

*Wilson  
Mr. Reed*

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**DECISION**



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

FILE: B-190408

DATE: December 21, 1977

MATTER OF: Janice Levy - Arbitration Award of  
Retroactive Promotion and Backpay

- DIGEST:
1. Where promotion of employee in career ladder position was delayed because original promotion request submitted by supervisor was lost in mails, agency may not comply with arbitration award of retroactive promotion and backpay. Original promotion request was lost prior to approval of promotion by authorized official and hence the delay in processing does not constitute such administrative error as will support retroactive promotion. Further, employee had no vested right to promotion effective the same date as other employees in same career ladder program.
  2. Award of retroactive promotion and backpay may not be sustained based on arbitrator's finding that employee would have been promoted March 28 but for loss of promotion request and that such loss constituted violation of collective bargaining agreement provision incorporating principle of equal pay for equal work. Retroactive promotion is appropriate where delay or failure to promote violates nondiscretionary agency regulation, policy or collective bargaining agreement provision, or a right granted by statute. Arbitrator did not and, in fact, could not, find that principle of equal pay for equal work mandates career ladder promotion at a specific date.

The Department of Health, Education, and Welfare (HEW) has requested a decision concerning its authority to implement an arbitration award of retroactive promotion and backpay to Ms. Janice Levy. The award was granted by the arbitrator as a remedy for

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HEW's failure to process Ms. Levy's promotion simultaneously with the promotions of other similarly situated career ladder employees. The Department believes that our decisions do not permit it to comply with the award.

The facts are not in dispute and may be summarized as follows. Janice Levy is a Claims Representative in the Social Security Administration (SSA). She was hired at grade GS-5 and, upon 1 year's satisfactory service, was promoted to GS-7, effective March 16, 1975. She became eligible for a career ladder promotion to GS-9 after 1 year of service in the lower grade. Promotion requests were initiated by the District Manager for a group of eligible employees in the Brooklyn Office of the SSA, including Ms. Levy. Those requests were forwarded in a common envelope to the New York Regional Personnel Officer of HEW, together with the supervisor's recommendation that the promotions be made effective March 28, 1976. All of the grievant's eligible coworkers were promoted on March 28, 1976. However, for reasons that remain unexplained, the promotion request made on Ms. Levy's behalf apparently never reached the Regional Personnel Officer who was authorized to approve promotion actions. As a result, Ms. Levy was not promoted along with the other employees on March 28, 1976. When the error was discovered, the District Manager, on May 7, resubmitted the promotion request, recommending that her promotion be made retroactive to March 28, 1976. The Regional Personnel Officer approved Ms. Levy's promotion effective May 9, 1976, but declined to make it retroactive on the ground that he had no authority to do so.

Ms. Levy filed a grievance as a result of the refusal to promote her on a retroactive basis. The matter was ultimately submitted to arbitration under the agency's labor-management agreement. On December 21, 1976, Eva Robins, the arbitrator, awarded Ms. Levy a promotion retroactive to March 28, 1976, together with backpay from that date through May 8, 1976. The award was predicated on the arbitrator's finding that the employer violated the following provision at Article XXV, Section 12 of the the General Agreement Between the Bureau of District Office Operations, SSA, New York Region, and the New York-New Jersey Council of District Office Locals of the American Federation of Government Employees, AFL-CIO:

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"The Employer and the Union agree to the principle of equal pay for substantially equal work as well as providing distinctions in pay that are consistent with distinctions in work and work performance."

In awarding a retroactive promotion with backpay, the arbitrator considered the Comptroller General's holding in B-180046, April 11, 1974, that where an original promotion request was lost in the mails the employee could not be promoted retroactively inasmuch as the loss occurred prior to approval by the particular official having delegated authority to approve promotions. That decision summarizes pertinent rulings with respect to retroactivity of promotions as follows:

"\* \* \* In cases involving approval of retroactive promotions on the ground of administrative or clerical error it is necessary that the official having delegated authority to approve the promotion has done so. If subsequent to such approval formal action to effect the promotion is not taken on a timely basis as intended by the approving officer consideration may be given to authorizing a retroactive effective date. However, when, as in this case, the delay or 'error' occurred prior to approval by such responsible official the intent of the agency to promote has not been established and there is no basis for holding that a properly approved promotion was delayed due to an administrative or clerical error. \* \* \*"

