

DECISION



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

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FILE: B-180486

DATE SEP 20 1976

MATTER OF:

Billy M. Medaugh - retroactive pay adjustment

DIGEST:

1. Supervisor, whose salary was less than that of wage board employee whom he supervised, was not identified as eligible for pay adjustment. Since prompt identification was required by non-discretionary agency regulation, non-compliance constitutes administrative error which may be rectified by the granting of backpay under 5 U.S.C. § 5596.
2. Pay adjustment for General Schedule supervisor of wage board employee under 5 U.S.C. § 5333(b) is conditioned on continued supervision of the wage board employee and is limited to nearest rate of supervisor's grade which exceeds the highest rate of basic pay paid to supervised employee. When these conditions are no longer met, as when wage board employee is separated or reduced in pay, the adjustment previously granted to the supervisor must be eliminated or reduced, as required by the circumstances.

This matter is before us as the result of the appeal by Mr. Billy M. Medaugh, the claimant herein, of the disallowance by our Claims Division of his claim for retroactive compensation. This claim was filed to correct an administrative failure to adjust Mr. Medaugh's pay from December 12, 1970, to September 30, 1972, during which Mr. Medaugh was the supervisor of a wage board employee whose salary exceeded his.

The record indicates that Mr. Medaugh, an employee of the Department of the Air Force, was appointed as a commissary store manager, GS-4, step 1, at \$5,853 per annum effective December 12, 1970. Part of his duties entailed supervising a wage board employee whose rate of pay exceeded his own salary. Although

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the claimant was promoted to GS-5, step 1, on April 4, 1971, the wage employee's salary still exceeded that of the claimant. The situation persisted until the resignation of the wage employee on September 30, 1972.

The agency concedes that because of an administrative oversight, it failed to identify the claimant as eligible for a pay adjustment as provided by Federal Personnel Manual (FPM) Supplement 990-2, Chapter 531, subchapter S3 (February 8, 1967). As a corrective measure, the employing agency's Civilian Personnel Office issued on June 19, 1973, Notifications of Personnel Action which set the claimant's proper initial salary rate at GS-4, step 9, and changed his promotion rate of pay to GS-5, step 7. A voucher for retroactive compensation was prepared for the period from December 12, 1970, through June 30, 1973, in the gross amount of \$3,532.80. Because the legality of these actions was questioned, the matter was forwarded as a doubtful claim to our Claims Division. The agency administratively recommended that the claim be approved.

It should be noted that on November 26, 1972, the employing agency increased Mr. Medaugh's pay to adjust his salary with respect to a second wage board employee who was subject to his supervision subsequent to November 12, 1972. Thereafter, the claimant's salary exceeded that of the second wage board employee. During the period from October 1, 1972, to November 12, 1972, Mr. Medaugh did not supervise any employee whose salary exceeded his own. Under the provisions of 5 U.S.C. § 5333(b) (1970) and implementing regulations at 5 C.F.R. §§ 531.301-531.305, the pay adjustment for supervisors is conditioned upon the regular supervision of a wage grade employee and is limited to the nearest rate of his grade which exceeds the highest rate of basic pay paid to the supervised employee. When these conditions are no longer met, as when the wage board employee is separated or reduced in pay, the pay adjustment previously granted to the supervisor must be eliminated or reduced, as required by the circumstances. Since, as noted above, Mr. Medaugh's rate of pay was adjusted on November 26, 1972, to exceed that of the second wage board employee and because he did not supervise any wage board employee receiving a rate of pay in excess of his rate of basic pay between October 1 and November 12, 1972, the only period for which Mr. Medaugh may properly claim a salary adjustment is from December 12, 1970, to September 30, 1972.

