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DECISION



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

FILE: B-198142.2

DATE: February 24, 1982

MATTER OF: Allan S. Danoff -- Termination of Temporary Promotion - Reconsideration

DIGEST: 1. An employee was given a temporary promotion not to exceed 1 year. During that period the agency instituted a reorganization and notified the employee that he would be in the lower grade position after the reorganization. The employee claims backpay because he was not given specific notice of the termination of his temporary promotion until some weeks after it became effective and because he continued performing the higher level duties. Upon reconsideration, denial of the employee's claim for backpay is affirmed since temporary promotions may be terminated at any time in the agency's discretion.

2. Recommendation that employee be given a temporary promotion retroactively was prepared by the official having delegated authority to make temporary promotions. This official did not have authority to make the retroactive promotion as requested. Therefore, the request for retroactive temporary promotion cannot be viewed as an exercise of that official's delegated authority to make temporary promotions, and thus it may not serve as a basis for paying employees the pay of the higher grade.

Allan S. Danoff, an employee of the Equal Employment Opportunity Commission (EEOC), requests reconsideration of our decision B-198142, August 19, 1981, in which we decided that he and another employee of EEOC were not entitled to backpay after their temporary promotions were terminated without specific notice to them. For the reasons given below the prior decision is affirmed. The claimant is not entitled to backpay after his temporary promotion was terminated.

On July 30, 1978, Mr. Danoff, who was employed in the Baltimore District Office of EEOC, received a temporary

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promotion, not to exceed 1 year, from Equal Opportunity Specialist, GS-12, to Supervisory Equal Opportunity Specialist, GS-13. By letter of July 19, 1978, he was notified in advance that his promotion was temporary and that, when his services were no longer needed in that capacity, he would be returned to his former grade and salary. Mr. Danoff signified his understanding of the conditions of the temporary promotion by signing the bottom of the letter.

As part of a reorganization of EEOC, Mr. Danoff was notified on November 21, 1978, that effective January 28, 1979, his position would be abolished and he would be offered reassignment in the same grade (GS-12) and salary. Mr. Danoff accepted the position offer contained in the notice.

Without specific notice to either the Baltimore District Office or Mr. Danoff, the EEOC Headquarters executed a Notification of Personnel Action, Form SF-50, terminating his temporary promotion effective January 27, 1979, returning him to his permanent GS-12 position. Although the GS-13 supervisory position was abolished the same day as part of the reorganization, it was reconstituted under the new organization with identical duties. Since the Baltimore District Office had not been notified of the termination action, Mr. Danoff continued to perform the duties of the GS-13 supervisory position. He received a permanent promotion to GS-13 on May 6, 1979.

On or about March 19, 1979, Mr. Danoff and the Baltimore District Office received verbal notice that the temporary promotion had been terminated. On March 27, 1979, Dorothy E. Mead, Acting Director of the Baltimore District Office, initiated a Request for Personnel Action (SF-52) to temporarily promote Mr. Danoff to Supervisory Equal Opportunity Specialist, GS-13, retroactive to January 29, 1979. The recommendation was forwarded to the Office of Field Services but was never submitted to the Director of Personnel for final approval.

Mr. Danoff filed a grievance with the EEOC claiming backpay for the difference between the GS-12 salary he received and the GS-13 salary he claims he should have

received for the period of January 28 to May 5, 1979. The grievance examiner determined that Mr. Danoff's continuous performance of all the duties of the GS-13 supervisory position entitled him to backpay. He found, among other things, that the agency was guilty of administrative error in failing to properly terminate the temporary promotion and recommended to EEOC that the grievant be granted the relief sought.

We held that Mr. Danoff's temporary promotion was effectively terminated by EEOC for the reason that temporary promotions may be terminated at any time at the discretion of the agency. We also found that when Mr. Danoff received his next paycheck after the termination, he knew or should have known of the termination. Actually, as pointed out by Mr. Danoff the next paycheck he received after the termination of the temporary promotion did not reflect the reduction in salary. However, the reduction was reflected in the following paycheck which was issued February 21, 1979.

