

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

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FILE: B-208397**DATE:** March 6, 1984**MATTER OF:** Gregory A. Walter - Retroactive Promotion
and Backpay - Reconsideration**DIGEST:**

Small Business Administration (SBA) employee requests reconsideration of Gregory A. Walter, B-208397, August 29, 1983, which denied his claim for retroactive promotion and backpay. Employee contends he should be granted relief because, as a student trainee under the Cooperative Education Program, he was not properly counseled and because of delay in his promotion. We conclude that the agency's failure to properly advise employee and the delays that occurred did not deprive him of any rights granted by statute or regulation nor violate any nondiscretionary regulation or policy. Hence, we find no entitlement under the Back Pay Act and our prior decision is sustained.

Mr. Gregory A. Walter, an employee of the Small Business Administration (SBA), has requested reconsideration of our decision, Gregory A. Walter, B-208397, August 29, 1983. In that decision, we denied Mr. Walter's claim for a retroactive promotion and backpay. Mr. Walter, who began his employment with SBA as a student trainee under the Cooperative Education (COOP) Program, claimed entitlement to such relief because a promotion for which he had been recommended was delayed while errors in SBA's administration of its COOP Program were being corrected. For reasons we will explain below, we affirm our previous decision.

The facts and circumstances and the issues involved in the claim were fully stated, discussed, and decided in our prior decision and will be repeated here only as necessary to resolve the questions and issues raised in this appeal.

In our decision of August 29, we held that SBA committed an administrative error when it noncompetitively converted Mr. Walter to a career-conditional position at the GS-7 grade level before the expiration of 12 calendar

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months, as required by OPM regulations. Therefore, he was not entitled to relief under the Back Pay Act, 5 U.S.C. § 5596 (1976). The Act provides a remedy for instances in which an employee is found to have undergone an unwarranted or unjustified personnel action which has resulted in the withdrawal or reduction of all or part of his pay, allowances, or differentials. We pointed out that the errors made by SBA caused Mr. Walter to receive pay rather than suffer a reduction in pay. We determined that the event which actually 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 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.

In his request for reconsideration, Mr. Walter contends that we failed to consider two points which he feels are extremely pertinent to any decision on his claim. The first involves the failure of SBA to comply with paragraph 2-15d of the Federal Personnel Manual (FPM), Chapter 308, which states that all COOP students should be advised of their right to seek entry-level career-conditional appointments at the GS-5 and GS-7 grade levels through the competitive process. The second point Mr. Walter makes is that SBA took an inordinate amount of time to act after it had discovered the errors it had made in the administration of the COOP Program and that the agency also contributed to the delay in the final regularization of the appointments by supplying OPM with incomplete and inaccurate information.

Paragraph 2-15d, Chapter 308, FPM, cited above, also provides that applicants who are within reach on a register for appointments to GS-7 positions are not subject to time-in-grade restrictions. Mr. Walter points out that, as evidenced by OPM's letter of November 5, 1981, he was within reach for referral and selection for GS-510-7 positions at the time of his noncompetitive conversion and that he should have been instructed to file under the competitive examination. He has also submitted a Notice of Rating, dated October 18, 1979, which shows that he was on the Accountant/Auditor/IRS Agents register at the GS-7 level. Mr. Walter states that, in any event, had he been

properly counseled by SBA officials, he would have opted for a competitive conversion at the GS-7 level rather than accept a noncompetitive conversion at the GS-5 level and, therefore, would not have been affected by the time-in-grade restrictions.

With respect to the relevancy of the Notice of Rating for the Accountant/Auditor/IRS Agents register, we note that Mr. Walter's noncompetitive conversion was effective September 4, 1979. Inasmuch as Mr. Walter was not placed on the register in question until October 18, 1979, approximately 6 weeks later, such placement had no relevancy to his prior noncompetitive conversion and he was therefore subject to the time-in-grade restrictions of his noncompetitive conversion.

Although paragraph 2-15d, Chapter 308, FPM, states that all COOP students should be advised of their rights to seek entry-level career-conditional appointments at the GS-5 and GS-7 grade levels through the competitive process, the regulatory language is not couched in mandatory terms, i.e., it does not state that the students "must" be so advised. This conclusion is substantiated by the fact that the regulation does not provide for any specific remedy or penalty in those circumstances in which the agency fails to advise the COOP students to seek career-conditional appointments through the competitive process.

