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DECISION



21592
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-202098

DATE: April 22, 1982

MATTER OF: Samuel H. Stern - Retroactive Promotion
and Backpay

- DIGEST:**
1. Employee filed two grievances with Department of the Army alleging improper rating, ranking, and certification in connection with vacancies for higher grade positions. He was ultimately promoted, and he alleges that the agency violated its own grievance procedures by not rendering a decision within 90 days from the date the grievance was filed. He seeks retroactive promotion and backpay. Matters relating to grievances are within the jurisdiction of the agency and the Office of Personnel Management and normally will not be reviewed by the General Accounting Office. 5 C.F.R. §§ 771.101 - 771.119 (1975).
 2. A grievance filed by the employee in May 1975 was delayed by his requests for postponement, schedule conflicts, mutual agreements for delay, and delays by the agency. A grievance decision rendered in March 1977, approximately two years later, awarded the employee priority consideration for promotion, and he was promoted in February 1979. 5 C.F.R. § 771.110 (1975), which states that the agency shall require a grievance decision within 90 days, is not a nondiscretionary regulation and violation by the agency is not an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1970). The agency has discretionary authority to promote and the employee has no vested right to promotion at any specific time.

Mr. Samuel H. Stern, an Industrial Specialist, GS-1150-13, Logistics Engineering Directorate, Communications and Electronics Materiel Readiness Command, Department of the Army, Fort Monmouth, New Jersey, has appealed Settlement Certificate Z-2827639, dated January 15, 1981, issued by our Claims Group, which denied his claim for a retroactive promotion and backpay.

B-202098

Since the record is devoid of any factual or legal basis upon which Mr. Stern is entitled to retroactive promotion and backpay, we affirm the action of the Claims Group.

The issue for consideration is whether the failure of the Department of the Army to process an employee's grievance within 90 days violated a nondiscretionary regulation or policy so as to constitute an unjustified and unwarranted personnel action under the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1970), and therefore entitle the employee to a retroactive promotion and backpay.

STATEMENT OF FACTS

On April 30, 1975, Mr. Samuel H. Stern initiated step one of his first formal grievance alleging improper rating, ranking, and certification for the position of Procurement Analyst, GS-1102-13, in the Procurement and Production Directorate. The grievance proceeded to a formal step three grievance on March 21, 1978. A Grievance Examiner then conducted an investigation and on June 13, 1978, submitted a report in which she concluded, among other things, that Mr. Stern's name should have been on the "Best Qualified" list. The Examiner recommended that appropriate corrective action (priority consideration) be taken in accordance with chapter 335, subchapter 5-4c(2), of the Federal Personnel Manual. The Commander of the Electronics Materiel Command issued a decision letter dated July 19, 1978, accepting the recommendation of the Grievance Examiner.

A second formal grievance was initiated by Mr. Stern on May 30, 1975. The grievance alleged improper rating, ranking, and certification of a Procurement Analyst position, GS-1102-13, in the Army Satellite Communications Agency. For purposes of the issue raised on this appeal, and since the May 30, 1975, grievance was filed only one month subsequent to the initial grievance, we will focus upon the period of time required by the agency to process and render a decision in connection with the May 30, 1975, grievance. Since resolution of the matter did not appear to be evident, a formal step three grievance was submitted by the employee on December 23, 1975. An investigation was conducted and a report was submitted August 24, 1976,

indicating irregularities in the rating and ranking procedures. On September 10, 1976, the Commander issued a decision letter accepting the recommendation made in the August 24 report that a panel be convened to reevaluate the candidates for the Procurement Analyst position. The panel met and Mr. Stern was advised that he was not in the "Best Qualified" group. Mr. Stern took issue with this action. In January 1977, a meeting was held in which it was agreed that a review of Mr. Stern's qualifications would be made by a representative of the Civilian Personnel Office. As a result of this review, Mr. Stern was determined to be in the "Best Qualified" group. By memorandum dated February 15, 1977, Mr. Stern was awarded priority consideration for the next vacant position of Procurement Analyst, GS-13. On March 12, 1977, Mr. Stern was granted priority consideration rights which did not require the individual who had been selected to fill the Procurement Analyst position to vacate it.

