

DECISION



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

61 Rel

FILE:

DATE: SEP 29 1976

B-173815.48

MATTER OF:

Ms. Rachel Rothschild - Retroactive
Promotion With Backpay

97957

DIGEST:

1. One month delay in employee's promotion occurred when recommendation sent through U. S. mail failed to reach official authorized to approve promotions. Employee is not entitled to retroactive promotion with backpay since where the official authorized to approve promotions has not acted there is no administrative error to correct.
B-183869, B-183885, July 2, 1975; B-180048, April 11, 1974.
2. Employee with training agreement did not receive promotion immediately after completion of specified period of satisfactory service because recommendation was lost in mail. She is not entitled to retroactive promotion and backpay. There is no evidence of violation of statutory or regulatory right, nor violation of any binding contractual obligation in training agreement which required nondiscretionary agency promotion action upon employee's completion of required service.
3. Even if delay in promotion results from misclassification, reclassification of position with concomitant pay increase may not be made retroactively. Neither Back Pay Act nor Classification Act creates substantive rights to backpay based on wrongful classification actions. United States v. Testan, 424 U.S. 392 (1975).

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This matter concerns the claim of Rachel Rothschild forwarded to us by the American Federation of Government Employees (AFGE). Ms. Rothschild, a Claims Representative Trainee of the Social Security Administration of the Department of Health, Education, and Welfare (HEW), believes she is entitled to a retroactive promotion and backpay due to a month's delay of her promotion from GS-7 to GS-9 under the circumstances stated below.

On May 8, 1975, the District Manager of the Madison, Wisconsin Office of the Social Security Administration completed a Form SF 52 recommending Ms. Rothschild for promotion and sent it to the Area Director. The form listed June 8, 1975, as the "proposed effective date" for the promotion, which was described in item F as: "Per Civil Service Commission training agreement. Employee fully performing at the next higher level." The Director approved it and forwarded it by United States mail to the Regional Personnel Officer, who had authority to approve the promotion. The form was lost in the mail and a second SF 52 was prepared and forwarded to the Regional Personnel Officer.

Since SF 52 of May 8, 1975, never reached the Regional Personnel Officer, Ms. Rothschild did not receive her promotion until July 7, 1975. Subsequently she filed a formal grievance with HEW requesting that the promotion be made effective as of June 8, 1975, the original proposed effective date. HEW denied the request for retroactive promotion with backpay, citing our decision B-183869, B-183885, July 2, 1975, in which we reaffirmed the general rule that promotions may not be made retroactively effective.

Our decision B-183869, B-183885, supra, involved the promotions of approximately 300 HEW employees which were delayed from 2 weeks to several months due to a breakdown in processing actions. In answer to the agency's request for general authorization to effect retroactive promotions to remedy the delay, we stated:

"The effective date of a change in salary resulting from administrative action is the date action is taken by the administrative officer vested with the necessary authority or a subsequent date specifically fixed by him. 21 Comp. Gen. 95 (1941). Retroactive promotions as such are not sanctioned by this Office. 33 Comp. Gen. 140 (1953); 39 id. 583

(1960). Where, due to a clerical or administrative error, a personnel action was not effected as originally intended, the error may be corrected retroactively to comply with the original intent without violating the rule prohibiting retroactive promotions. In such cases it is necessary that the official having delegated authority to approve the promotions has done so. If, subsequent to such approval, formal action to effect the promotion is not taken on a timely basis as intended by the approving officer, consideration may be given to authorizing a retroactive effective date.
B-180046, April 11, 1974.

"Additionally, we have construed administrative error to consist of the failure of an agency to carry out written administrative policy of a nondiscretionary nature or to comply with administrative regulations having mandatory effect. Similarly, retroactive adjustments have been permitted where administrative error has deprived an employee of a right granted by statute or regulation. See 50 Comp. Gen. 850 (1971), 54 Comp. Gen. 263 (1974). * * *"

We concluded that the facts of that case did not establish an administrative error as defined above and that the general rule that promotions may not be made retroactively was applicable.

In the instant case the AFGE, on behalf of Ms. Rothschild, has presented various reasons which it believes entitled her to a retroactive promotion and backpay.

The AFGE first contends that the rule of B-183869, B-183985, supra, requiring that the official having the delegated authority to approve the promotions must have done so before the promotion becomes effective is "manifestly unfair in the present case." In support of its contention the AFGE alleges that the Regional Personnel Officer, the official having the delegated authority to approve the promotions, performed a "ministerial act" requiring little or no discretion. The fact remains, however, that this

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official retains the power to approve or disapprove recommendations for promotions such as that of Ms. Rothschild and that his approval is necessary to effect promotions such as that of Ms. Rothschild. Hence we find no basis for distinguishing our holding in B-183869, B-183985 from the instant case. Also, see B-180046, April 11, 1974, which holds that a promotion may not be made retroactively where the official having authority to approve promotions did not receive the recommendation because it was lost in the mail.

The AFGE also argues that the holding in 55 Comp. Gen. 42 (1975) is "very relevant." In that case promotions were erroneously delayed beyond the dates specified in a collective bargaining agreement. We held that since such a provision in a collective bargaining agreement relating to effective dates of promotions becomes a nondiscretionary agency requirement, we would not object to retroactive promotions based on an administrative determination that employees would have been promoted as of the revised effective dates but for the administrative failure to process promotions in a timely manner in accordance with the agreement. Although AFGE asserts that Ms. Rothschild was deprived of a right granted by statute or regulation in that management did not live up to its training agreement with her, neither the training agreement nor any evidence showing any binding, nondiscretionary rights incident to the agreement has been submitted to our Office. The AFGE cites Federal Personnel Manual (FPM) ch. 271, § 7-6 (1969 ed. July 1969) which states in pertinent part, "A training agreement may be the basis for promotions as provided in subchapter 6 of Chapter 300." (Emphasis added.) In the absence of any evidence to the contrary, we must conclude that Ms. Rothschild's training agreement conferred no right granted by statute or regulations, nor any binding contractual obligation, which could, as in the case of certain automatic step-increases or collective bargaining agreements, be the basis of a nondiscretionary agency requirement within the contemplation of 55 Comp. Gen. 42, supra.

Finally, the AFGE contends that Ms. Rothschild's promotion must be adjusted retroactively to reflect the proper classification of her position. AFGE states that

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5 U.S.C. § 5107 (1970) as implemented by FPM ch. 511, § 3-7c (1969 ed. July 1969), which requires that positions be correctly classified on the basis of their current duties and responsibilities, constitutes a statutory mandate entitling Ms. Rothschild to a retroactive promotion and backpay under the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970). Even if Ms. Rothschild's position was misclassified between June 8, 1975, and July 7, 1975, that fact would not enlarge her entitlement. In this connection we have consistently held that in cases of this nature the reclassification of a position with a concomitant pay increase may not be made retroactively. B-186087, June 1, 1976. Furthermore, the United States Supreme Court held in United States v. Testan, 424 U.S. 392 (1976), that neither the Back Pay Act nor the Classification Act, 5 U.S.C. §§ 5101-5115 (1970), creates a substantive right to backpay based on a wrongful classification action.

For the reasons stated above, we conclude that there is no authority to grant Ms. Rothschild a retroactive promotion and backpay.

S.F. KELLEY



Comptroller General
of the United States