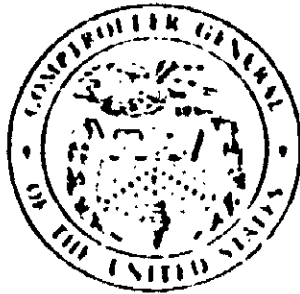


DECISION

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

W. H. C. S.
7565

FILE: B-188521

DATE: September 7, 1978

MATTER OF: Robert S. Kaplan

- DIGEST:
1. Employee was demoted from GS-13, step 4, to GS-12, step 10, on March 30, 1975, and appealed demotion to Federal Employee Appeals Authority (FEAA). On July 20, 1975, he obtained another GS-13 position and was paid GS-13, step 6 pay rate. FEAA subsequently ordered demotion cancelled and employee's restoration to GS-13, step 4, position. Employee was overpaid from July 20, 1975, to April 24, 1976, when FEAA determination was implemented. Effect of FEAA action was to convert promotion to transfer of employee between GS-13 positions. GAO may not waive or review FEAA determination.
 2. Employee appealed demotion from GS-13, step 4, to GS-12, step 10, to Federal Employee Appeals Authority (FEAA). He obtained another GS-13 position and, on basis of promotion from GS-12, was placed in step 6 of GS-13. Later FEAA ordered demotion cancelled and employee restored to GS-13, step 4, position which, in effect, converted promotion to second GS-13 position to transfer from GS-13 position and resulted in overpayment for period employee was paid at GS-13, step 6, rate. Waiver of overpayments of pay from February 14 to April 24, 1976, is denied since agency had informed employee that favorable FEAA decision resulted in possible payment at improper rate and he was, thus, on notice that there was possibility of overpayments.

This decision is in response to the request dated January 31, 1978, from Mr. Robert S. Kaplan, an employee of the Department of Housing and Urban Development (HUD), for reconsideration of the action of our Claims Division, No. Z-2632576-121, on November 29, 1977, which held him indebted for overpayments of pay during the period from July 20, 1975, through April 24, 1976, and denied in part waiver of the overpayments.

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The record shows that Mr. Kaplan was employed by the Operations Division, Camden, New Jersey, as a Supervisory Urban Planner, GS-13, step 4, when on March 3, 1975, due to a reduction in force, his position was abolished and he was offered the position of Community Planner, GS-12, step 10. Mr. Kaplan accepted this position and subsequently appealed the reduction-in-force action to the Civil Service Commission (CSC). Prior to receiving a decision on his appeal, he accepted a promotion to the position of Supervisory Community Planner, GS-13, step 6, in the Community Planning and Development Division, New York, New York, effective July 20, 1975.

On July 21, 1975, the Federal Employee Appeals Authority revised HUD's reduction-in-force action taken to downgrade Mr. Kaplan due to procedural violations. The Department of Housing and Urban Development was instructed to cancel the reduction-in-force action and to restore Mr. Kaplan to his former position. The net effect of this action prevented Mr. Kaplan from retaining his promotion to GS-13, step 6, which was based on the reduction in force to GS-12, step 10. That promotion thereby became a transfer and Mr. Kaplan was reestablished at GS-13, step 4. On August 6, 1975, Mr. Kaplan informed the HUD Personnel Division that he did not wish to be restored to his former position but wished to remain in his New York position, i. e., Supervisory Community Planner in the Community Planning and Development Division.

The Regional Personnel Office was instructed to issue a Standard Form 50 cancelling the reduction-in-force action as of the original date and further to issue another Standard Form 50 to establish the terms of his subsequent position change to his current assignment effective the date the position change was made. Through administrative error the Personnel Office failed to take this corrective action and Mr. Kaplan continued to be paid at the GS-13, step 6, rate. The error was discovered in December 1975, but a Standard Form 50 was not processed until May 15, 1976. As a result, Mr. Kaplan was erroneously paid at the GS-13, step 6, level from July 20, 1975, through April 24, 1976, resulting in an overpayment of \$957.60. Mr. Kaplan requested that an exception be granted to the requirement that he be restored to the GS-13, step 4, level, and, if not, that the overpayment he received be waived under the provisions of 5 U.S.C. § 5584, as amended,

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The Claims Division held that since the decision of the Federal Employee Appeals Authority may not be disregarded, Mr. Kaplan must be considered reassigned from one GS-13 position to another GS-13 position at step 4, not promoted from GS-12 to GS-13. The Claims Division also approved waiver of \$809.60 representing overpayments of pay from July 20, 1975, through February 14, 1976, but denied waiver of the \$148 overpayment after that date.

Mr. Kaplan has requested (1) reconsideration of his request that he be returned to the GS-13, step 6, level, and (2) that the \$148 portion of the erroneous payments that was not waived be waived.

With respect to his request to be returned to the GS-13, step 6, level, the Claims Division stated that the Federal Employee Appeals Authority decision, which cancelled Mr. Kaplan's demotion and reestablished him at GS-13, step 4, was binding and conclusive upon our Office. In B-183635, July 22, 1975, we were asked to review a decision of the Board of Appeals and Review, United States Civil Service Commission, in an appeal regarding an employee's demotion. We held that we had no jurisdiction to review determinations of the CSC in matters concerning appeals of agency demotion actions. The regulations applicable to the employee's appeal have been changed since then. Therefore, the question is whether we may review a determination of the CSC under the regulations now in effect.


Section 5596(c) of title 5, United States Code (1970), authorizes the CSC to prescribe regulations to carry out the provisions of the Back Pay Act of 1966. Section 550.804(a) of title 5, Code of Federal Regulations (1975), provides that when an appropriate authority corrects an unjustified or unwarranted personnel action, the agency shall recompute for the period covered by the corrective action the pay of the employee as if the unjustified or unwarranted personnel action had not occurred. Also, 5 C. F. R. § 772.101 explicitly grants to the Federal Employee Appeals Authority the authority to make final decisions on appeals to the CSC. Accordingly, we do not have the authority to waive or review the decision of the Federal Employee Appeals Authority. In the instant case HUD was required to restore Mr. Kaplan to his grade 13, step 4, position and cancel his demotion to GS-12 in accordance with the determination of the Federal Employee Appeals Authority and treat his subsequent appointment to the GS-13 New York position as a transfer from a position in

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that grade. In view of this and since we have no jurisdiction to waive or review the CSC determination, we must affirm the Claims Division action holding Mr. Kaplan indebted to the United States for the excess payments based on the rate for GS-13, step 6,

Mr. Kaplan further requests review of the Claims Division action which denied him waiver of the erroneous payments, \$148, occurring after February 14, 1976. In this regard we have consistently denied waiver in situations where the employee was aware of the possibility that he was receiving pay to which he was not entitled. See B-188803, June 15, 1977, and cases cited therein.

In this case, Mr Kaplan was denied waiver of \$148 overpayment for the pay period ending February 28, 1976, and subsequent periods through April 24, 1976. In a letter dated March 5, 1976, Mr. Kaplan stated that he had recently been informed of his reduction to GS-13, step 4, and that there was a possibility that he was being paid at an improper rate. Due to the time lag in the issuance of Government pay checks, Mr. Kaplan knew of the reduction prior to receiving pay for the period ending February 28, 1976, and was on notice of the possibility of overpayments after that date. Accordingly, we affirm the denial of the waiver of overpayments of \$148.


Deputy Comptroller General
of the United States