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DECISION



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

FILE: B-210917

DATE: August 10, 1983

MATTER OF: Howard A. Morrison - Retroactive Temporary
Promotion - Agency Regulations

DIGEST:

Agency asserts that its internal regulations which establish a policy to make temporary promotions for details mandatory after 30 days, was based on our early Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) sustained at 56 Comp. Gen. 427 (1977). Therefore, agency argues that after Turner-Caldwell III, 61 Comp. Gen. 408 (1982), which overruled prior Turner-Caldwell decisions, the agency's policy changed and its regulations did not require such temporary promotions. However, a reading of the applicable agency regulations show that no changes were made, and, therefore, we conclude on the basis of the agency's regulations that a nondiscretionary policy to grant temporary promotions for employees detailed to a higher-graded position for more than 30 days existed. Accordingly, the employee may be granted a retroactive temporary promotion beginning the 31st day of the detail.

This decision responds to a request by the Honorable Danford L. Sawyer, Jr., The Public Printer, concerning the claim of Mr. Howard W. Morrison, for a retroactive temporary promotion and backpay. This decision has been handled as a labor-relations matter under our procedures contained in 4 C.F.R. Part 22 (1982) and, in this regard, we have received comments from the Graphic Arts International Union, Local No. 4B, and Mr. Morrison.

The issue presented is whether the Government Printing Office (GPO) has established through its own regulations a nondiscretionary agency policy that employees who are detailed to higher-graded positions for over 30 days are entitled to a temporary promotion. This decision holds that the applicable GPO regulations established a nondiscretionary agency policy of temporary promotions of employees on

overlong details which continued after our Turner-Caldwell I and II decisions on temporary promotions for overlong details were reversed by our decision in Turner-Caldwell III.

FACTS

The facts in this case are not in dispute. Mr. Morrison was a Journeyman Bookbinder assigned to the Pamphlet Section in the Binding Division. He was detailed to the position as a Group Chief in the Folding Room from September 1, 1980, to August 15, 1981, and he performed all duties and assumed all responsibilities that go with that position during the time of the detail.

In its submission, GPO explains the factors which led to the overlong detail in this case. The agency explains that as a result of a finding of liability in class action law suit brought by female Journeyman Binding Workers, GPO agreed that it would not fill any supervisory or other uprate positions in the Binding Division, except on a temporary basis, until a decision on relief was issued by the District Court. Thompson, et al. v. Boyle, 499 F. Supp. 1147 (D.D.C. 1979). In its relief decision, the court required GPO to make promotions to uprate and supervisory positions within the Binding Division on a quota basis with certain of these promotions necessarily going to the class plaintiffs in the litigation. Subsequent to the relief decision, the Government decided to appeal certain aspects of the District Court's decision. The appeal was argued on September 23, 1981, and was decided on April 27, 1982. Thompson, et al. v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982). From the date of the initial liability decision in October 1979, until a Joint Stipulation was entered into and filed with the court on June 15, 1981, very few promotions were processed and, as a result, the supervisory and uprate workforce was understaffed. Management filled these positions on a temporary detail basis with lower-graded employees, including Mr. Morrison.

On September 23, 1981, Mr. Morrison wrote to the Director of Personnel seeking payment for those periods that he had been detailed to a higher-paid position. The Director of Personnel denied the claim on the basis of

the Court of Claims decision in Wilson v. United States, Ct. Cl. No. 324-81C, (Order, October 23, 1981). The union then wrote to the Director of Personnel contending that internal GPO regulations required that payments be made for overlong details. The agency has contended that these regulations do not require that the employee be paid at the higher-graded position for an overlong detail.

Legal Background

Before discussing the issues involved in this particular claim, we believe it will be helpful to discuss our recent decision in Turner-Caldwell III, 61 Comp. Gen. 408 (B-203564, May 25, 1982), which, in effect, overruled our prior Turner-Caldwell decisions. Our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975), sustained in 56 Comp. Gen. 427 (1977), represented a departure from prior decisions of our Office regarding the entitlement of employees to temporary promotions where they have been detailed to higher level positions for more than 120 days without the prior approval of the Civil Service Commission (now Office of Personnel Management). See 52 Comp. Gen. 920 (1973). Our Turner-Caldwell decisions allowed temporary promotions under such circumstances, following a decision of the Board of Appeals and Review, Civil Service Commission, dated April 19, 1974, which held that the remedy expressed in the Federal Personnel Manual for an agency's failure to obtain prior Civil Service Commission approval to extend a detail was a temporary promotion for the employee.

