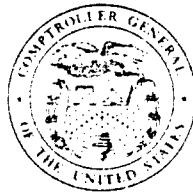


DECISION



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

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FILE: B-180010

DATE: MAY 26 1976

MATTER OF: National Labor Relations Board - Retroactive
Adjustment of Reclassification Action

DIGEST: National Labor Relations Board employee filed a grievance alleging that her position reclassification and promotion was delayed in violation of collective-bargaining agreement. Agency sustained employee's grievance and requested ruling on propriety of retroactively adjusting effective date of reclassification action. Because Federal Personnel Manual ch. 511 § 7-1(a) (1969 ed) expressly precludes retroactive adjustments of reclassification actions upgrading a position, agency is prohibited from making reclassification date retroactively effective, despite violation of a collective-bargaining agreement provision that agency construes as requiring such action.

This action concerns a request by the General Counsel of the National Labor Relations Board (NLRB) for a decision as to whether that agency may award a retroactive promotion and back-pay to an agency employee.

This matter arises out of a grievance filed by an NLRB employee under a negotiated grievance procedure contained in a collective-bargaining agreement between the National Labor Relations Board Union (Washington Local) and the General Counsel of the National Relations Board, pursuant to Executive Order No. 11491, as amended, 3 C. F. R. 254 (1974). The grievance procedure culminates with the General Counsel and provides for binding arbitration thereafter. The facts as found pursuant to the grievance procedure are as follows:

"An employee of the agency was eligible for consideration for promotion (reclassification) from GS-4 to the GS-5 grade level on March 31, 1975, the anniversary date of her last promotion. Prior to this date, the employee on several occasions had asked her supervisors if she would receive a promotion to GS-5 on the anniversary date, and believed from the responses she received that her promotion would occur on that date. Near the end of February, 1975, the employee's supervisor counseled her that,

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in order to be promoted, she would have to demonstrate the ability to perform certain functions at the GS-5 level.

"In the judgment of her supervisor, the employee had not demonstrated such ability by March 31 and was not promoted on that date. The promotion was not granted until approximately 9 weeks later, on May 25, 1975, when the supervisor judged the employee ready for promotion. The promotion was not a competitive action but a reclassification within the established career ladder for that position, based upon demonstrated ability to perform at the higher grade level. The employee's performance at the GS-4 level is not at issue.

"After learning she would not receive her promotion on March 31, the employee filed a grievance. The requested remedy was promotion to GS-5 retroactive to March 31, 1975."

Article VI, Section 1(d) of the agreement states:

"Consistent with the needs of each office, all unit employees in that office will be given an adequate opportunity for development and progress through proper assignment of a variety of work essential to their development for potential promotion to a higher grade."

In deciding the grievance, the agency found for the employee, as follows:

"The agency finds that, albeit unintentionally, it failed to follow the agreement insofar as informing the employee not earlier than end of February provided less than 'an adequate opportunity for development * * * for potential promotion,' as set forth in Article VI, Section 1(d). Furthermore, the agency believes grievant would have been promoted on March 31 had she been afforded an opportunity 9 weeks earlier than was the case to demonstrate her ability to perform at the higher level, inasmuch as 9 weeks beyond March 31 grievant

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in fact was promoted on the basis of having demonstrated such ability by that time. In her supervisor's judgment, grievant demonstrated ability to perform the GS-5 duties within the period from near the end of February to May 25, a period of approximately 13 weeks. Had grievant been given opportunity 9 weeks prior to the counseling event, management believes she could have demonstrated ability to perform GS-5 duties in a corresponding 13 week period, thereby becoming qualified for promotion 9 weeks earlier, on the anniversary date of March 31. Because management erred in not giving grievant adequate opportunity to demonstrate her promotion potential, thereby failing to follow the agreement, the agency believes grievant's promotion correspondingly, was delayed."

Based on the foregoing, the agency requests a ruling as to whether it may retroactively adjust the employee's promotion to March 31, 1975, and award backpay for the retroactive period.

We assume from the above-quoted findings of fact that the promotion was incident to a reclassification of the position by the agency from grade GS-4 to GS-5. Accordingly, Civil Service Commission regulations contained in Federal Personnel Manual ch. 511, § 7-1(a) (1969 ed., July 1969) governing dates on which agency position classification actions may be made effective, would apply to this situation. These regulations provide:

"7-1. EFFECTIVE DATES FOR NON-
APPEAL ACTIONS

"a. Action by an agency. An agency classification action takes effect on the date the action is approved unless the agency specifically sets a later effective date. The Comptroller General has emphasized that any later effective date which is administratively fixed by an agency must be 'within a reasonable period of time' (37 Comp. Gen. 492). The agency may not make the action effective retroactively."
(Emphasis supplied.)

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Applying the principles expressed in the above-quoted regulation, the Court of Claims and this Office have consistently held that the effective date of a reclassification action may not be made retroactively effective in the absence of a statute expressly so providing, but that the reclassification of the position becomes effective on the date on which the action is taken by the administrative official vested with proper authority or on some reasonable future date fixed by the administrative official. Testan v. United States, 44 U. S. L. W. 4245 (March 2, 1976), Dianish v. United States, 183 Ct. Cl. 702 (1968), 55 Comp. Gen. 515 (1975), 39 id. 583 (1960), 37 id. 492 (1958).

We note that section 11(a) of Executive Order No. 11491, supra, precludes an agency from negotiating a collective-bargaining agreement provision that is contrary to the mandatory requirement of law, regulations, and the Federal Personnel Manual. Hence, the collective-bargaining agreement provision would not provide a basis for making a reclassification action retroactively effective in violation of the law and regulations.

In view of the foregoing, the agency may not retroactively adjust the effective date of the reclassification and promotion actions.

R.F. KELLER

Deputy

Comptroller General
of the United States