The priority consideration given Mr. Stern was based upon a document issued by the Chief, Civilian Personnel Division, dated March 7, 1975, to provide guidance concerning career management matters. Paragraph 1b(1) states:

"Priority Candidates - As indicated in CPR 950-1.1-3w, functional chiefs have a good deal of discretion in identifying employees for priority consideration. The general criterion is that the assignment be in the interest of management. Where such employees are referred they must be selected, unless an exception is granted by the functional chief. Request for exception must include job related evidence that the candidate cannot perform the duties of the position. Justifications must evaluate the candidate against job requirements, as opposed to a comparison with other employees who may be better qualified. * * *

In commenting on the preference given Mr. Stern, in his memorandum of March 8, 1977, to the Commanding General, the Civilian Personnel Officer stated that:

" * * * priority consideration of Mr. Stern will not mean automatic promotion; it will mean that he is referred ahead of

other non-priority candidates once. If he is so referred, the selecting official is not required to select him, but he must justify non-selection to the satisfaction of the Career Program Functional Chief."

In light of the priority consideration rights accorded Mr. Stern in March 1977 and July 1978, the Civilian Personnel Office had continued to examine vacancies in order to determine whether there were any to which Mr. Stern could be referred as a priority candidate. During this period, the Electronics Materiel Readiness Command underwent a major reorganization and a promotion "freeze" was in effect on filling vacancies except those approved by the Commander.

In February 1979, Mr. Stern was referred as a priority candidate for the position of Industrial Specialist, GS-1150-13. He was selected and promoted to fill that position, effective February 11, 1979.

Mr. Stern contends that the Department of the Army, through its negligent actions, violated its own grievance procedures by not adhering to the time limitations for processing a grievance and he is therefore entitled to a retroactive promotion to May 24, 1976, with backpay.

CONTROLLING PROVISIONS OF LAW

The General Accounting Office normally will not inquire into matters relative to a grievance. Such matters are within the jurisdiction of the employing agency and the Office of Personnel Management.
Donald J. Tate, B-203622, January 19, 1982; 5 C.F.R. §§ 771.101 - 771.119 (1975).

We would point out however that the following regulatory provisions are applicable to the resolution of this claim. Section 771.110 of title 5 of the Code of Federal Regulations, in effect at the time Mr. Stern filed his grievance, provided that an agency shall require that the decision on a grievance be issued within 90 days after initiation of the procedure established for the informal adjustment of grievances. The agency was further required to establish time limits for each of the various steps involved in processing the grievance from completion of action under the informal procedure to the issuance of a

decision after completion of the examiner's inquiry. This provision no longer contains a specific time limit. See 5 C.F.R. § 771.302 (1981).

The Back Pay Act, 5 U.S.C. § 5596 (1970), provides a remedy for instances in which an employee is found to have undergone an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of his pay, allowances or differentials. An "unjustified or unwarranted personnel action" is defined as an act of commission or of omission which it is subsequently determined violated or improperly applied the requirements of a nondiscretionary provision. A "nondiscretionary provision" means any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective-bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria. 5 C.F.R. § 550.802 (1978).

Subchapter 8-4b(2), Book 550, Federal Personnel Manual Supplement 990-2 (June 16, 1977) provides:

"In order for an employee to be entitled to back pay under section 5596 of title 5, United States Code, it must clearly be established that, but for the unjustified or unwarranted personnel action, the employee would actually have been entitled to receive the pay, allowances, or differential which are in question. For example, in the case in which an employee alleges that he had been improperly denied a promotion and a finding by appropriate authority is made that a nondiscretionary provision has been violated, the employee, nonetheless, would not be eligible for back pay if the employee would have been only one of several qualified candidates for the promotion and the factual record does not clearly establish that the employee would have been selected. Such an employee, however, would be entitled to back pay if it is clearly established by appropriate authority that, under applicable law, Executive order, regulation, or collective bargaining agreement, the employee would have been selected for the promotion, but for the unjustified or unwarranted personnel action. * * *

As a general rule, a personnel action may not be made retroactive so as to increase the rights 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. Douglas C. Butler, 58 Comp. Gen. 51 (1978).

