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Mr. Pool

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GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-196116 (RCP)

DEC 3 1979

Mr. Robert N. Baker
Assistant Staff Director for
Administration
Federal Election Commission 261
Washington, D.C. 20463

Dear Mr. Baker:

Further reference is made to your letter dated September 19, 1979, concerning the propriety of retroactive promotion in the case of Mr. Paul R. Reyes.

In view of statutory and regulatory provisions relating to our decision making authority, formal rulings and decisions of the Comptroller General are usually rendered only to heads of departments and agencies, disbursing and certifying officers, or to claimants who have filed monetary claims with our Office. See 31 U.S.C. §§ 74 and 82(d) (1976). Although we may not render a decision in response to your letter, the following information is provided for your assistance. If Mr. Reyes wishes to file a claim concerning this matter, it should be addressed to the Director, Claims Division, U.S. General Accounting Office, Washington, D.C. 20548. See 4 C.F.R. §§ 31.2, et seq. Consideration of his claim will be expedited if it is first filed with the FEC so it can be forwarded along with the administrative report required for adjudication.

You explain that Mr. Reyes was hired by the Federal Election Commission (FEC) as a temporary Public Information Clerk (GS-5 1001) in the FEC's Office of Public Records effective August 7, 1978. On October 8, 1978, Mr. Reyes was assigned to a position in the Office of Public Communications as a Public Information Specialist (Trainee at GS-5 1081). At that time Mr. Reyes was advised by agency officials that he would be eligible for promotion to a GS-7 level within 6 months from the date (October 8, 1978) he entered Public Communications provided he successfully completed the training program. Subsequently, when Mr. Reyes' supervisor inquired concerning his potential for promotion at the end of 6 months, it was discovered that the training program in which Mr. Reyes was performing had in fact been discontinued in the Public Communications section effective December 19, 1977. On August 12, 1979, Mr. Reyes was promoted to the GS-7 level. Mr. Reyes has since requested that this promotion be made retroactive to April 8,



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1979, the date on which he successfully completed 6 months as a Public Information Specialist Trainee.

The enclosures forwarded with your correspondence include a memorandum from the Staff Director to Assistant Staff Directors and the General Counsel, FEC, dated March 13, 1978, which states as follows in regard to training program promotions:

"This is to advise that December 19, 1977, was the date on which the staff was verbally notified by this Office of a suspension of automatic promotions from GS-5 to GS-7 after six months training. Any commitments made prior to that date will be honored but personnel hired after that date must meet the basic Whitten requirement of one year in-grade."

The time-in-grade restrictions on promotions imposed by the Whitten Amendment (section 1310 of the Act of November 1, 1951, as amended, printed as a note following 5 U.S.C. § 3101 (1976)) were terminated on September 14, 1978, by section 101 of the National Emergencies Act, Pub. L. 94-412, September 14, 1976, 90 Stat. 1255. However, the time-in-grade requirements in Part 300, Subpart F, of the Civil Service Commission's (now Office of Personnel Management) regulations are based not on the Whitten Amendment, but rather on the authority granted to the Office of Personnel Management to administer the civil service. These time-in-grade restrictions continue to apply to any advancement by promotion from a competitive position that is subject to the General Schedule to a competitive position that is subject to the General Schedule.

We have long held that the effective date of salary changes resulting from administrative action exclusively is the date the action is taken by the administrative officer vested with the proper authority, or a subsequent date specifically fixed. 21 Comp. Gen. 95 (1941). The general rule then is that a personnel action may not be made retroactively effective so as to increase the right of an employee to compensation. 40 Comp. Gen. 207 (1960). There are however, certain limited exceptions to this general rule. Where an administrative or clerical error has prevented a personnel action from taking effect as originally intended, denied an employee of a right granted by statute or regulations, or resulted in the failure to carry out a nondiscretionary administrative regulation or policy, a retroactive personnel action may be processed. In those instances,

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failure to process the personnel action in a timely manner constitutes an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1976). 58 Comp. Gen. 59 (1978).

The Staff Director's memorandum quoted above, indicates that FEC had a policy to promote from GS-5 to GS-7 after 6 months of training. While it is not clear whether such a policy was discretionary or in fact amounted to a nondiscretionary administrative regulation, it appears to be inapplicable to Mr. Reyes' case because it was suspended effective December 19, 1977, more than 10 months before Mr. Reyes was assigned to the training position.

Your letter does not indicate that Mr. Reyes was entitled to be promoted at a specific time. While a trainee in a similar position may have been eligible for promotion from GS-5 to GS-7 upon the successful completion of 6 months training prior to December 19, 1977, or perhaps even if the position commitment had been made prior to December 19, 1977, no agency regulation or policy would appear to have required Mr. Reyes promotion effective April 8, 1979. Thus, the general rule would appear to apply that an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947) and 40 id. 207, supra.

It appears that Mr. Reyes may have been erroneously advised that he would receive a promotion to the GS-7 level upon successful completion of the 6 months training assignment when in fact the agency's policy in that regard had been suspended. In this regard it is a well settled rule of law that the Government cannot be bound beyond the actual authority conferred upon its agents by statute or by regulations, and this is so even though the agent may have been unaware of the limitations on his authority. See 54 Comp. Gen. 747 (1975), and 56 id. 131 (1976).

Sincerely yours,

~~Robert L. Higgins~~

Robert L. Higgins
Assistant General Counsel

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DIGEST

Employee of Federal Election Commission was appointed to GS-5 level trainee position on October 8, 1978, and advised that upon successful completion of 6 months training program he would automatically be promoted to GS-7 level. However, agency policy in regard to such promotions was suspended effective December 19, 1977. Thus, time-in-grade requirements in Part 300, Subpart F, of Civil Service Commission regulations are applicable and, absent circumstances not present here, general rule applies that personnel action may not be made retroactively effective so as to increase the right of employees to compensation in absence of statute so providing.