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DECISION



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

FILE: B-187846

DATE: February 17, 1978

MATTER OF: Roger Rosenwald - Computation of
Backpay Award

DIGEST: Employee was permanently promoted from GS-14, step 4 to GS-15, step 2, 1 year after detail to higher graded position. Under our decision in Turner-Caldwell, 55 Comp. Gen. 539 (1975), employee was entitled to temporary promotion from GS-14, step 3, to GS-15, step 1, on October 11, 1972, 121 days after detail began. Under 5 C.F.R. § 550.804(a) the employee's pay is to be recomputed as if the unwarranted or unjustified personnel action had not occurred. Thus, the employee is entitled only to the difference between the amount he would have received from October 11, 1972, to October 11, 1975, the date he finally received correct pay, and the amount he actually received.

By a letter dated December 2, 1977, Ms. Donna D. Beecher, Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), requested our decision concerning the method to be used in computing the amount of backpay to be paid to Mr. Roger Rosenwald, a former HUD employee.

The record indicates that effective June 11, 1972, Mr. Rosenwald was detailed from his position at grade GS-14, step 3, to a grade GS-15 position. One year later, on June 10, 1973, Mr. Rosenwald was permanently promoted to the position to which he had been detailed. Since Mr. Rosenwald was paid at the GS-14, step 4 level, at the time of the permanent promotion, he was promoted to grade GS-15, step 2.

In accordance with our decision in Everett Turner and David L. Caldwell, 55 Comp. Gen. 539 (1975), and Marie Grant, 55 Comp. Gen. 785 (1976), which were sustained upon reconsideration in 56 Comp. Gen. 427 (1977), Mr. Rosenwald requested a retroactive temporary promotion effective on the

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121st day after his detail to the GS-15 position. His agency complied with the request and granted him a temporary promotion effective October 11, 1972. In so doing, the agency determined that Mr. Rosenwald was entitled to grade GS-15, step 1 on the effective date of the temporary promotion. It placed him at that level and revised all subsequent personnel actions. The agency then ascertained that, pursuant to 5 U.S.C. § 5335(a), Mr. Rosenwald would not have been eligible for step 2 of GS-15 until October 14, 1973. However, Mr. Rosenwald had received payments at the GS-15, step 2, level since June 10, 1973. Similar payment situations existed between June 9 and October 12, 1974, and between June 8 and October 11, 1975, when he finally received correct pay. Mr. Rosenwald retired on May 22, 1976. In view of the above payment situations, our guidance was requested concerning the proper method to compute Mr. Rosenwald's backpay entitlement. Specifically, we are asked whether Mr. Rosenwald should receive the difference between what he would have been paid during the period October 11, 1972, to October 11, 1975, if the unjustified or unwarranted personnel action never occurred, and the pay actually received, or whether he should receive backpay computed by some other method.

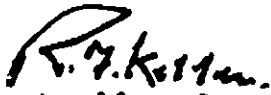
When a temporary promotion is later made permanent, the personnel action which achieves that result is effected for the sole purpose of removing an indefinite or temporary limitation placed on the last promotion. See section A-3 of subtable 6-3, table 4, Book V, FPM Supplement 296-31. Thus, the revised personnel action of June 10, 1973, which made the promotion permanent merely removed the temporary limitation on the October 11, 1972 promotion to grade GS-15. Since the personnel action by its terms merely removes a temporary time limitation, the individual's rate of compensation is properly determined upon the facts and circumstances in existence at the time of the initial, temporary promotion, giving consideration to the time served in the higher grade. C. Lawrence Vache, B-189324, October 18, 1977. Time served in the temporary appointment is credited for purposes of determining the within-grade step increase entitlement in the higher grade position. Vache, supra.

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Awards of backpay made under our decision in Turner-Caldwell are afforded pursuant to the provisions of the Back Pay Act, 5 U.S.C. § 5595. Civil Service Commission regulations which implement that Act provide that the employee shall be deemed for all purposes to have rendered service for the agency during the period covered by the corrective action, and is entitled to within-grade step increases which otherwise would have become due. 5 C.F.R. § 550.804(b)(4). In view of this, and since those regulations also provide at 5 C.F.R. § 550.804(a) that in correcting an unwarranted or unjustified personnel action, the agency shall recompute the pay of the employee as if that personnel action had not occurred, the computation of Mr. Rosenwald's backpay award should be based on the entire period of time involved, giving consideration to payments of compensation already made to him. This conclusion is further supported by a recent amendment to section 550.804(a), which added the following language:

"* * * but in no case will the employee be granted more pay, allowances, and differential than he or she would have been entitled to by law, Executive order, regulation, or agency policy." See 42 Fed. Reg. 16128 (March 25, 1977.) (Emphasis added.)

Thus, Mr. Rosenwald is entitled to the difference between the amount he would have received during the period October 11, 1972, and October 11, 1975, had the unjustified personnel action not occurred, and the amount he actually received during that period.


Deputy Comptroller General
of the United States