our latest information is that there is at least a possibility that if submitted to them they could approve the claim.

LRHouston

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FROM: NAME, ADDRESS AND PHONE NO.	DATE
General Counsel 221 East	4/17/59

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28 May 1959

MEMORANDUM FOR: Mr. Houston

SUBJECT: Claim of [redacted]

REFERENCE: Memorandum for the Record, dated 10 April 1959, same subject

1. On 11 May, at this Office, [redacted] a former employee, discussed the rejection of his claim for the difference between a GS-16's salary, which he received from December 1951 to the date of his resignation, and a GS-17's and GS-18's salary to which he believes he is successively entitled for the period from November 1953 to the date of his resignation last March. [redacted] presented his arguments in which he cited authorities which he believed supported his claim. His case has been restudied in the light of his arguments. The conclusion, however, remains the same, and it is recommended that [redacted] should be notified that no adequate basis has been established upon which to allow his claim.

2. [redacted] said that he was pressing his claim within the Agency rather than going to GAO at this time even though the claim, as first submitted to this Agency, was denied. He felt that if he presented his claim with all of the surrounding facts to GAO it might cause an inquiry to be made by GAO into Agency personnel policies and practices. Furthermore, he continued, this could start an inquiry by congressional "Civil Service Committees seeking an accounting by Mr. Dulles of his stewardship of CIA's personnel."

3. He requested a further review of his case, looking toward a determination by the Agency in his favor. If his claim should again be denied, he requested a stipulation of the facts and questions in his case for presentation to GAO so that, according to [redacted] opportunities for criticism of the Agency would be minimal.

4. Several contentions were emphasized by [redacted] during his visit: (1) the duties performed by him were not those of the position to which he was appointed; (2) he was not detailed to the position the duties of which he had performed; (3) the duties he performed were covered by GS-17 and GS-18 positions which had been set up prior to his performance of those duties; (4) the "Personnel Journal" to which he does not have access may

show that he was actually appointed to the GS-17 and GS-18 positions; (5) if not, he was constructively appointed to those positions; (6) opinions of the Comptroller General show that positions established and appointment to those positions are two separate acts, both of which appear in and are applicable to his case; and (7) regulations governing appointment to a position must be followed by the Agency according to the Service case.

5. Because the Agency's personnel records probably would govern in a determination of an employee's pay status, a chronological list of Personnel Actions pertaining to [redacted] is presented as follows:

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1. Personnel Action Request - Excepted Appointment, Intelligence Officer (Chief, Standards and Techniques Staff, OPC, GS-15), approved 7 September 1950.

2. Entrance on Duty Record, 13 September 1950.

3. Personnel Action Request - Promotion, To Admin. Officer - Logistics (Deputy Chief, Admin. and Logistics Staff) OPC, GS-16, approved 21 December 1951.

4. Request for Personnel Action - Reassignment, To IO (Chief) GS-16-132, DDP/PPC Program Coordination Group, approved 15 January 1953.

5. Request for Personnel Action - Reassignment, To IO (Deputy Chief) GS-132-16, Planning and Program Coordination Staff, Office of the Chief, approved 22 November 1953.

6. Request for Personnel Action - Reassignment, To Ops. Officer (gen.) GS-0136.06-16, Planning and Program Coordination Staff, Office of the Chief, no date of approval.

7. Request for Personnel Action - Reassignment, To Ops. Officer (gen.) (Assistant Chief) GS-0136.06-16, DDP/PPC Staff, approved 12 September 1954.

8. Request for Personnel Action - Reassignment, To Ops. Officer (gen.) (Staff Chief) GS-0136.06, GS-16, no date of approval.

6. During our discussion, [redacted] cited three Comptroller General opinions, a Court of Claims case and a statute which are listed below together with our comments on their relevancy.

25X1

a. 30 Comp. Gen. 94 (29 August 1950)

This opinion involved a blue collar employee who through an error on a personnel form was paid at a rate below that to which he was entitled. The Comptroller General found that the employee could be paid to correct the error. [redacted] depends on the following part of the opinion: "The general rule is that where an incumbent of a position performs the duties thereof and is otherwise qualified to

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hold such a position he is entitled to the salary established for the position, and when, through administrative error, he is not paid the lawful salary attaching thereto, a future payment of an amount to correct the error retroactively is not to be regarded as a retroactive promotion such as ordinarily is prohibited by law." In [redacted] case, as can be seen from the record of personnel actions, there was no administrative error and the salary claimed could only be obtained if the Director in fact made an appointment to the GS-17 and GS-18 grades.

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b. 24 Comp. Gen. 518 (12 January 1945)

[redacted] cited this opinion as authority for the proposition that there is a distinction between the classification of a position and the appointment to it. It is pointed out in this opinion that an employee who does not meet certain qualifications (minimum time in grade) then the salary may not be paid at the rate allocated to the position. This case involved an employee whose position was reallocated to a higher grade but he did not meet the minimum time-in-grade requirement. [redacted] argues, on the basis of this opinion, that there was a position already allocated and he was assigned the duties of that position permanently, he was not assigned on temporary detail. Therefore, it is his contention that he was constructively appointed to those positions; and he was permanently assigned the duties of first the GS-17 and then the GS-18 positions. His argument flies in the face of the general rule established by Comptroller General opinions and Court of Claims decisions that "a federal employee is entitled only to the compensation of the position to which he is properly appointed, regardless of the duties and responsibilities assigned to him" (B-117680, dated 4 January 1954). (Price v United States, 80 F. Supp. and cases cited therein.)