The arbitrator distinguished the situation addressed in B-180046, supra, based first on the fact that Ms. Levy's promotion was part of a career ladder program, and based secondly on the fact that loss of the initial promotion request had been established by clear and compelling evidence:

"It was acknowledged at the hearing that there is no question whatever about Ms. Levy's performance and eligibility for promotion as a career ladder promotion. It was stipulated that, but for the error, Ms. Levy would have had the

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promotional increase as of March 28, 1976. It appears to the Arbitrator to be cold comfort to the grievant that retroactivity was requested by the operating management but declined only because Regional Personnel Management had no record of receipt of the original form prepared and approved by that same operating management. Where, as here, it is clear that this was not an optional promotion but was a part of a career ladder program in which her colleagues as well as Ms. Levy were to be promoted as of a date certain, the improper retroactivity which the civil service and comptroller general rules appears to be aimed at preventing would not seem to have the same characteristics. In the opinion of this Arbitrator, a lasting inequity results from the application of the no-retroactivity provision in exactly the same manner for career ladder promotions as for other promotions which might require the added protections. There does not appear to be any doubt that the interpretation given by the Employer constitutes a continuing violation of Article XXV, Section 12 of the agreement. "

The arbitrator stated that she believed this grievance to be distinguishable from the Comptroller General's decision in B-180046, supra, not only because of the difference in the kind of promotion involved, but for other reasons as well. The arbitrator's opinion continued as follows:

"\* \* \* There is here clear and compelling evidence of clerical or administrative error. Ms. Levy had inquired in advance about her promotion, was told it was in process. The Assistant District Manager testified to its preparation and its transmittal as required. The performance appraisal supporting statements are glowing, and contain no negative comment. As a career ladder promotion, there can be no doubt that Ms. Levy would have received the promotion as of March 28, 1976 but for the administrative error. It was stipulated at the hearing that error

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occurred. There is no basis upon which one can decide which of two conjectures is valid; but either the original Form 52 was lost before it reached the Regional Personnel Office, or it was lost after it reached that office and before it was acted on there.

"Finally, it should be noted that the Arbitrator reads the Comptroller General's decision submitted as Employer Exhibit 4 [B-180046, April 11, 1974] as indicating that some retroactive correction is permissible. Thus, in discussing the general 'rule', the decision states that where a personnel action was not effected as originally intended, the error may be corrected retroactively to comply with the original intent, without violating the rule prohibiting retro-prohibiting retroactive promotions. Subsequent language appears to raise other questions as to the time when the error occurs, but does so on the basis of the establishment of the intent of the agency. It appears to the Arbitrator that, for the reasons stated above, the clear intent of the Agency to promote has been established. Whether the correction of error must be made by one department or another of the agency, since the error is found to result in contract violation it appears to the Arbitrator, and she so finds, that it must be corrected by the Agency."

The Social Security Administration filed a petition for review and stay of the arbitration award with the Federal Labor Relations Council (FLRC). In denying the petition for review and for stay of the award, the Council specifically rejected the agency's contention that the award violates the general rule prohibiting retroactive promotion, stating:

"The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates applicable law and appropriate regulation. In this case, however, the Council is of the opinion that the agency's petition does not present facts and circumstances necessary to support its exception that the arbitrator's

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award violates applicable law and appropriate regulation. In this regard, the Council has previously noted that, consistent with Civil Service Commission instructions and Comptroller General decisions, it has been established that an agency may be required to promote a particular individual, consistent with the Federal Personnel Manual, and accord that individual backpay, when a finding has been made by an arbitrator, or other competent authority, that such individual would definitely (and in accordance with law, regulation and/or the negotiated agreement) have been promoted at a particular point in time but for, among other things, an agency violation of its negotiated agreement. \* \* \* As noted previously the arbitrator specifically found that the error by the agency constituted a violation of Article XXV, section 12 of the negotiated agreement. Moreover, as noted by the arbitrator, it was stipulated that, but for the error, the grievant would have been promoted on March 28. The agency's argument that the provision found to be violated, because of its lack of specificity, does not constitute a nondiscretionary agency requirement appears to constitute nothing more than disagreement with the arbitrator's interpretation of Article XXV, section 12 of the parties' collective bargaining agreement. In this respect, Council precedent is clear that a challenge to an arbitrator's interpretation of a collective bargaining agreement is not a ground upon which the Council will grant review of an arbitration award. \* \* \*

