

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

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FILE: B-182565

DATE: MAY 29 1975

MATTER OF: William Scott - Retroactive promotion

DIGEST: Grievance examiner's recommendation that deputy marshal be awarded retroactive promotion may not be effected even though grievance examiner found improper evaluation of deputy marshal's abilities led to his not being promoted since promotion is a discretionary function of the agency and retroactive promotion is allowed only where there is a violation of a nondiscretionary function or duty and there was no such violation. The fact that other employees similarly situated were promoted does not serve as justification for retroactively promoting the deputy marshal since employees are not entitled to identical treatment in promotion actions.

This action is in response to a request for an advance decision from Mr. Glen E. Pommerening, Assistant Attorney General for Administration, Department of Justice, concerning the propriety of granting retroactive pay to Deputy United States Marshal William Scott, United States Marshals Service, Southern District of New York, pursuant to a grievance examiner's recommendations.

The record shows that on March 22, 1970, Mr. Scott began his employment with the Bureau of Prisons, Department of Justice, as a Correctional Officer, GS-6, step 1. On November 16, 1970, Mr. Scott transferred to the United States Marshals Service at the same grade level. Mr. Scott received within grade increases on March 22, 1971, to GS-6, step 2, and on March 22, 1972, to GS-6, step 3. Mr. Scott was subsequently promoted to the GS-7 level on December 10, 1972. It appears that from July 1971 to May 1972, Mr. Scott was absent from work because of illness associated with a job related incident. On January 7, 1973, Mr. Scott filed a grievance with the Marshals Service concerning the failure of the United States Marshal for the Eastern District of New York, Mr. Benjamin F. Butler, to promote him in a timely manner. Mr. Scott based his complaint on the assertion that he had demonstrated his ability to perform satisfactorily on the GS-7 and GS-8 levels and on the assertion that he was denied the same promotional opportunity as other deputy marshals.

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On August 29, 1973, subsequent to a hearing on Mr. Scott's grievance, the grievance examiner submitted his report and findings to the Director of the United States Marshals Service. The grievance examiner found that Mr. Scott was eligible for promotion to the GS-7 level in March 1971, and he was eligible for promotion to the GS-8 level in March 1972. He also found that prior to May 1972, at which time promotion standards were promulgated, career promotions were routinely granted upon satisfactory performance of duties. It was unusual for a deputy marshal to not receive a promotion at his eligibility date. The grievance examiner also found that in deciding not to promote Mr. Scott, Mr. Butler had relied too much on the unfavorable reports of two of Mr. Scott's supervisors who had spent relatively little time in actually supervising Mr. Scott. On the other hand Mr. Butler was found to have relied too little on the favorable report of another supervisor who had supervised Mr. Scott for a longer period of time. The grievance examiner appears to have found Mr. Scott's performance to have been satisfactory or better. Finally, the grievance examiner found that after May 1972, regulations required that the United States Marshal inform a deputy marshal who was not promoted how he could improve his performance. Mr. Scott was not properly counseled as to how his performance could be improved.

In light of his findings the grievance examiner recommended the following:

"1. Mr. Scott should be promoted to GS-7, retroactively from May 1972. This is a compromise position. It takes into account that the weight of the supervisors testimony is that at the time of his injury, his performance was adequate for promotion under pre-1972 standards and that the required counseling was lacking. It also recognizes that while he was eligible for promotion as of March 1971, he had only been employed by the Marshals Service for about 4 or 5 months at this time. Even by July, at the time of his injury, he had only been employed 8 or 9 months. Although the period from July to May was 'inoperative' for purposes of job evaluation, the absence from work was caused by a work-related injury, and should not be meaningless for purposes of promotion eligibility.

"2. Mr. Scott should be considered eligible for promotion to GS-8 as of May 1973 * * *."

It appears from the above that the grievance examiner felt that Mr. Scott should have been promoted because his record was improperly evaluated and because like situated deputy marshals received their promotions on time. The Associate Director for Administration of the United States Marshals Service, after reviewing the grievance examiner's recommendations, decided to retroactively promote Mr. Scott, to the GS-7 level effective May 14, 1972, to the GS-8 level effective May 27, 1973, and to the GS-9 level effective July 8, 1973. However, the Acting Director of Personnel and Training, Department of Justice, ruled that the retroactive promotions could not be made. Accordingly, Mr. Pommerening now asks whether there is any legal basis on which the retroactive promotions may be made. Mr. Scott has meanwhile received a nonretroactive promotion to the GS-9 level on December 23, 1973.

Federal employees are entitled only to the salaries of the positions to which they are appointed regardless of the duties they actually perform. B-175377, April 13, 1972; Dianish v. United States, 183 Ct. Cl. 702 (1968). It is also a well settled rule that the granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. 54 Comp. Gen. 263 (1974); Bierney v. United States, 168 Ct. Cl. 77 (1964); Wienberg v. United States, 192 Ct. Cl. 24 (1970). Moreover, salary increases may ordinarily not be made retroactively. 40 Comp. Gen. 207 (1960). We have made exceptions to this rule, however, where through administrative or clerical error a personnel action was not effected as originally intended, where nondiscretionary administrative regulations or policies have not been carried out, or where an administrative error has deprived the employee of a right granted by statute or regulation. 54 Comp. Gen. 403 (1974); 54 Comp. Gen. 69 (1974); 30 Comp. Gen. 550 (1960).

It is clear that the decision to not promote Mr. Scott was intentional and no administrative or clerical error was made in this regard. Moreover, there is nothing in the record which would indicate that the promotion of Mr. Scott was nondiscretionary. No statute, regulation, labor-management agreement, or other binding agency directive mandated the promotion of Mr. Scott after a given

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time had passed. Even after May of 1972, when promotion standards for the Marshals Service were promulgated, there was no requirement that deputy marshals be promoted within a certain time frame. Therefore, since the decision to promote Mr. Scott was purely of a discretionary nature, there can be no entitlement to a retroactive promotion and backpay. 54 Comp. Gen. 263, supra; B-180056, May 28, 1974.

The fact that other deputy marshals, received their promotions as a matter of general practice as soon as they became eligible for them does not serve as a basis for retroactively promoting Mr. Scott. Mr. Scott has not alleged nor has the grievance examiner found any discrimination based on race, color, religion, sex or national origin which might serve as a basis for awarding retroactive promotions and backpay. Cf. B-180042, June 5, 1974. While the Equal Protection Clause of the 14th Amendment to the United States Constitution prohibits arbitrary and capricious distinctions, it does not require identical treatment among the similarly situated. Milnot Co. v. Richardson, 350 F. Supp. 221 (1972). Since there is no law, regulation, or binding labor-management agreement which requires that Mr. Scott be promoted because other like situated deputy marshals were promoted, we find no basis for the assumption that Mr. Scott is entitled to retroactive promotions because other deputy marshals were promoted when they became eligible for promotion but Mr. Scott was not. 53 Comp. Gen. 926 (1974).

Accordingly, the retroactive promotions may not be effected in Mr. Scott's case.

R. F. KNEELER

[Deputy]

Comptroller General
of the United States