

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

FILE: B-181223

DATE: FEB 19 1976

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MATTER OF: Richard Siriani - Retroactive Promotion

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**DIGEST:** Under Back Pay Act of 1966, 5 U. S. C. § 5596 (1970), retroactive promotion to grade GS-11, including retroactive pay adjustment, may be made where agency erred in failing to carry out its practice of placing appointee in grade GS-11 attorney position when individual was eligible for that grade at the time of his appointment.

This decision is rendered at the request of Warren F. Brecht, Assistant Secretary (Administration) of the Treasury Department, by letter dated May 7, 1975. The question raised is whether the Internal Revenue Service (IRS) may make a retroactive promotion to GS-11 with backpay in the case of Mr. Richard Siriani.

The submission shows Mr. Siriani was hired by the Detroit District Office, Internal Revenue Service, as an Attorney, grade GS-905-9, under an Excepted Appointment, and commenced work on January 2, 1974. At the time of his appointment, Mr. Siriani was informed that he had been rated ineligible for a grade GS-11 Attorney position but that it was the intention of the District Office to promote him to that level as soon as he became eligible. However, in May 1974 Mr. Siriani questioned the grade at which he had been hired because other IRS offices hired applicants with his qualifications at GS-11 and because he had been performing at the GS-11 level since his appointment.

At that time a review of Mr. Siriani's qualifications showed that he had been eligible for a grade GS-11 Attorney position at the time of his appointment but that there had been an incorrect determination that he was ineligible for a grade GS-11 Attorney position. In September 1974 Mr. Siriani was promoted to grade GS-905-11. The employee seeks to have his grade GS-11 Attorney appointment made retroactive to January 2, 1974.

The Detroit District Office of the Internal Revenue Service acknowledges the administrative error in rating Mr. Siriani ineligible for a grade GS-11 Attorney position at the time of his appointment and supports his request to be retroactively appointed to grade GS-11, effective January 2, 1974, with retroactive pay. The Detroit District

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Office also states that the District's practice was to fill these positions at the grade GS-11 level whenever the applicant is eligible for that grade. The Treasury Department's submission supports the claim and states that the employee has performed GS-11 duties since his appointment and would have been appointed at that level except for the error.

Whether a retroactive promotion is permissible depends on whether the facts of the case comes within the purview of 5 U. S. C. § 5596(b) and (c) which states:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action has not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of leave authorized for the employee by law or regulation.

"(c) The Civil Service Commission shall prescribe regulations to carry out this section \* \* \*"

The Civil Service Commission has promulgated regulations for the above-quoted statute in 5 C. F. R., Part 550, subpart H. Subsections

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550.803(d) and (e) set forth the criteria of an unjustified or unwarranted personnel action as follows:

"(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

"(e) A personnel action referred to in section 5506 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter."

In support of the retroactive promotion, reference is made to 54 Comp. Gen. 69 (1974), cited in the submission as B-181223, dated July 29, 1974. In 54 Comp. Gen. 69, supra, we held that a retroactive promotion to grade GS-11 for law clerks hired at the grade GS-9 level was proper where there existed a nondiscretionary agency policy to hire law clerks at the grade GS-11 level when they met certain criteria in the Federal Personnel Manual and would have been so appointed had it not been for the administrative error.

We believe our decision of 54 Comp. Gen. 69, supra, applies to the instant case. Here, the record shows that it is the practice of the Detroit District Office to fill the Attorney position in question at a grade GS-11 level if an appointee is found eligible for that level according to agency criteria and that Mr. Siriani would have been appointed at grade GS-11 if the administrative error had not been made at the time of his appointment.

We believe that the foregoing amounts to an administrative determination by appropriate authority that Mr. Siriani has undergone an unjustified personnel action which resulted in a reduction of salary.

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Accordingly, appropriate corrective action to include a retroactive adjustment of the employee's appointment grade along with the proper salary adjustment may be made.

R. F. Keller  
Deputy; Comptroller General  
of the United States