

*D. Agazarian P1M.2*



**DECISION**

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

*AGC00022 9043  
AGC00013*

FILE: B-191817

DATE: February 5, 1979

MATTER OF: John P. Corrigan - [Retroactive Salary Increase]

**DIGEST:** Employee of HEW was appointed at grade GS-12, step 1. Agency, through administrative oversight, did not act timely to obtain approval of Civil Service Commission (CSC) to appoint employee at step 10 of grade 12. Employee may not receive retroactive increase in pay as applicable regulation, 5 C.F.R. 531.203(b), requires that appointments to position in grade GS-11 or above at rate above minimum rate of appropriate grade be made only with prior approval of CSC.

By letter dated April 20, 1978, Mr. Raymond J. Sumser, Deputy Assistant Secretary for Personnel and Training, Department of Health, Education, and Welfare (HEW), has requested an advance decision as to whether Mr. John P. Corrigan, an employee of HEW may be granted a retroactive pay increase.

On January 16, 1977, Mr. Corrigan was appointed to the position of Program Analyst, GS-345-12, step 1, in the Office of Child Development even though he had indicated on his application for employment, SF-171, that he would accept a GS-12 appointment at a minimum salary of \$27,094, his salary in his current position. The agency desired to appoint Mr. Corrigan at the GS-12, step 10 rate (\$26,571) but through administrative oversight no action was taken prior to his appointment to secure permission from the Civil Service Commission (CSC) to appoint him at a rate above the minimum rate of his grade.

On March 18, 1977, the HEW requested that the CSC approve a superior qualifications appointment for Mr. Corrigan which request was denied by the CSC on the basis that he was a current employee and not a new appointment as specified in 5 C.F.R. 531.203 (b)(2). On September 19, 1977, the HEW requested that the CSC grant a variation from section 531.203(b)(2) to allow the adjustment of Mr. Corrigan's salary. On December 2, 1977, the CSC advised the agency that under Civil Service Rule V, it had approved a variation of regulation 531.203(b) to permit the adjustment of Mr. Corrigan's salary from the first step to the tenth step of the grade in which he was serving, GS-12. The CSC further stated that such salary adjustment "may be effective as of November 15, 1977," which was the date of the CSC action.

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B-191817

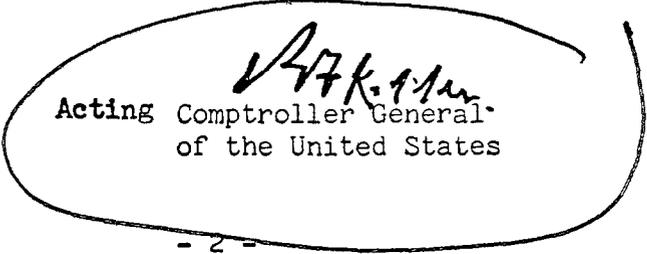
The HEW now asks whether Mr. Corrigan may be granted a pay adjustment retroactive to the date of his appointment..

As a general rule an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947); 39 id. 583 (1960); and 40 id. 207 (1960). However, we have permitted the adjustment, retroactively effective, of salary rates where errors occurred as a result of failures to carry out nondiscretionary administrative regulations or policies. See 34 Comp. Gen. 380 (1955); 39 id. 550 (1960); and 54 id. 263 (1974). Also, we have permitted retroactive adjustments in cases where an administrative error has deprived the employee of a right granted by statute or regulation. See 21 Comp. Gen. 369, 376 (1941); 37 id. 300 (1957); id. 744 (1958); and 55 id. 42 (1975).

Section 5333 of title 5, United States Code, provides in pertinent part that new appointments shall be made at the minimum rate of the appropriate grade. Section 5333 also authorizes that under regulations of the CSC which provide for such considerations as the existing salary or unusually high or unique qualifications of an appointee or a special need of the Government, the head of an agency may appoint, with the approval of the CSC, an individual to a position in grade GS-11 or above at a rate above the minimum rate of the grade. The applicable CSC regulation is found at 5 C.F.R. 531.203(b) which provides in pertinent part that a "superior qualifications appointment" means an appointment at a rate above the minimum rate of the appropriate grade under the authority of 5 U.S.C. 5333, and with the prior approval of the CSC.

An agency has no authority under 5 U.S.C. 5333 (1976) and implementing regulations to appoint an employee at a rate above the minimum rate of the grade prior to obtaining approval of the CSC. We have held that the failure of an agency to request such approval in a timely manner is neither a violation of a non-discretionary administrative regulation or policy nor a deprivation of a right granted by statute or regulation. See Matter of Harriet B. Marple, B-188195, January 3, 1978.

Accordingly, there is no proper basis on which to allow Mr. Corrigan a retroactive increase in his pay.

  
Acting Comptroller General  
of the United States