

DECISION



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

FILE: B-211784

DATE: May 1, 1984

MATTER OF: Department of Agriculture--Retroactive Promotions--Nondiscretionary Agency Policy

DIGEST:

Eight employees whose promotions were delayed due to a clerical error which occurred prior to approval of the promotion request by the authorized official may be retroactively promoted because of failure to carry out a nondiscretionary agency policy. Although not committed to writing, there was an established nondiscretionary agency policy to promote entry level plant protection and quarantine officers on their earliest eligibility date. This policy was implemented by established procedures, and was routinely communicated to affected employees. The agency's failure to carry out its nondiscretionary policy was an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1982).

This is a request for a decision from John R. Block, Secretary of Agriculture, concerning the entitlement to retroactive promotions of eight employees whose promotions were delayed due to a clerical error which occurred prior to approval of the promotion requests by the authorized official. We find that although it was not reduced to writing, the agency had a nondiscretionary policy to promote employees on their earliest eligibility date. Accordingly, the eight employees may be retroactively promoted.

FACTS

The facts in this case are relatively simple. During the summer of 1981, the Animal and Plant Health Inspection Service (APHIS) hired a total of 193 plant protection and quarantine officers, GS-436, at the GS-5 and GS-7 grade levels. This case involves eight of those officers who worked in San Juan, Puerto Rico, but came under the administration of the Miami Area office.

028727

According to the Secretary of Agriculture, APHIS informed the individuals hired in the GS-436 series that they would be eligible for noncompetitive promotions to the GS-7 and GS-9 levels when time-in-grade requirements were met, if their performance was acceptable. To implement this policy, the secretary at the Miami office maintained a tracking list which showed when officers were eligible for promotion and submitted their SF-52's, Request for Personnel Action, approximately 4 weeks before their eligibility dates. Promotions were routinely initiated in this manner unless there was a problem in performance, in which case the supervisor would notify the office that the SF-52 should not be forwarded.

Through a clerical error, the names of eight officers in Puerto Rico were omitted from the list of eligible officers and their SF-52's were not submitted on time. The error was not discovered for a month and the promotions of these eight officers were two pay periods late due to this clerical error.

The Secretary of Agriculture advises us that APHIS has established a clear precedent regarding career ladder promotions of entry level plant protection and quarantine officers. They are regularly promoted effective the first pay period of their eligibility for the next higher grade, unless the supervisor documents that there are performance problems. In this case, the supervisors certified that the officers' performance was satisfactory.

The Secretary further advises that APHIS fully intended to promote these eight officers on their eligibility dates and is willing to do so retroactively if it is legally permissible. However, he reports that the legality of doing so is doubtful because of Comptroller General decisions against retroactive personnel actions. He states that there is no written nondiscretionary APHIS policy which mandates career promotions within a fixed time frame, but there is a practice of doing so which has the effect of an established policy between management and employees in the GS-436 series.

The Secretary of Agriculture states that he cannot, in good conscience, accept the fact that a clerical error should prevent these eight officers from being promoted in the same manner as hundreds of other officers in the

GS-436 series. He says it is inequitable to penalize eight employees throughout their career for such an error.

DISCUSSION

We have long held that errors in processing a promotion may not be remedied when the error occurred prior to the time the official authorized to approve promotions has signed the promotion papers. The rule and its rationale is more fully set forth in Janice Levy, B-190408, December 21, 1977, at pages 8-9, as follows:

"As a general rule a personnel action may not be made retroactive so as to increase the right 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. See 55 Comp. Gen. 42 (1975), 54 id. 888 (1975), and decisions cited therein."

From the record in this case, it appears that the second exception relating to the failure to carry out a nondiscretionary agency policy applies. While APHIS had no written nondiscretionary agency regulation requiring it to promote on an employee's eligibility date, it did have an established policy of promoting plant protection and quarantine officers in the GS-5 through GS-9 career ladder as soon as they became eligible. There is no requirement that the nondiscretionary policy be in written form. Joseph Pompeo, B-186916, April 25, 1977; and 54 Comp. Gen. 69 (1974).

In this case, as in Pompeo, the agency had an established policy that, if there were no performance problems, employees would be promoted to the GS-7 and GS-9 level on the date they met time-in-grade requirements. This policy was implemented by established procedures and was routinely communicated to affected employees. Thus, although not incorporated into agency regulations, a nondiscretionary policy nonetheless existed. APHIS failed

10134

B-211784

to carry out that policy due to clerical error and thus committed an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1982).

Accordingly, the eight employees may be retroactively promoted as of their eligibility dates.

for *Harry R. Van Cleave*
Comptroller General
of the United States