The above discussion is amplified by the following footnote suggesting that decisions of this Office have permitted retroactive promotions under similar circumstances where promotion requests had not been approved by the properly delegated agency official:

"In support of its exception the agency cites decisions of the Comptroller General prohibiting retroactive promotions when the official having authority to approve the promotion has not done so. The agency alleges that in the facts and circumstances of the instant case the official with

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the appropriate delegated authority was the Regional Personnel Officer and that official had not approved the promotion. However, the Council notes that in at least two decisions the Comptroller General has permitted retroactive promotions in cases involving violations of collective bargaining agreement provisions even though the appropriate agency official has not approved the promotions. 55 Comp. Gen. 42 (1975); B-180010, August 30, 1976. Thus in B-180010, August 30, 1976, involving a question of whether an employee whose promotion was delayed could be given a retroactive promotion, and in which the agency involved made arguments before the Comptroller General similar to those made by the agency in the instant case, the Comptroller General concluded that "[s]ince the arbitrator has determined that but for the agency's undue delay the grievant would have been promoted earlier, we would have no objection to processing a retroactive promotion \* \* \* and paying the appropriate backpay."

Regarding the FLRC, we stated in 54 Comp. Gen. 312, 317 (1974):

"\* \* \* When an agency does choose to first file an exception with the Council, if the Council is unsure as to whether the arbitration award may properly be implemented in accordance with the decisions of this Office, it should either submit the matter directly to this Office for decision or, after ruling on any other issues involved in the exception which involve matters not within the jurisdiction of this Office, it should instruct the agency involved to request a ruling from this Office as to the legality of implementation of the award."

That decision concedes the FLRC's authority to rule on questions of the legality of implementation of an award in the first instance while at the same time reaffirming the Comptroller General's statutory responsibility as the final administrative authority to rule on questions of the propriety of expenditures of appropriated funds.

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Upon an agency's request for decision or referral of the matter by the FLRC, where we have found that an arbitration award violates applicable law or regulations we have held that the award may not be implemented. See 54 Comp. Gen. 921 (1975); 55 id. 183, 564, 1062 (1975); and 56 id. 57, 131 (1976). Although in the instant case, the FLRC has opined that the award does not violate applicable laws and regulations, HEW questions the correctness of that determination. Therefore, this Office will give further consideration to the question of whether the award contravenes the rule against retroactive promotions.

As a general rule a personnel action may not be made retroactive so as to increase the right of an employee to compensation. We have made exceptions to this rule where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation. See 55 Comp. Gen. 42 (1975), 54 id. 888 (1975), and decisions cited therein.

With respect to delays or omissions in processing of promotion requests that will be regarded as administrative or clerical errors that will support retroactive promotion, applicable decisions have drawn a distinction between those errors that occur prior to approval of the promotion by the properly authorized official and those that occur after such approval but before the acts necessary to effective promotion have been fully carried out. The rule is as stated in B-180046, quoted above. See also 54 Comp. Gen. 539 (1974); B-183969, July 2, 1975; and B-184817, November 28, 1975. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request unless his exercise of disapproval authority is otherwise constrained by statute, administrative policy or regulation. Thus, where the delay or omission occurs before that official has had the opportunity to exercise his discretion with respect to approval or disapproval, administrative intent to promote at any particular time cannot be established other than by after-the-fact statements as to what that official states would have been his determination. After the authorized official has exercised his authority by approving the promotion request, all that remains to effectuate that promotion is a series of ministerial acts which could be compelled by writ of mandamus. In that category

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of case, administrative intent can be ascertained with certainty and retroactive promotion as a remedy for failure to accomplish those ministerial acts is appropriate.