This Office has held that an administrative or clerical error constitutes an unjustified or unwarranted personnel action when it prevents a personnel action from taking effect as originally intended, deprives an employee of a right granted by statute or regulation, or results in the failure to grant a nondiscretionary administrative regulation or policy if not adjusted retroactively. 55 Comp Gen. 42 (1975); 54 Comp. Gen. 69 (1974); Joseph Pompeo, et al., B-186916, April 25, 1977. Thus, and as applicable here, the failure of SBA officials to advise Mr. Walter of his right to seek a career-conditional appointment at the GS-7 grade level through the competitive process did not deprive him of a right granted by regulation. Therefore, it cannot be said that he underwent an unjustified or unwarranted personnel action under the provisions of 5 U.S.C. § 5596. Additionally, Mr. Walter had no vested right to an appointment since

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there was no absolute guarantee that he would have been selected to fill a position at the GS-7 grade level had he applied for such a position.

Mr. Walter states that in making our decision, we also failed to take into account the fact that SBA did not notify OPM of the errors it had made in connection with the administration of the COOP Program until 8 months after they were discovered and did not notify the affected employees until almost a year after the errors were discovered. He contends that OPM's actions, as reflected in its letter of November 5, 1981, were incomplete and resulted in no action being taken on his behalf because SBA supplied OPM with incomplete and inaccurate information and failed to request the appropriate decision. He points out that OPM finally granted a variance to the time-in-grade restrictions in April 1982, 5 months after the request was made by SBA. He contends that this delay was also due to incomplete and inaccurate information supplied to OPM by SBA officials.

Mr. Walter feels that he is completely innocent of any improprieties in connection with his employment at SBA, that he relied completely on the advice and recommendations of SBA officials concerning his cooperative education employment, and that he has been penalized as the result of initial mismanagement of the COOP Program by SBA personnel officials and their continued incompetency during the subsequent period of time. Mr. Walter reiterates his claim of entitlement to backpay and correction of his anniversary date to September. He contends that this action would enable him to receive what he would have received if the errors had not occurred and would place him on equal terms with any other Federal employee who competitively entered the Federal service in September 1979.

Prior to addressing the effect of Mr. Walter's contentions, we would like to make several statements in connection with them. First of all, it is inaccurate to state that the action by OPM on November 5, 1981, resulted in no benefit to Mr. Walter. His noncompetitive conversion was erroneous not only because it occurred before time-in-grade restrictions had been met, but also because he was converted from a part-time position and because SBA

had no agreement with the school from which he graduated. Although OPM did not grant a variance to the time-in-grade restrictions, it did regularize Mr. Walter's appointment insofar as the other errors were concerned and allowed his retention in his then current position.

Mr. Walter also alleges that the delay by OPM in granting a variation to the time-in-grade restrictions was caused by inaccurate and incomplete information supplied by SBA. However, and as we stated in our decision of August 29, 1983, the record discloses that the delay 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.

In regard to Mr. Walter's contention that SBA personnel officials were aware of the irregularities in the COOP Program for almost a year prior to notifying him of such irregularities, we are not aware of any regulation or policy which requires an agency to act within any specific timeframes in such matters. Apparently, and as Mr. Walter has stated, SBA officials were attempting to resolve the irregularities in-house prior to contacting OPM. In any event, we do not believe that the matters Mr. Walter has discussed rise to the level of administrative error so as to entitle him to relief under the Back Pay Act.

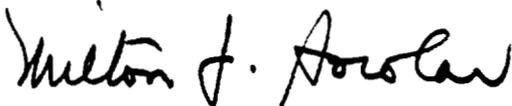
As we previously mentioned, Mr. Walter states that the circumstances involved in his claim arose through no fault of his own and that he relied, to his detriment, upon the advice given him by SBA officials regarding his cooperative education employment and his conversion privileges. We have no doubt that Mr. Walter was completely innocent of any improprieties with respect to the irregularities in the COOP Program. However, such fact does not increase his entitlement to relief under the law and regulations. The fact that SBA officials gave him erroneous advice does not constitute a basis for additional relief for it is a well-settled rule of law that the Government is not bound by the erroneous advice given by its officials. See Joseph Pradarits, 56 Comp. Gen. 131 (1976), and cases cited therein.

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In summary, we reiterate that, in response to a second request by SBA officials, OPM granted a variation to the 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 grade level. Thus, Mr. Walter received his promotion to the GS-11 level in April 1982, approximately 2 months earlier than he would have received such promotion under normal promotion procedures.

Accordingly, our prior decision of August 29, 1983, which denied Mr. Walter's claim for a retroactive promotion and backpay, is sustained.

for 
Comptroller General
of the United States