

DECISION



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

FILE: B-207129

DATE: August 26, 1982

**MATTER OF: Doris Brissett - Retroactive promotion
and backpay**

DIGEST: Employee, who was promoted 4 weeks before she was eligible for within-grade increase, claims retroactive promotion and backpay. Employee alleges that agency violated policy of deferring grade promotions until eligible employees receive anticipated within-grade increases. Claim is denied since agency has not established nondiscretionary policy described by claimant. Disparate treatment of employees similarly situated does not provide a basis for an aggrieved employee's retroactive promotion. Rather, the granting of promotions is within the discretion of agency, whose findings shall not be upset except for abuse of discretion.

Mrs. Doris Brissett, an employee of the Federal Mediation and Conciliation Service (FMCS), appeals our Claims Group's Settlement Z-2837392, March 22, 1982, denying her claim for a retroactive step increase and backpay in connection with her 1977 promotion to grade GS-5. For the reasons stated below, we affirm the action of the Claims Group.

In late 1977, Mrs. Brissett was employed as a GS-4, Step 9, Clerk-Typist, with FMCS in its New York City office. The record shows that Mrs. Brissett became eligible, on the basis of time served, for a within-grade (step) increase on January 16, 1978. However, on December 19, 1977, 4 weeks before she was eligible for the step increase, Mrs. Brissett was promoted to grade GS-5, Step 7. Since Mrs. Brissett received her promotion in grade before she became eligible for her step elevation, she never received the anticipated within-grade increase.

Mrs. Brissett correctly states that, if her grade promotion had been delayed until after she had received her within-grade increase on January 16, 1978, her subsequent

promotion to GS-5 would have taken her to step 8 of that grade instead of step 7. Mrs. Brissett claims that FMCS should have delayed her grade promotion until after she had received her within-grade increase, since "[i]t is the policy of this agency [FMCS] to defer a promotion so that the within-grade increase can precede a promotion." As evidence of this "policy", Mrs. Brissett cites the cases of several other FMCS employees who were granted promotions in grade only after they had received their time-based step increases.

In essence, Mrs. Brissett now charges that FMCS discriminated against her by failing to adhere to this alleged deferral policy in the timing of her promotion. As a result, she claims that she is entitled to retroactive compensation for the pay differential between a step 7 and a step 8 position within the GS-5 grade. We disagree.

It is a well-settled rule that the granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. Wienberg v. United States, 192 Ct. Cl. 24 (1970); Tierney v. United States, 168 Ct. Cl. 77 (1964).

Moreover, an administrative change in salary may not be made retroactively effective in the absence of specific statutory authority. This Office has permitted retroactive promotions in cases where through an administrative or clerical error a personnel action was not effected as originally intended, where an agency has failed to carry out nondiscretionary regulations or policies, where an administrative error has deprived the employee of a right granted by statute or regulation, or where the agency has through a collective bargaining agreement vested in the employee the right to be promoted after a specified period of time. Ruth Wilson, 55 Comp. Gen. 836 (1976); Lawrence Brown, Jr., B-199843, April 29, 1981.

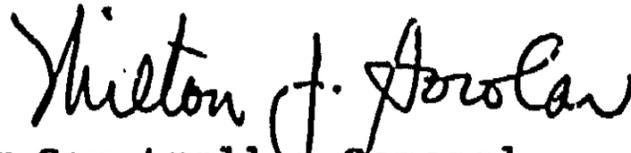
By promulgation of a regulation or a nondiscretionary policy, an agency may limit its discretion to promote employees, so that under specific conditions that agency must make a promotion on an ascertainable date, or must defer a promotion until after the occurrence of a specified event. John Cahill, 58 Comp. Gen. 59 (1978); Alyne Rebel, B-197394, October 9, 1980. In this case, Mrs. Brissett asserts that FMCS had promulgated, but failed to carry out,

a nondiscretionary policy to defer eligible employees' promotions in grade until after they receive their expected within-grade increases.

We have found no evidence that FMCS has adopted the type of nondiscretionary promotion deferral policy which Mrs. Brissett has described. Indeed, Mrs. Brissett herself has not introduced any evidence to prove the existence of such a policy; she has merely alleged that several other FMCS employees had their grade promotions delayed in the manner she has described. In this regard, the fact that an agency handles some employees' promotions in a similar manner in itself does not establish, and cannot be used to prove, the existence of a nondiscretionary promotion policy for all agency employees. In the absence of such a policy, an agency's mere disparate treatment of employees similarly situated does not provide a basis for an aggrieved employee's retroactive promotion. John Cahill, cited above.

The record in this case indicates that FMCS has not established a nondiscretionary policy to defer its employees' grade promotions until after they have received their step increases. Therefore, the timing of Mrs. Brissett's promotion to GS-5 was a matter within the discretion of the agency. Such a determination shall not be upset unless there is a strong showing of abuse of discretion by the agency. Carolyn Whitlock, 58 Comp. Gen. 290 (1979). There is no evidence that FMCS abused its discretion in making its determination in this case.

Accordingly, we sustain our Claims Group's determination denying Mrs. Brissett's claim for a retroactive promotion and backpay.



Acting Comptroller General
of the United States