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c. 33 Comp. Gen. 96 (28 August 1953)

Quoting from 32 Comp. Gen. 381: ". . . the assignment of an employee to occupy and perform the duties of a position classified in one grade while his salary is fixed in that of a position classified in a lower grade, appears to be contrary to the provision of the Classification Act of 1949 . . . which contemplates that employees shall receive the salary provided for the grade in which the position they occupy and perform the duties of has been classified." 33 Comp. Gen. 96 goes on to say that the above statement "relates only to situations where an officer otherwise is properly placed in a position by the appointing authorities pursuant to law." In his case, [redacted] was not "properly placed" in a GS-17 or GS-18 position by the appointing authority which appears to be the Director [redacted] paragraph 5a(5).)

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d. 135 C. Cls. 890 (1956)

Gorman L. Schaible, et al v. United States

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In a suit for salary it was decided that a group of customs inspectors were entitled to extra compensation for extra duty performed.

25X1 [redacted] apparently depends on one paragraph in the case, page 898: "The clear weight of authority and the better reasoning favor the view that full statutory compensation of public employees is mandatory, on grounds of public policy. Any suggestion of barter and trade in public employment is thereby eliminated. In order to make certain of this result, protection is afforded against the pardonable, and even commendable zeal of administrative officials in the application of statutory standards through regulations, if as a matter of law their sights were set too low. For these reasons, doctrines of waiver and estoppel have no application in situations such as here are under consideration." This case, of course, is completely distinguishable on its facts from one in which compensation is sought for a position which an employee occupies but for which he is not paid a designated salary. Even out of context, however, it is distinguishable from

25X1 [redacted] case because in his situation there was a valid appointment to a GS-16 position and he was fully compensated for that position even when reassigned. Furthermore, there was no barter and trade and no question of application of statutory standards through regulations.

e. 5 U.S.C. 38 - Details of officers, employees, or clerks within department

"Each head of a department may, from time to time, alter the distribution among the various bureaus and offices of his department, of the clerks and other employees allowed by law, except such clerks or employees as may be required by law to be exclusively engaged upon some specific work, as he may find it necessary and proper to do, but all details hereunder shall be made by written order of the head of the department, and in no case be for a period of time exceeding one hundred and twenty days. Details so made may, on expiration, be renewed from time to time by written order of the head of the department, in each particular case, for periods of not exceeding one hundred and twenty days." By this statute, Congress contemplated "the head of a department" altering the distribution of employees among the offices and bureaus of a department. Furthermore, this Agency has, under section 8a of the CIA Act of 1949, broad authority in personnel matters which suggests that the above statute is inapplicable to Agency positions. Chapter X-1, section 9, of the Federal Personnel Manual appears to implement the above statute. Under "Coverage" the following appears: "This section applies to details within an agency of employees who are appointed under the Civil Service Act or who are serving in positions subject to the Classification Act of 1949." Since this Agency's positions are outside the Civil Service Act and Classification Act of 1949, the provisions on details included in the Federal Personnel Manual would not apply to this Agency and consequently it is argued that the statute above also does not apply. In any event, it is difficult to equate this statute with [redacted] claim for back pay.

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7. According to information furnished by the Wage and Salary Division, Office of Personnel, the practice of this Agency has been, for all grades, to assign personnel to positions with a grade higher than that held by the employee assigned when deemed desirable by the supervisor. While there is some question as to whether [redacted] applies to super-STATINTL grades, it contains the only regulatory statement on the Agency policy in this regard. Paragraph 2f of the regulation contains the following statement:

"Normally, individuals will occupy positions which correspond in grade to their grade after promotion. However, they may occupy positions higher in grade than their grade after promotion, when necessary; or they may be promoted under competitive evaluation procedures and occupy a position lower in grade than their grade after promotion when it is necessary in the best interests of the Agency that they be retained in or assigned to such a position in a personal rank assignment status."

8. An unpublished opinion of the Comptroller General, B-137849, dated 29 January 1959, suggests the argument that there is some responsibility in an employee to point out that his position is not properly allocated or classified. That part of the opinion which is pertinent reads:

"There is nothing in the record to show that either you or your supervisor protested the position allocation or expressed any opinion that such position was improperly classified during the period for which additional compensation is claimed. Moreover, it is reported that your job description sheet was reviewed in 1954, at which time it was concluded that no change was justified."

9. [redacted] was assigned to positions which had allocated to them grades GS-17 and GS-18. He was proposed for promotion but it was not acted upon. The Agency was aware of his situation but chose not to promote him. In these circumstances and in the light of Comptroller General opinions and decisions of the Court of Claims, the following rule would apply: "One who holds office is entitled to no more than the salary of the office to which he was appointed, whether or not he performs the duties of an office of higher grade." (George L. Coleman v. United States, 100 C. Cls. 41 and cases there cited.) Accordingly, it is recommended that [redacted] be informed that this Office has reviewed his claim and has found no adequate basis for a determination in his favor. Of course, the way is still open for him to pursue his claim with the General Accounting Office and perhaps the Court of Claims.

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[redacted signature box]

Office of General Counsel

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Signer
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