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Susan Serling
Civ. Pers.

DECISION



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

FILE: B-181238

DATE: December 21, 1976

MATTER OF: Jacque Swain - Retroactive promotion -
Administrative error - Reconsideration

DIGEST: Although supervisor believed his execution of so-called 10-month report during employee's probationary period and preparation of favorable performance rating was all that was necessary to initiate promotion of employee at earliest possible time, retroactive promotion may not be authorized since he made no positive recommendation for promotion nor were other steps taken as required by agency policy prior to promotion and there was no administrative error justifying exception to rule against retroactive promotion. Upon reconsideration, decision is affirmed.

This action responds to a request for reconsideration of decision B-181238 dated November 15, 1974. That decision held that there was no administrative error indicated in the record then before us which would permit the Department of the Treasury to retroactively adjust Jacque Swain's promotion with pay. The digest of the decision of November 15, 1976, reads as follows:

"Although supervisor believed that his execution of so-called 10-month report during employee's probationary period and preparation of favorable performance rating was all that was necessary to initiate promotion of the employee at the earliest possible time, retroactive promotion may not be authorized since he made no positive recommendation for promotion as required by agency policy and there was no administrative error justifying exception to rule against retroactive promotion."

The facts are fully set forth in the decision of November 15, 1974, and need not be repeated except as pertinent to the present discussion of the case. Hayward Reed, Assistant Counsel, National Treasury Employees Union, in requesting reconsideration on behalf of Ms. Swain, states that the ruling in the decision of November 15, 1974, is based on the general proposition that "where, due to a clerical, or administrative error, a personnel action was not effected

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as originally intended, the error may be corrected retroactively to comply with the original intent without violating the rule prohibiting retroactive promotions" and argues that the determination that no administrative error had occurred in the case was in non-alignment with Comptroller General decisions made subsequent to November 15, 1974. In this connection, Mr. Reed refers to B-175372, April 13, 1972, and B-180010, August 30, 1976.

The decision in B-175372 involved denial of a claim for backpay involving a delay in promotion due to alleged administrative error. Although the claimant had apparently been inadequately informed regarding the documents required to be furnished to initiate his promotion, we held that this did not constitute administrative error so as to justify an exception to the general rule against retroactive promotion. The decision in B-180010 involved an arbitration award of a retroactive promotion with backpay to an employee who was found to have been entitled to promotion under the terms of a negotiated agreement between the agency and the union. The arbitrator had found that the agency had failed to promote the employee when there was a mandatory requirement under the collective bargaining agreement to do so. Since we were concerned solely with the legality of implementing the binding arbitration award under the agreement, and not with the underlying fact determinations which were appropriately made by the arbitrator, our decision implementing the award is not in point here.

As pointed out in the decision of November 15, 1974, agency instructions provide that promotions under the training and development programs are not automatic. Certain affirmative actions must be taken prior to the promotion of an employee: (1) positive determination by the appropriate supervisor that the employee was actually demonstrating the capacity to perform the higher level duties; (2) positive request to the personnel office through appropriate management levels for promotion of the employee to the next higher level; (3) determination that employee met all legal and regulatory requirements for promotion; and (4) approval of the promotion by the official delegated authority to approve personnel actions. These steps indicate that promotion in the agency is discretionary rather than mandatory. There is no evidence that this discretion had been exercised and that these actions had been taken prior to the date Ms. Swain claims she should have been promoted.

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Upon review we find no basis warranting reversal of our decision of November 15, 1974, and accordingly, it is affirmed.

Atkinson
Deputy Comptroller General
of the United States