

**DECISION**

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

26105

**FILE:** B-208397**DATE:** August 29, 1983**MATTER OF:** Gregory A. Walter - Retroactive Promotion  
and Backpay**DIGEST:**

1. Small Business Administration employee claims entitlement to a retroactive promotion and backpay since a promotion for which he was recommended was delayed by order of OPM while an investigation was conducted concerning errors made by SBA in the administration of its Cooperative Education (COOP) Program. SBA committed administrative error when it non-competitively converted claimant, a COOP student, from the GS-5 grade level to a career-conditional position at the GS-7 level, 3 months after his promotion to the GS-5 level. Paragraph 2-15c(4), FPM, chapter 308, requires that a student must have served at the GS-5 level for 12 calendar months.
  
2. Office of Personnel Management granted a variance to the time-in-grade requirement approximately 7 months after request was made by SBA. Error by SBA caused employee to receive pay rather than suffer a reduction in pay. Action by OPM in granting variance was not erroneous and allowed claimant to receive promotion to GS-11 approximately 2 months earlier than he would have under normal promotion procedures. Therefore, employee is not entitled to a retroactive promotion and backpay under the Back Pay Act, 5 U.S.C. § 5596 (1976), which provides relief to employees who have suffered an unjustified or unwarranted personnel action directly resulting in the withdrawal, reduction, or denial of pay.

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This decision results from a request by the Small Business Administration (SBA) for a decision concerning the claim of one of its employees, Mr. Gregory A. Walter, for a retroactive promotion and backpay. Mr. Walter, who began his employment with SBA as a student trainee under the Cooperative Education (COOP) Program, claims entitlement to backpay because a promotion for which he had been recommended was delayed while errors in SBA's administration of the COOP Program were being corrected. For reasons we will explain below, the circumstances of this situation do not entitle Mr. Walter to the relief he seeks.

Mr. Walter commenced his employment with the SBA on June 4, 1978, as a part-time accounting student trainee under the COOP Program at the GS-4 grade level. He entered the program under the provisions of an agreement between SBA and Ben Franklin University, the institution where he was enrolled as a student. On June 17, 1979, Mr. Walter received a promotion to the GS-5 level. He transferred to Southeastern University, graduated in August 1979, and was noncompetitively converted to a career-conditional position at the GS-7 level on September 4, 1979, under the provisions of chapter 308, Federal Personnel Manual (FPM). Mr. Walter received a promotion to GS-9 on September 7, 1980, and his supervisor recommended him for a promotion to the GS-11 level by a Request for Personnel Action, Standard Form 52, dated August 26, 1981, with a proposed effective date of September 6, 1981.

The promotion, however, was not effected at that time. SBA has informed us that in the Fall of 1980, the agency became aware of possible violations of Office of Personnel Management (OPM) regulations governing the SBA's administration of the COOP Program for students in the program. No specific remedial actions were initiated at that time. In May 1981, SBA personnel officials met with COOP Program officials from OPM. It was agreed that the appointments of current SBA COOP employees could be regularized without the involvement of OPM. However, and as applicable to Mr. Walter's claim, OPM also instructed SBA to review the records of previous COOP employees for compliance with requirements for noncompetitive conversion and directed SBA to place a freeze on all personnel actions related to the COOP students who had been converted, until a determination could be made as to the legitimacy of their conversions or until their appointments and actual service could be regularized.

Irregularities were found in the employment histories of a number of individuals, including that of Mr. Walter. The SBA reports that the irregularities which occurred in connection with Mr. Walter's employment were his conversion

from a part-time position, his conversion to a GS-7 based on a correct determination of superior academic achievement but before time-in-grade restrictions had been met, and his conversion from a COOP position when SBA had no agreement with Southeastern University, the institution from which he graduated. By letter dated August 20, 1981, SBA wrote to OPM explaining their findings and requested that a variation or exception be made to the irregularities which had been discovered.

In its written response of November 5, 1981, OPM stated, and as pertinent here, that it had reconstructed the GS-510-5/7 registers and determined that Mr. Walter would have been within reach on the register at the time of his conversion to a permanent position, thus establishing a legal basis for his acquisition of competitive status in accordance with section 315.703(a)(1), Title 5, Code of Federal Regulations. However, since Mr. Walter had not met the time-in-grade requirements at the time of his conversion, he was required to make up the time he had not served at the GS-5 level at his then-current grade level.

