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DECISION



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

FILE: B-195063

DATE: October 3, 1979

MATTER OF: Dwight D. Meier - *Request for* Retroactive Salary Increase - Appointment Above the Minimum of the Grade

DIGEST:

Employee of the Department of Justice was appointed to a position at grade GS-13, step one Agency through administrative error had failed to obtain approval of Civil Service Commission (CSC) to appoint employee at a step rate above the minimum of the appropriate grade. Employee may not receive a retroactive increase in pay, under 5 U.S.C. § 5333 (1976) and implementing regulation, 5 CFR 531.203(b), since prior CSC approval is required for appointments to positions in grade GS-11 or above at a rate above the minimum rate of the appropriate grade.

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ISSUE DECIDED

An employee appointed to a position at GS-13, step one, may not receive a retroactive salary increase to a higher step rate under section 5333 of title 5, United States Code (1976), and implementing regulations, section 531.203(b) of title 5, Code of Federal Regulations (1978), since the agency must receive prior approval from the Civil Service Commission (now Office of Personnel Management) before appointing an employee to a position in Grade GS-11 or above at a rate above the minimum rate.

FACTS

Kevin D. Rooney, Assistant Attorney General for Administration, Department of Justice, has requested permission to make a retroactive change in the appointment of Mr. Dwight D. Meier so that Mr. Meier may be paid at the GS-13, step two rate from October 22, 1978, to December 22, 1978.

Mr. Meier was appointed as a Trial Attorney (General), GS-905-13, step one, in the Civil Division, Department of Justice, on October 22, 1978. It was the intention of

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the agency to appoint Mr. Meier to grade GS-13, step two. Associate Attorney General Michael J. Egan had offered Mr. Meier a position at GS-13, step two, in a letter dated August 22, 1978. However, through administrative error in processing the appointment the agency personnel office did not obtain CSC permission to appoint Mr. Meier to the second step of Grade GS-13, pursuant to 5 U.S.C. § 5333 (1976) and 5 C.F.R. § 531.203(b) (1978).

After the error was discovered, the agency obtained permission from the Civil Service Commission to appoint Mr. Meier to the position of GS-13, step two, and on the basis of that approval, Mr. Meier's salary was adjusted from GS-13, step one, to GS-13, step two, effective December 22, 1978.

OPINION

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. 774 (1958); and 55 id. 42 (1975).

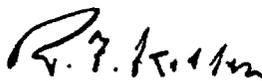
Section 5333 of title 5, United States code, provides in pertinent part that new appointments shall be made at the minimum rate of the appropriate grade. Section 5333 also authorizes that under regulations of the CSC which provide for such considerations as the existing salary or unusually high or unique 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

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"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.

Thus, the agency has no authority under 5 U.S.C. 5333 (1976) and implementing regulations to appoint Mr. Meier 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 nondiscretionary 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; and Matter of John P. Corrigan, B-191817, February 5, 1979.

Accordingly, a retroactive change may not be made in the appointment of Mr. Meier from GS-13, step one, to GS-13, step two, for the period October 22, 1978, to December 22, 1978.


Deputy Comptroller General
of the United States