As we stated in our earlier decision, it is well settled that an agency in its discretion may terminate a temporary promotion at any time. Normally, of course, notice is required before an employee may be reduced in grade or salary. 16 Comp. Gen. 979 (1973); 27 Comp. Gen. 176 (1947). But Mr. Danoff signed a statement on July 19, 1978, acknowledging the agency's prerogative to terminate his promotion at any time his services were no longer needed in the supervisory capacity. Also, on November 21, 1978, he was notified that his position would be abolished effective January 28, 1979. When he received his paycheck on February 21, 1979, the fact that his temporary promotion had been terminated should have been clear to him. In fact, he concedes that the February paycheck alerted him to a reduction in salary from GS-13 to GS-12.

We recognize that the November 21 letter did not specifically set forth the consequences of the reorganization of Mr. Danoff's position. That reorganization, however, did abolish both his permanent position and the position to which he had been temporarily promoted. It is unfortunate that the specific results of that action were not communicated to the Baltimore Office and to Mr. Danoff on a more timely basis. However, lack of specific notice does not change

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his entitlement to pay since the position and Mr. Danoff's temporary promotion were terminated as a result of the reorganization. The fact that two other employees holding temporary promotions prior to the reorganization retained those temporary promotions does not change the fact that Mr. Danoff's temporary promotion was terminated.

Mr. Danoff also maintains that he is entitled to a retroactive promotion because the EEOC Office of Field Services rejected the Request for Personnel Action submitted to it by Ms. Mead, the Acting Director of the Baltimore District Office.

The Request for Personnel Action recommending Mr. Danoff's temporary promotion was prepared by Ms. Mead, the Acting Director of the Baltimore District Office. Although we do not have a copy of the form in question, Mr. Alvin Golub in his letter of May 25, 1979, rejecting Mr. Danoff's grievance, stated:

"The Baltimore District Office initiated a SF-52, Request for Personnel Action on March 27, 1979 to effect a temporary promotion for you to Supervisory Equal Opportunity Specialist (Employment) GS-160-13 effective January 29, 1979. The Office of Field Services did not approve this action."

With respect to the employee's status after January 29, 1979, Ms. Mead stated in a memorandum of April 19, 1979:

"Based on a telephone conversation with Bill Bartlett, SF-52s on each of the above four temporary supervisors were submitted to Headquarters with a 1/29/79 date. These are the ones you returned.

* * * * *

"I want to emphasize the new or amended SF-52s are not required and are not even appropriate.

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"There has been no change in the status of any of these employees and they continue to perform as compliance unit supervisors. The period of the temporary appointments has not expired and there are no provisions in the FPM or related regulations authorizing us to reduce the pay of these employees since they have continuously performed under a valid appointment to the higher grade. Further, there is no alternative to the continuation of these appointments. * * *"

Mr. Danoff has furnished copies of regulations effective February 27, 1979, delegating to District Directors the authority to make temporary promotions to grade GS-13. He asserts that the action of March 27, 1979, should be considered a valid exercise of that authority by the District Director and that the action of the Office of Field Services in not approving that action was an administrative error which prevented implementation of a promotion which was intended and approved by appropriate authority. However, the record shows that the District Director believed that Mr. Danoff was entitled to be paid under the original temporary promotion. Further, the request for Personnel Action does not evidence the exercise by the District Director of authority to make a temporary promotion since it was a request for personnel action to be taken on a retroactive basis. The District Director did not have authority to make a retroactive temporary appointment. Therefore, we cannot agree that valid action was taken on March 27, 1979, by the District Director to give Mr. Danoff a temporary promotion. Her position was that Mr. Danoff's temporary promotion to GS-13 had not been validly terminated. As indicated above we have reached a contrary conclusion with respect to the termination of the temporary promotion.

Since the District Director at no time intended to exercise the authority delegated to her on February 27, 1979, a temporary promotion cannot be considered to have taken place as a result of actions taken in March of 1979.

For the reasons stated we find, upon review, that the decision of August 19, 1981, was correct, and it is affirmed.

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There is no further avenue of administrative appeal available to the claimant. However, he may bring action in the Court of Claims for the amount he believes is due him. See 28 U.S.C. 1491 (1976).

Milton J. Rowland
for Comptroller General
of the United States