The arbitrator is of the opinion that the persuasiveness of the showing of error is one factor that militates toward an exception to this rule. We note that in B-183969, supra, HEW itself requested authorization to retroactively effect 300 promotions, mostly career ladder promotions, based on a breakdown in procedures which resulted in a failure to process promotion requests. In most cases of retroactive promotion requests, as in B-183969, the showing of error is clear and certainly can be no more convincing than where the department or agency itself concedes the error and initiates action to effect correction. Thus, we do not concur in the arbitrator's reliance on this factor.

The other factor which the arbitrator finds distinguishes Ms. Levy's case and permits retroactive promotion is the fact that hers was a career ladder position. The arbitrator states that hers was not an "optional promotion but part of a career ladder program in which her colleagues as well as Ms. Levy were to be promoted as of a date certain." The arbitrator specifically finds that this difference in the kind of promotion "has meaning" and, from a careful reading of the arbitrator's opinion, it appears that this perceived distinction is the touchstone for the award.

We note that the opinion does not specifically refer to any regulation, instruction or policy of either HEW or the SSA making career ladder promotions obligatory and, in fact, the parties' agreement appears to confirm the nonexistence of any such requirement by its reservation for further negotiations of the matter of career ladder promotions. Article XXXVI, Section 14, of the agreement provides:

"In the event the Employer obtains authority to negotiate the effective date of career ladder promotions, the parties agree to negotiate a supplement to the General Agreement."

In the absence of any such administrative regulation, instruction, or policy, career ladder promotions are not mandatory. Subchapter 4-2b(2) of chapter 335 of the Federal Personnel Manual specifically provides that an agency may make successive career ladder promotions:

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"(2) Career ladder position. An agency may make successive career promotions of an employee until he reaches the full performance level in a career ladder if he is one of a group in which all employees are given grade-building experience and are promoted as they demonstrate ability to perform at the next higher level, and if there is enough work at the full performance level for all employees in the group. \* \* \*"

In B-168715, January 22, 1970, we held that employees in such positions have no vested right to be promoted at any specific time and that the dates of such promotions were within the discretionary authority of the official having promotion approval authority. The fact that career ladder employees have no vested right to promotion in the absence of a mandatory administrative regulation, instruction or policy or provision in a collective bargaining agreement was recently reaffirmed in Matter of Adrienne Ahearn, B-186649, January 3, 1977. Compare Matter of Joseph Pompeo, B-186913, April 25, 1977, where retroactive promotions were upheld based on the existence of an agency policy mandating promotion where there had been certification that a career ladder employee was performing at an acceptable level of competence.

Thus, we disagree with the arbitrator's conclusion that under pertinent regulations and decisions initiation of a promotion request without approval by the authorized official establishes agency intent to promote within the context of the administrative error rule discussed above and that those authorities do not apply to career ladder promotions where error is established by clear and convincing evidence.

The FLRC, in denying the SSA's request for review suggests that there is an alternative basis upon which the arbitration award can be upheld. As indicated by the above-quoted language from its decision, the FLRC is of the opinion that decisions of this Office, specifically 55 Comp. Gen. 42 (1975), and B-180010, August 3, 1976, permit retroactive promotion where there has been a determination of error on the agency's part amounting to a violation of a negotiated agreement and where, but for that error, the employee would have been promoted on a specific date. Noting that the arbitrator specifically found that but for loss of the promotion request Ms. Levy

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would have been promoted on March 28 and that such loss constituted a violation of Article XXV, Section 12, of the agreement, the FLRC finds a basis for sustaining the award.

As indicated above, one exception to the rule prohibiting retroactive promotion is where the failure to promote constitutes violation of a nondiscretionary regulation or policy. We have recognized that an agency, by agreeing to a provision of a collective bargaining agreement may, as well as by its own promulgation of regulations and instructions, limit its discretion to such a degree that it becomes mandatory under certain conditions to promote classes of employees. In both 55 Comp. Gen. 42, supra, and B-180010, supra, the collective bargaining agreements contained provisions mandating promotion of career ladder employees. In 55 Comp. Gen. 42, supra, the agreement included the following specific provision:

"All employees in career ladder positions will be promoted on the first pay period after a period of one year or whatever lesser period may be applicable provided the employer has certified that the employee is capable of satisfactorily performing at the next higher level."