LEGAL ANALYSIS AND CONCLUSION

In addressing the issue as to whether the Department of the Army violated a nondiscretionary administrative regulation in not issuing a decision on Mr. Stern's grievance within 90 days, we do not regard the regulatory provision as being absolute or nondiscretionary in nature. The regulation merely provides procedural guidelines for Federal agencies to follow in processing grievances. This conclusion is substantiated by the fact that the regulation does not provide for any specific remedy or penalty in those circumstances where the grievance proceeding exceeds the 90-day period. Thus, we find no violation of a mandatory regulation in this case which could be considered as an unjustified or unwarranted personnel action so as to justify a retroactive promotion and backpay.

Mr. Stern contends that officials of the Department of the Army intentionally delayed the processing of his grievance. The position of the agency is that the delay in processing the grievance was not solely the result of action or inaction on the part of management officials but was also caused by requests for postponement by Mr. Stern, mutual agreements to allow additional time for review of records, and conflicts between the schedules of the employee and management officials.

The review of a claim by the General Accounting Office is limited to the facts presented by the written record. There is no statutory or regulatory provision that authorizes this Office to hold an adversary hearing which would necessarily include the examination and

cross-examination of witnesses, 4 C.F.R. § 31.7 (1981). Where, as here, there are disputed questions of fact involved in the claim, it has long been the practice of this Office to accept the statement of facts furnished by the agency in the absence of a preponderance of evidence to the contrary, 40 Comp. Gen. 178, 180 (1960); Burton H. Jaffe, B-183723, August 21, 1975. The assertions by Mr. Stern that officials of the Department of the Army intentionally delayed his grievance are not supported by the written evidence of record. Our review of the evidence discloses that while some of the delays in processing the grievance may have been caused by management officials, there is no indication that such delays, considered individually or collectively, constituted deliberate attempts on their part to prolong the grievance.

Mr. Stern refers to our decisions, B-180010, published at 54 Comp. Gen. 312 (1974); 54 Comp. Gen. 435 (1974); and 54 Comp. Gen. 760 (1975) as supporting his claim for a retroactive promotion and backpay. In 54 Comp. Gen. 435 (1974), the arbitrator determined that the agency had not given the employee priority consideration for promotion in accordance with the Federal Personnel Manual and the collective-bargaining agreement and that had such consideration been given, the employee would have been promoted. The agency accepted the findings of the arbitrator. In concluding that we would have no objection to the processing of a retroactive promotion for the employee with backpay, we stated at page 440:

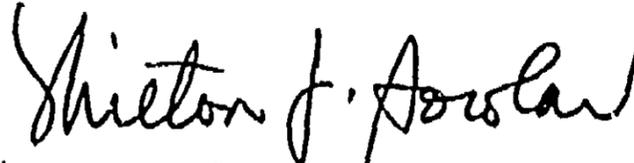
"* * * However, of prime importance in that regard is the fact that the agency did not take an exception to the arbitrator's finding that [the employee] 'would have been promoted,' questioning only their authority to grant the ordered retroactive promotion and backpay. We believe that the fact that the agency chose not to take an exception to the finding that [the employee] would have been promoted but for its denial of priority consideration was tantamount to an agency determination that but for their

violation of the agreement in not giving [the employee] priority consideration after they had ordered he be given it, he would have been promoted. * * *"

In 54 Comp. Gen. 312, 319, and similar to the agency action in 54 Comp. Gen. 435, the agency admitted that had it not been for the unjustified or unwarranted personnel action, the employee later promoted to the position would have been promoted originally.

However, in this case officials of the Department of the Army do not state that Mr. Stern would have been promoted had he been afforded priority consideration for promotion prior to March 12, 1977. Since under the provisions of 5 C.F.R. § 335.102 (1975), an agency has the discretionary authority to promote, demote, or reassign employees within the agency, Mr. Stern had no vested right to be promoted, even with the designated status of a "priority candidate," unless and until officials of the Department of the Army exercised their discretionary authority to promote him. Such authority was exercised by the Army when Mr. Stern was selected and promoted to fill the position of Industrial Specialist, GS-1150-13, effective February 11, 1979.

Accordingly, the denial of the claim is sustained.

for 
Comptroller General
of the United States