On November 13, 1981, SBA requested OPM to approve a variation to the time-in-grade requirement. By letter dated April 7, 1982, OPM approved a variation to regularize the appointments and actual service of the affected employees, which included Mr. Walter. The variation was formally issued as FPM Bulletin 315-70 dated April 29, 1982. Based on the April 7, 1982, letter from OPM, the SBA personnel office processed the requested promotion action on Mr. Walter to the GS-11 grade level, effective April 18, 1982.

The authority of this Office to award backpay derives from the Back Pay Act, 5 U.S.C. § 5596 (1976), and the implementing regulations set forth in 5 C.F.R. § 550.803(d) and (e) (1980), which provide a remedy for instances in which an employee is found, by appropriate authority, to have undergone an unjustified or unwarranted personnel action which has resulted in the withdrawal, reduction, or denial of all or part of his pay, allowances, or differentials. Before retroactive payment may be made under the provisions of 5 U.S.C. § 5596, it must be determined that the unjustified or unwarranted action directly resulted in a withdrawal of pay and that but for the wrongful action, the withdrawal of pay would not have occurred. 54 Comp. Gen. 760 (1975).

It is clear that SBA committed an administrative error when it noncompetitively converted Mr. Walter to a career-conditional position at the GS-7 grade level. The regulations which govern such a conversion require, at paragraph 2-15c(4), chapter 308, FPM, that an employee must have served at the GS-5 level as a cooperative education student for 12 calendar months to be eligible for conversion at the GS-7 level. The error by SBA, however, did not cause a withdrawal, reduction, or denial of Mr. Walter's pay. To the contrary, the errors made by SBA resulted in Mr. Walter receiving pay rather than causing him to suffer a reduction of his salary.

The event which caused the delay in Mr. Walter receiving his promotion to the GS-11 grade level was the freeze imposed by OPM on all personnel actions until a determination could be made as to the legitimacy of the noncompetitive conversions of Mr. Walter and other COOP Program students or until their appointments and actual service could be regularized. There is no evidence showing that the action by OPM was erroneous. The record does disclose that the delay from November 1981 to April 1982 by the Director, OPM, in granting the variance to the time-in-grade requirement was apparently caused by the severity and complexity of the violations by SBA of OPM regulations, the necessity for OPM to reconstruct the pertinent registers, the number of SBA-COOP employees involved, and other policy considerations, i.e., adherence to OPM regulations and competitive principles, potential hardships for the affected employees, and the efficiency of the Federal service. Further, it should be noted that until OPM granted a variance to the time-in-grade requirement, there was, in fact, no basis for consideration of possible relief under the Back Pay Act.

Indeed, the April 7, 1982, letter and FPM Bulletin 315-70, April 29, 1982, issued by OPM, had the effect of allowing Mr. Walter to receive his promotion to the GS-11 grade level, approximately 2 months earlier than he would have received such promotion under normal promotion procedures.

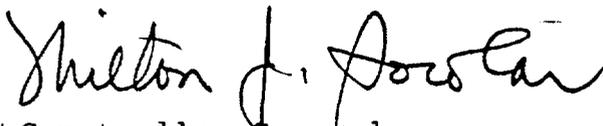
The time-in-grade regulations promulgated by OPM in section 300.602(b)(1), title 5, Code of Federal Regulations, provide that:

"\* \* \* An agency may advance an employee to a position at GS-6 through GS-11 only after he has served:

"(1) One year in a position two grades lower, when the position to which he is advanced is in a line of work properly classified at two-grade intervals; \* \* \*."

Since Mr. Walter was promoted to the GS-5 level on June 17, 1979, under normal promotion procedures, he would have been entitled to receive a promotion to the GS-7 level in June 1980, to the GS-9 level in June 1981, and to the GS-11 level in June 1982. The fact that Mr. Walter qualified for GS-510-7 positions on the basis of superior academic achievement, does not satisfy or substitute for the time-in-grade requirements set forth in the previously cited regulation or as provided in paragraph 2-15c(4), chapter 308, FPM, cited earlier.

However, because OPM granted a variation to the above time-in-grade requirement, thus changing its initial determination to require Mr. Walter to make up the time he had failed to serve at the GS-5 level, he received his promotion to the GS-11 grade level in April 1982. Under these circumstances, it cannot be said that Mr. Walter suffered an unjustified or unwarranted personnel action. Therefore, he is not entitled to a retroactive promotion and backpay under the Back Pay Act, 5 U.S.C. § 5596.

*for*   
Comptroller General  
of the United States