The arbitrator in that case found that the Internal Revenue Service had violated that provision in delaying promotions of seven employees for up to 2 months. In upholding the arbitration award, we stated:

"\* \* \*our recent decisions considering the legality of implementing binding arbitration awards, which relate to Federal employees covered by collective-bargaining agreements, have held that the provisions of such agreements may constitute nondiscretionary agency policies if consistent with applicable laws and regulations, including Executive Order 11491, as amended. Therefore, when an arbitrator acting within proper authority and consistent with applicable laws and Comptroller General decisions, decides that an agency has violated an agreement, that such violation directly results in a loss of pay, and awards backpay to remedy that loss, the agency head can lawfully implement a backpay

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award for the period during which the employee would have received the pay but for the violation, so long as the relevant provision is properly includable in the agreement. \* \* \*

There, retroactive promotions were properly awarded based upon the arbitrator's finding that the delays in the promotions violated a nondiscretionary agency policy. See also 54 Comp. Gen. 888 (1975). In B-180010, supra, the award of retroactive promotion was partially upheld based on the arbitrator's finding that the agency had violated the nondiscretionary policy to which it had subscribed in the collective bargaining agreement mandating, rather than permitting, promotion of certain career ladder employees when they had met the qualifications of the position, demonstrated ability to perform at the higher level and provided there was enough work at the full performance level for all employees in the career ladder group. Thus, not every violation of a collective bargaining agreement will support the award of a retroactive promotion, but only violation of a nondiscretionary agency policy. See 55 Comp. Gen. 427 (1975), and 54 Comp. Gen. 403 (1974).

The FLRC suggests that the arbitrator's finding that SSA violated Article XXV, Section 12, of the agreement amounts to a finding of violation of such a mandatory agency requirement. Having reviewed the arbitrator's opinion we are unable to find that she specifically construed Article XXV, Section 12, as mandating promotion of career ladder employees at any specific time. Rather, she appears to have concluded that the inequity that would result from failure to retroactively promote the employee violates the general concept of equal pay for equal work as incorporated in the agreement. Moreover, we do not believe that the arbitrator could specifically find that the language of that section constitutes a nondiscretionary agency policy mandating promotion of career ladder employees within any specific timeframe.

In interpreting the language of a collective bargaining agreement, the arbitrator is bound by applicable laws and regulations. Where a particular provision does nothing more than incorporate controlling laws and regulations into the agreement, the arbitrator is not free to disregard administrative and judicial construction of such provision and the obligation of this Office to determine whether the agreement, as construed by the arbitrator, violates

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applicable laws and regulations extends to a consideration of the arbitrator's interpretation of such specific provision.

The language of Article XXV, Section 12, in substance, is merely a restatement of the following provision of the Classification Act as codified: 5 U. S. C. § 5101 (1970):

"§ 5101. Purpose

"It is the purpose of this chapter to provide a plan for classification of positions whereby--

"(1) in determining the rate of basic pay which an employee will receive--

"(A) the principle of equal pay for substantially equal work will be followed; and

"(B) variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service\* \* \*."

That language sets forth a basic precept of the position classification system established in 1949. Odian v. United States, 203 Ct. Cl. 321 (1973). Even with respect to classification actions, the argument has been judicially rejected that the principle of equal pay for equal work mandates the upgrading of positions at any specific date, Brech v. United States Immigration and Naturalization Service, 362 F. Supp. 914 (1973), much less that it permits payment of backpay as a remedy for failures to timely reclassify, Haneke v. Secretary of Health, Education and Welfare, 535 F. 2d 1291 (1976). The fact that substantially similar language is incorporated into a collective bargaining agreement does not, in our opinion, give the arbitrator authority to now find that language of a law that has been in existence since 1949 mandates career ladder promotions, given the

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above court decisions and the fact that decisions of this Office postdating 1949 have repeatedly held that employees, and in particular career ladder employees, have no vested right to promotion.

Accordingly, we hold that HEW may not comply with the arbitrator's award of retroactive promotion and backpay to Ms. Levy.

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of the United States