

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

FILE: B-183142

DATE: FEB 24 1976

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MATTER OF:

Marlin W. Williams - Retroactive temporary
promotion for extended detail to higher
grade

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DIGEST:

1. Guard at Naval Surface Weapons Center, detailed to higher grade position in excess of 120 days without prior approval of an extension from the Civil Service Commission, is entitled to a retroactive temporary promotion effective 121 days after detail began.
2. Employee is entitled to back pay for period from 121 days after detail began, when he should have received temporary promotion, until time when his temporary promotion was officially made effective.

This action is in response to a letter dated January 29, 1975, with enclosures, from J.M. Waddle, disbursing officer for the Naval Surface Weapons Center, White Oak Laboratory, forwarded to this Office from the Naval Surface Weapons Center Headquarters by letter dated January 30, 1975. The letter requested an advance decision as to the propriety of making payment on a voucher in favor of Mr. Marlin W. Williams in the amount of \$714.01, representing the additional amount of compensation which he would have received had he been paid according to the duties which he performed during the period December 4, 1972, to March 1974, rather than according to his position of record.

The submission states that Mr. Williams, who was assigned on the record to the position of Guard, grade GS-085-6, was informally assigned on December 4, 1972, by the officer in charge, to the duties of the Guard Captain, who was on sick leave pending retirement. At the time of this informal assignment, the duties of the position which the description represented were altered so as to effectively reduce the classification grade level of the assigned duties and responsibilities to grade GS-7 level. On December 11, 1973, an official vacancy announcement was made for the position of Guard Supervisor, grade GS-085-7, with duties corresponding to those which Mr. Williams had been performing since his informal assignment on December 4, 1972. Mr. Williams

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was selected for the position on a temporary promotion effective February 3, 1974, not to exceed February 2, 1975. On February 6, 1974, Mr. Williams submitted a formal grievance to the Naval Surface Weapons Center requesting retroactive pay covering the period during which he had performed higher level duties. Effective March 3, 1974, Mr. Williams received a permanent promotion to grade GS-085-7.

Generally an employee who performs duties of a grade level higher than the one to which he is appointed is not entitled to the salary of the higher level until such time as he is promoted to the higher level. United States v. McLean, 95 U.S. 750 (1877); Coleman v. United States, 100 Ct. Cl. 41 (1943); Dianish et. al. v. United States, 183 Ct. Cl. 702 (1968); 52 Comp. Gen. 631 (1973). Furthermore, as a general rule, a personnel action may not be effected retroactively so as to increase the right of an employee to compensation. 40 Comp. Gen. 207 (1960).

However, our Office has permitted retroactive adjustments of salary rates in certain cases where an administrative error has deprived an employee of a right granted by a nondiscretionary statute or regulation. See 39 Comp. Gen. 550 (1960); 37 id. 774 (1958); 34 id. 380 (1955); 21 id. 369, 376 (1941). Thus where an agency is bound by a mandatory requirement that an employee be promoted within a certain time period but due to the failure of the agency to take the necessary personnel action the employee is not promoted, the employee is entitled to have his pay records adjusted to reflect the promotion at the time it should have occurred. 54 Comp. Gen. 263 (1974).

Federal Personnel Manual (FPM) chapter 300, subchapter 8 on "Detail of Employees" provides at 8-3b (2) that:

"Since extended details also conflict with the principles of job evaluation, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained as provided in section 8-4f. All details to higher grade positions will be confined to a maximum initial period of 120 days plus one extension for a maximum of 120 days."

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At 8-4f (1), the regulations reiterate that:

"When it is found that a detail will exceed 120 days, or when there is a question of the propriety of the detail, the agency must request prior approval of the Commission on Standard Form 59." (Emphasis added).

In B-183086, December 5, 1975, 55 Comp. Gen. _____, our Office stated that:

"* * * an agency's discretionary authority to retain an employee on detail to a higher grade position continues no longer than 120 days and * * * the agency must either seek prior approval of the Commission for an extension of the detail or temporarily promote the detailed employee at the end of the specified time period. Therefore, where an agency fails to seek prior approval of the Commission to extend an employee's detail period in a higher grade position past 120 days, the agency has a mandatory duty to award the employee a temporary promotion if he continues to perform the higher grade position."

Our Office thus concluded that the regulations which specify the maximum periods for details to higher grade positions, quoted above are mandatory and not discretionary.

In the present case, the agency did not comply with FPM chapter 300, 58-3b (2) and 58-4f (1) since the detail of Mr. Williams, a grade GS-6 on the record, to grade GS-7 duties extended beyond the mandatory 120 day limit without an extension being requested from the Civil Service Commission. The present case thus satisfies the exception to the rule against retroactive promotions since the employee was deprived of a right granted by a non-discretionary statute or regulation. Accordingly, Mr. Williams is entitled to have his pay records adjusted to reflect a temporary promotion at the time it should have occurred, 121 days after the detail began on December 4, 1972.

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The Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), specifies that where an agency's action is found to constitute an unjustified or unwarranted personnel action which results in a withdrawal in pay, the employee is entitled to the additional amount he would have earned had the unjustified or unwarranted personnel action not occurred.

Inasmuch as we have found in this case that the failure of agency officials to comply with mandatory regulations deprived the employee of a temporary promotion which he otherwise would have been entitled to, the Back Pay Act entitles the employee to back pay for the period from 121 days after the detail began, when he should have been granted a temporary promotion, to February 3, 1974, when his temporary promotion became effective.

R.F. KELLER

Deputy Comptroller General
of the United States