Subsequently, the Court of Claims decided A. Leon Wilson v. United States, Ct. Cl. No. 324-81C, Order, October 23, 1981. The plaintiff had sought a retroactive temporary promotion and backpay for an alleged higher level detail based upon our Turner-Caldwell decisions. The court denied the plaintiff's claim by relying upon its prior decisions where it had denied relief for overlong details. In addition, the court in Wilson addressed our Turner-Caldwell decisions but declined to follow them, stating that neither the applicable statute (5 U.S.C. § 3341) nor the Federal Personnel Manual authorizes a retroactive temporary promotion and backpay in cases involving overlong details.

After the Wilson decision was issued, we reconsidered the Turner-Caldwell decisions in Turner-Caldwell III, cited

above. For reasons stated at length in that decision, we have decided to adopt the Wilson decision and no longer follow our Turner-Caldwell III decision as they apply to all pending and future claims.

However, we have held that an agency, by its own regulation or by the terms of a collective bargaining agreement, has the discretion to establish a specified period under which it becomes mandatory to promote an employee who is detailed to a higher-graded position. Thus, an agency may establish a specified period by regulation, or it may bargain away its discretion and agree to a specified period through a provision of a collective bargaining agreement. If the regulation or the agreement establishes a nondiscretionary agency policy and if the provision in question is consistent with applicable Federal laws and regulations, then the violation of such a mandatory provision in a regulation or negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (Supp. III 1979).

Therefore, after the Wilson case, we held that such agency regulations and clauses in collective bargaining agreements provided authority for the payment of backpay for three employees who were involved in an overlong detail. Beachley and Davis, 61 Comp. Gen. 403 (B-200000, B-200001, May 25, 1982); and Albert W. Lurz, 61 Comp. Gen. 492 (B-200005, June 18, 1982). In those cases, internal agency regulations and the collective bargaining agreement stated that if an individual's assignment to higher level work is expected to exceed 60 days in a 12-month period, the assignment should normally be made by temporary promotion rather than by detail. The agency argued, and we agreed, that this provision provided for a nondiscretionary policy in which temporary promotions were required.

GPO Instructions and Internal Regulations

In the present case, the report from GPO states that GPO internal regulations are divided into two categories -- Instructions and Notices. Instructions are directives which contain permanent policies or procedures applicable generally to the entire Office. Notices, on the other hand,

contain temporary, short-term or emergency type information that applies across organizational lines or to the entire Office. The GPO Instructions and Notices that are relevant to this matter include GPO Instruction 615.1B, Regulations Governing Detail of Employees, dated February 2, 1976, which governs details to higher-paying positions and which indicates in paragraph 4 that it was not applicable to details:

"* * * (3) to a higher level position which exceed, or are expected to exceed, 30 calendar days. [In details of employees to higher graded positions for more than 30 calendar days, provisions of Federal Merit Promotion Plan No. 16, Temporary Promotion Plan, should be used.]"

This Instruction also provided in paragraph 7 that details to a higher level position in excess of 30 days were prohibited and prescribed that:

"* * * [i]f such assignment is expected to exceed 30 calendar days, provisions of the Temporary Promotion Plan will be instituted. At the end of the 30 days, the detailed employee must be returned to his position of record and another employee detailed, as required."

The relevant GPO regulations governing temporary promotions, GPO Instruction 615.2A, dated September 20, 1973, Federal Merit Promotion Program, Plan No. 16, Temporary Promotions, indicates in paragraph 1a that the plan "will be used to fill any position when it becomes known or anticipated that it would be vacant for 30 days or more." It also indicates in paragraph 1b that:

"For a period of absence estimated to be less than 30 days, or if the specific position has not been approved for temporary filling, details will be used in lieu of temporary promotion. Such details must be made in accordance with GPO Policy concerning these types of personnel actions."

The relevant notices, GPO Notice 615-16, July 3, 1978, GPO Notice 615-20, March 15, 1979, GPO Notice 615-22, April 11, 1980, and GPO Notice 615-26, March 20, 1981, all have the following provisions:

2. b. "GPO Instruction 615.1B, Subject: Regulations Governing Detail of Employees, dated February 2, 1976, specifies that, except for management officials and supervisors, employees may not be detailed to higher-graded positions for more than 30 consecutive calendar days. The detailed employee must be returned to his/her regular position at the end of the 30 days and another employee detailed, if required. If the employee remains on the detail beyond 30 days, he/she is entitled to file a claim with the Director of Personnel for a retroactive temporary promotion with backpay for any time spent on the detail beyond 30 days."

* * * * *

3. b. "When it is known or anticipated that a position will be vacant for 30 days or more and an employee at the same or higher grade cannot be detailed to it, a temporary promotion should be made in accordance with Plan No. 16 of GPO Instruction 615.2A, Subject: Federal Merit Promotion Program."

