

DECISION



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

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FILE: B-165042

DATE: December 21, 1978

MATTER OF: Arnold J. Glaz -- Pay Adjustment for Supervisors

DIGEST: *a* General Schedule supervisor, whose salary rate was less than ^{the} wage board employees ^{he} supervised, did not receive pay adjustment under 5 U.S.C. § 1133 (now 5333(b)). Entitlement to a pay adjustment is within ^{the} discretion of agency, and, absent mandatory agency policy, ^{the} failure to grant a pay adjustment does not constitute ^{an} abuse of discretion error ^{by an agency} which warrants retroactive compensation. *discretionary*
agency regulations regarding payment for supervisor

This action is in response to the appeal by Mr. Arnold J. Glaz of our Claims Division settlement dated January 30, 1978, denying his claim for a retroactive pay adjustment as a General Schedule supervisor of wage board employees.

The record indicates that Mr. Glaz was employed by the Federal Aviation Administration (FAA) and that from August 7, 1965, to September 10, 1967 he was detailed to the position of Acting Chief, Domestic Services, grade GS-9, and from September 10, 1967, to May 18, 1969, he was appointed to the position of Domestic Services Chief, grade GS-9. During this period of nearly 4 years, Mr. Glaz supervised one or more prevailing rate employees whose rate of basic pay exceeded his rate; he received no pay adjustment as a result of that supervision; and he has filed a claim for retroactive compensation for this period.

The Claims Division settlement denied Mr. Glaz' claim since under the applicable statute and regulations such a pay adjustment is not mandatory but is wholly within the discretion of the employing agency. On appeal, Mr. Glaz argues that the FAA may have failed to consider him for a pay adjustment, an action which he considers to be an abuse of discretion and tantamount to an evasion of regulations.

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Under the authority of 5 U.S.C. § 1133 (1964) (now 5333(b)), a General Schedule employee may be paid at a step rate above that to which the employee is otherwise entitled when he supervises prevailing rate employees whose rate of basic pay is higher. The implementing regulations promulgated by the Civil Service Commission and appearing in 5 C.F.R. Part 531, Subpart C, provide that the decision to grant an employee such a pay adjustment is within the discretion of the agency. See also Federal Personnel Manual Supp. 990-2, Book 531, Subchapter 3.

In the present case, the FAA issued regulations which established criteria to be used in determining a supervisor's entitlement to a pay adjustment. These regulations do not require that each supervisor who is eligible for a pay adjustment must have their salary adjusted, and therefore, the regulations must be considered to be discretionary in nature. With regard to the application of these agency regulations to Mr. Glaz, the administrative report is inconclusive since it states that a comparison of the pay rates of prevailing rate employees and Mr. Glaz may not have been made while he was detailed to the position of Acting Chief, Domestic Services. However, the report states that a comparison was certainly made once Mr. Glaz was promoted to the position of Domestic Services Chief. In any event, at no time has the FAA granted Mr. Glaz a pay adjustment, and the agency has not recommended payment of his claim.

Other decisions of our Office have permitted retro-active pay adjustments for such supervisors where the agency has failed to follow a mandatory agency policy which requires such a pay adjustment under certain conditions. See Billy M. Medaugh, 55 Comp. Gen. 1443 (1973); and John O. Johnson, November 2, 1976. In both of these decisions, the agency had exercised the discretion which is permitted under the statute and Civil Service Commission regulations and had mandated that a pay adjustment be made whenever a supervisor became eligible. However, in the present case there is no evidence that the FAA had implemented any mandatory policy regarding pay adjustments for supervisors, and, in fact, the agency regulations specifically state that the regulations were not to be applied "mechanically."

In the absence of such a mandatory provision, the decision to grant a pay adjustment is within the discretion of the agency. We have held that where agency action is committed to agency discretion, the standard to be applied by the reviewing authority is whether the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Harold E. Levine, 54 Comp. Gen. 310 (1974). Based upon the record before us, we find nothing which would establish that the agency abused its discretion or acted improperly when it did not grant Mr. Glaz a pay adjustment during the period in question.

Accordingly, we sustain the determination of our Claims Division denying Mr. Glaz' claim for retroactive compensation.

With regard to the claimant's question about further appeal of his claim, we point out that decisions of this Office are binding upon the executive branch of the Federal Government. Independent of the jurisdiction of the General Accounting Office, the United States Court of Claims and the United States District Courts have jurisdiction to consider certain claims against the United States. 28 U.S.C. §§ 1346(a)(2) and 1491. However, sections 2401 and 2501 of title 28, United States Code, provide that civil actions against the United States shall be barred unless filed within 6 years after the right of action first accrues.


Acting Comptroller General
of the United States