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In Settlement Certificate No. Z-2524194 dated November 5, 1973, the Claims Division disallowed Mr. Medaugh's claim, based on 5 U.S.C. § 5333(b) which provides for pay adjustments for General Schedule employees who supervise wage board employees. The statute merely provides that the salary of a supervisor of wage board employees may be adjusted upward within the grade of the supervisor until it exceeds that of the wage employees. Relying on the statute, and on implementing regulations at 5 C.F.R. § 531.305(a), the Claims Division determined that such adjustment is permissive and discretionary with the employing agency. Finding no automatic entitlement, the claim was denied.

Further implementing the program of pay adjustments for General Schedule supervisors of wage board employees, the Department of the Air Force had promulgated regulations at section 5213 of Air Force Manual 40-1 which, although presently rescinded, were in force at all times relevant to this action. Paragraph 3c thereof provided:

" * * * Operating officials, insofar as practicable and in accordance with good management practices, will avoid making or continuing work assignments which result in a situation where Classification Act employees supervise Wage Board employees receiving a higher basic rate of compensation. Where this is not practicable, they must initiate a request for pay adjustment. This recommendation must state the basis for the determination of supervision of one or more Wage Board employees receiving a higher basic rate of compensation."
(Emphasis added.)

Paragraph 2 states that it is the Department's policy that the pay of such a supervisor "is adjusted as provided by this section unless the adjustment would result in inequitable treatment among supervisors in the same or related organizational entities."
(Emphasis added.) Thus, although the supervisor's pay adjustment is merely authorized and permitted by statute, and is therefore generally within the discretion of the employing agency, the Department of the Air Force had, by internal regulation, mandated that immediate action be taken to adjust the salaries of eligible

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employees. Because of administrative oversight, Mr. Medaugh's employing agency failed to perform the required act of identifying him for the salary adjustment. When he was so identified, the agency admitted error, issued corrective notices of personnel action, and administratively recommended that the claim be paid.

The record in this case indicates some confusion as to whether an administrative error in the nature of that which occurred in the failure to adjust Mr. Medaugh's pay may be corrected by retroactive salary adjustment under the Back Pay Act of 1966. That act, as codified at 5 U.S.C. § 5596 (1970), provides:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of leave authorized for the employee by law or regulation.

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"(c) The Civil Service Commission shall prescribe regulations to carry out this section * * *

The Civil Service Commission has promulgated regulations pursuant to the above-quoted statute in 5 C.F.R., Part 550, subpart H. Subsections 550.803(d) and (e) set forth the criteria by which a personnel action is determined to be unjustified or unwarranted as follows:

"(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

"(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter."

The relationship between an administrative error resulting in the failure to increase an employee's pay and the remedy afforded by the Back Pay Act for loss of pay resulting from an unjustified or unwarranted personnel action is discussed in 55 Comp. Gen. 836 (1976). As indicated in that decision, 5 U.S.C. § 5596 (1970) provides broad authority to rectify erroneous personnel actions by providing backpay and effectively covers situations such as Mr. Medaugh's in which an administrative error has resulted in the failure to carry out a nondiscretionary regulation or policy.

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The Supreme Court has recently considered the Back Pay Act inapplicable to wrongful classification claims. United States v. Testan, decided March 2, 1976, ___ U.S. ___, 47 L. Ed. 2d 114, 44 U.S.L.W. 4245. The matter before us is not, however, a claim for reclassification, and we find the Testan case is not applicable to the backpay issue in the present case.

The employing agency here has admitted administrative error in its failure to comply with a mandatory administrative regulation requiring it to promptly identify Mr. Medaugh as eligible for a pay adjustment. Upon discovery of the error, notifications of personnel action were processed to retroactively effectuate his entitlement to the adjustment. Further, it has been administratively recommended that the claim be paid. Where an employee is thus entitled to a specific allowance by reason of his position and, because of administrative error has been denied or delayed in the receipt thereof, he has suffered a withdrawal or reduction in the benefits to which he is entitled and is entitled to backpay therefor.

Accordingly, a settlement in favor of Mr. Medaugh for the period from December 12, 1970, to September 30, 1972, will be issued by our Claims Division.

R.F. KELLER
Deputy / Comptroller General
of the United States