GPO's Position

The agency admits that the Instruction providing for temporary promotions was not followed to fill the vacant supervisory and uprate positions in the Binding Division during the period covered in Mr. Morrison's request. This was done on purpose by the GPO because of the uncertainty engendered by the Thompson litigation.

The agency contends that it permitted retroactive temporary promotions only because of our Turner-Caldwell I and II decisions. To illustrate that point, GPO Notice 615-11, Elimination of Improper Details, dated July 3, 1978, included the following warning for supervisors,

"The Comptroller General has ruled that when an employee is detailed to a higher-graded position for a period longer than the time allowed under agency and Civil Service Commission Regulations, the employee is entitled to a retroactive temporary promotion with back pay."

This paragraph was also contained in the GPO Notices cited above, but nothing of this nature has been issued subsequent to the Wilson decision.

The agency's argument, therefore, is that the timing and sequence of the GPO Instructions and Notices, as well as the express language, demonstrate that GPO's pronouncements were simply an implementation of GAO's decisions in the first two Turner-Caldwell decisions. Thus when the decisions were overruled in Turner-Caldwell III, so also was the basis upon which the GPO could authorize retroactive payment.

Union's Position

The Union's position is primarily based on GPO Notices 615-16, 615-20, 615-22, and 615-26 which were in effect during parts of the period in question. The Union argues that these notices, read along with the instructions, constitute a nondiscretionary policy that if a vacant position cannot be filled by an employee of the same or higher grade within 30 days, a temporary promotion should be made. The Union further argues that by entitling an employee who remains on detail over 30 days to file a claim for a retroactive temporary promotion, GPO has indicated that such employees were, if not already promoted, entitled to such a promotion. Finally the Union argues that GPO Instruction 615.1B expressly provides that if a detail is to exceed 30 calendar days, provisions of the Temporary Promotion Plan will be instituted. Mr. Morrison's arguments parallel those of the Union.

Analysis

After a careful consideration of both arguments, pertinent internal regulations, and case law precedents, we

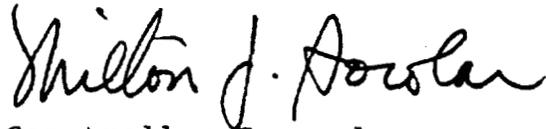
conclude that the GPO failed to follow a mandatory agency policy by failing to give Mr. Morrison a temporary promotion after he had been detailed to a higher-graded position for more than 30 days. Accordingly, Mr. Morrison should be granted a retroactive temporary promotion beginning 31 days after the detail began.

In both the Lurz and Beachley and Davis cases cited above, we gave great weight to the agency's interpretation of its own internal regulations. In this case, GPO admits that their regulations did establish a nondiscretionary right to be promoted after being detailed to a higher-graded position for over 30 days before the Wilson case and Turner-Caldwell III, *supra*. However, GPO argues that when we changed our earlier Turner-Caldwell decisions, their policy changed in that area also. But, GPO had not provided any documents which clearly shows that their policy changed. Also, GPO's argument that their pertinent internal Instructions were solely based on our early Turner-Caldwell decisions loses effect when we consider that our Turner-Caldwell I and II decisions only allowed temporary promotions beginning on the 121st day of a detail and GPO regulations require a promotion beginning on the 31st day of the detail. In that respect, GPO had gone further than our early decisions required, and therefore, established a policy which was different than Turner-Caldwell I and II required. We also note that any agency could now state that their internal policy concerning these issues were originally based on Turner-Caldwell I and II. However, we have held in both the Lurz and Beachley and Davis cases that even after Turner-Caldwell III, internal regulations which were established prior to Turner-Caldwell III could be a basis for a retroactive temporary promotion.

The internal GPO regulations do establish that employees who have been detailed to a higher-graded position for over 30 days are entitled to a temporary promotion. See GPO Instruction 615.1B, which states that when a detail is expected to exceed 30 days, provisions of the Temporary Promotion Plan will be instituted and that at the end of 30 days, the detailed employee must be returned to his position of record. Clearly, GPO violated these provisions when they allowed Mr. Morrison to be detailed for over 30 days to a higher-graded position without either implementing the

Temporary Promotion Plan or returning him to his position of record. Also, GPO Notice 615-16, cited above, states that if an employee is detailed beyond 30 days, he is entitled to file a claim for a retroactive temporary promotion with backpay. Therefore, we conclude that under GPO's regulations there is a nondiscretionary policy of granting temporary promotions after 30 days of a detail to a higher-graded position and that GPO violated that policy in Mr. Morrison's case.

Accordingly, Mr. Morrison should be granted a retroactive temporary promotion beginning 31 days after the start of his detail.

for 
Comptroller General
of the United States