

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-212288**DATE:** June 14, 1984**MATTER OF:** Compensation Recoupment - Promotions
Subject to Subsequent Mandatory Training
Requirement**DIGEST:**

The propriety of compensation payments to contracting officers at Fort Monmouth, New Jersey, is questioned since the employees have not met a condition subsequent mandatory training requirement after promotion as set forth in a Department of Defense civilian career program manual. Office of Personnel Management (OPM) regulations mandate that agency-established position qualification requirements must be promulgated so that an evaluation can be made before an employee is appointed to a position. Since the position qualification training requirement did not have to be met at the time of appointment, it is invalid as inconsistent with OPM requirements and there is no basis for ordering recoupment of compensation from the employees involved.

INTRODUCTION

By a letter dated November 21, 1983, Representative Peter H. Kostmayer--in cooperation with his constituent Saul Lefkowitz--requested a Comptroller General decision on the propriety of compensation payments to certain civilian employees at Fort Monmouth, New Jersey, alleged to be holding positions for which they are not qualified.

The issue here is whether compensation payments to contracting officers who have not met a condition subsequent mandatory training requirement set forth in a DOD civilian career program manual must be recouped because they are/were not qualified for the positions to which promoted. We conclude that compensation payments to these contracting officers were not improper since the training requirement does not conform to Office of Personnel Management (OPM) requirements.

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Our review is undertaken pursuant to our authority to settle accounts set forth in 31 U.S.C. § 3526 (1982). Representative Kostmayer and his constituent, as well as the DOD, provided us with their views in this matter. In arriving at our decision, we considered all of the materials submitted to us.

BACKGROUND

The condition subsequent mandatory training requirement found in DOD 1430.10-M-1, "DOD Civilian Career Program for Contracting and Acquisition Personnel," December 7, 1982, page 4-1, states that: "The mandatory courses [listed elsewhere] * * * shall be completed before promotion to the next higher level [of 3 contracting officer career levels] or within 12 months after promotion." The record, including an Army Inspector General letter dated September 30, 1983, substantiates that there are contracting officers at Fort Monmouth, New Jersey, who have not completed these mandatory courses prescribed for their positions, either before promotion, or within 12 months after promotion. The DOD submission does not deny this.

THE ARGUMENTS

Essentially, Mr. Lefkowitz argues that our decisions require the recoupment of compensation paid to employees while in positions for which they are not qualified, where there is bad faith or fraud on the part of the employees or the administrative officials involved. To derive this rule, Mr. Lefkowitz cites to our decision 28 Comp. Gen. 69 (1948), for a quotation to the effect that an employee not having the qualifications necessary for the position to which appointed must refund all compensation received because of such erroneous action without regard to the bona fides of the administrative officials involved. He then cites to our decision 28 Comp. Gen. 514 (1949) for a modification of that rule to the effect that, in recognition of "honest errors," recoupment would be required only if there was bad faith or fraud either on the part of the employee or the administrative officials involved. He then refers to the condition subsequent mandatory training requirement of DOD 1430.10-M-1. Since the record discloses agency knowledge of the violation of that requirement, he concludes that

thereafter there is bad faith or fraud by administrative officials involved. Therefore, recoupment should be undertaken against the affected employees from that time.

The DOD position, essentially, is that OPM establishes the minimum qualification standards for positions. Therefore, as long as incumbents of positions meet OPM minimum qualification standards, they are qualified and may not be removed from those positions on the basis of not being qualified. It is stated that the condition subsequent mandatory training requirement of DOD 1430.10-M-1 is an agency-established training "objective"--not an OPM minimum qualification requirement. Therefore, failure to meet that objective would not make the incumbents of these positions unqualified to hold these positions.

DISCUSSION

As a jurisdictional matter, we have no authority to order the removal of employees from positions. The jurisdiction of our Office is statutorily limited to the settlement of monetary claims. 31 U.S.C. §§ 3526 and 3702 (1982). Presumably, Mr. Lefkowitz recognizes this, since he suggests that compensation recoupment would be appropriate.

More recently, our decision Victor M. Valdez, Jr., 58 Comp. Gen. 734 (1979), modified the rule as to retention of compensation by employees serving in a de facto status under an unauthorized personnel action. We stated in Valdez at 735:

"[I]n those cases where a person has been appointed to a position by an agency and the appointment is subsequently found to have been improper or erroneous, the new rule is that the employee is entitled to receive unpaid compensation and to credit for good faith service for purposes of accrual of annual leave and to lump-sum payment for unused leave upon separation, unless--

(1) the appointment was made in violation of an absolute statutory prohibition, or

(2) the employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter.

Our earlier decisions in conflict with this rule will no longer be followed."

As the above quotation indicates, our decision 28 Comp. Gen. 514, cited by Mr. Lefkowitz as a basis for recoupment, has been significantly modified. Thus, we would no longer seek recoupment unless one of the factors shown were present, and if the record shows that the promotions were made in violation of an absolute statutory prohibition, or that the employees were guilty of fraud. Further, erroneous overpayments of pay and allowances where there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employees involved are subject to waiver. See 5 U.S.C. § 5584 (1982); and 55 Comp. Gen. 109 (1975). However, for the reasons set forth below, we find that the promotions were not in error and it is unnecessary for us to reach the issue of recoupment.

The granting of promotions is a discretionary matter primarily within the province of the administrative agency involved. However, 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. Doris Brissett, B-207129, August 26, 1982. In B-189002, February 8, 1978, we recognized that an agency could impose a requirement that certain training be completed prior to a promotion. There, a Navy civilian employee's promotion was delayed approximately 2 weeks due to his inability to complete required training until he had returned from military leave. We recognized the agency's interest in establishing such requirements, since in many instances the lack of training in a specific element could

have serious consequences, such as the failure of a nuclear power plant, or of a critical aircraft or missile component. We upheld the agency's own promotion requirement as a valid basis upon which to delay a promotion.

Here, the condition subsequent mandatory training requirement in DOD 1430.10-M-1 states that certain mandatory courses shall be completed before promotion to the next higher level, or within 12 months after promotion. However, no one has questioned whether the employees here involved were qualified at the time of their appointments. Thus, the question is whether a condition subsequent mandatory training requirement can disqualify an employee after he or she has served competently in a position for 12 months, but without having completed required training? In our opinion it cannot. Under FPM, ch. 335, § 1-4 (Inst. 262, May 7, 1981), each agency must establish procedures for promoting employees which are based on merit. Qualification requirements are among those to be undertaken under a promotion plan. Methods of evaluation for promotion and selection for training which leads to promotion, must be consistent with FPM Supp. 335-1, which prescribes evaluation procedures and methods. Under FPM Supp. 335-1, S2-1 (June 1969), the process for evaluating employees must be designed to determine basic eligibility as well as to identify highly qualified and best-qualified eligibles. Further, FPM Supp. 335-1, S4-1 (June 1969), states that an employee's training and experience should be evaluated in terms of the knowledge, skills, and abilities needed for success in the job to be filled. Thus, agency-established qualification requirements for a position must be promulgated so that an evaluation can be made before an employee is promoted to that position. Since DOD's condition subsequent mandatory training requirement imposes a position qualification requirement, and a later subsequent evaluation after the employee has been appointed to a position, it is invalid as inconsistent with OPM's requirements. We therefore agree with DOD that its training requirement is more of a desired objective than a mandatory requirement.

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Accordingly, since a mandatory subsequent training requirement is inconsistent with OPM requirements, we find no basis for ordering recoupment of compensation.

for Milton J. Fowler
Comptroller General
of the United States