

DOCUMENT RESUME

03001 - [B2874122]

[Retroactive Promotions]. E-169675. October 7, 1977. 4 pp. + enclosure (2 pp.).

Decision re: Patricia Worden; J. Kim Lockyer; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: National Labor Relations Board.

Authority: Back Pay Statute (5 U.S.C. 5596). 5 C.F.R. 550(H).

P.P.M., ch. 511, sec. 7-1(a). 55 Comp. Gen. 42. 55 Comp. Gen. 44. E-180010 (1976). B-186916 (1977). Testan v. United States, 424 U.S. 392 (1976).

John S. Irving, General Counsel of the National Labor Relations Board, requested an advance decision as to whether the agency may grant retroactive promotions to two of their employees. The two employees filed a grievance which alleged that their promotions were delayed in violation of their collective bargaining agreement, and this allegation was supported by the agency fact finder. The retroactive promotions with backpay for these employees may be implemented. (Author/SC)

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# DECISION



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

*John R. ...*

FILE: B-189675

DATE: October 7, 1977

MATTER OF: Patricia Worden and J. Kim Lockyer - National  
Labor Relations Board - Retroactive Promotions

DIGEST: National Labor Relations Board employees filed a grievance alleging that their promotions were delayed in violation of collective-bargaining agreement. Agency fact finder found that a mandatory provision of agreement had been violated and but for the violation employees would have been promoted on earlier date. Retroactive promotions with backpay for these employees may be implemented under the Back Pay Statute, 5 U.S.C. § 5596. B-186916, April 25, 1977; 55 Comp. Gen. 42 (1975).

This action is in response to a request for an advance decision from Mr. John S. Irving, General Counsel, National Labor Relations Board (NLRB), as to whether his agency may grant retroactive promotions to grade GS-4 with backpay to Patricia Worden and J. Kim Lockyer, two Clerk-Stenographer employees of the NLRB. Local 19, National Labor Relations Board Union (NLRBU) on behalf of the two employees in question, filed a grievance under the provisions of the collective-bargaining agreement between the General Counsel and the NLRBU, alleging that the Regional Director for Region 19, Seattle, Washington, violated the agreement by failing to timely evaluate and promote Worden and Lockyer and sought retroactive promotions and backpay for these employees as corrective action. The grievance progressed to step 3 of the negotiated grievance procedure and was referred to Joseph E. DeSio, Associate General Counsel, for fact finding and a decision. The step 3 decision established the following facts and conclusions:

"Patricia Worden and J. Kim Lockyer were hired as GS-3 Clerk-Stenographers on August 23, 1976, and August 29, 1976, respectively. Article VI, Section 4(b) of the extended Agreement provides that GS-3 Clerk-Stenographers 'shall be eligible for consideration for promotion' to the position of GS-4 Clerk-Stenographer after serving 6 months in grade at the GS-3 level. Although Worden had served 6 months in grade by February 23, 1977,

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and Lockyer had served 6 months in grade by March 1, 1977, the Regional Director did not consider or determine if either had demonstrated the ability to perform at the next higher grade until March 18, 1977, when he executed a Standard Form 52 for each employee making their promotions effective on March 27, 1977.

"In contending that Worden's and Lockyer's promotions should have been effectuated at the beginning of the pay period immediately after they had concluded their 6-month time in grade requirements, the Union relies upon Article VI, Section 4(c) of the extended Agreement which provides, in relevant part, that:

'The time periods set forth in subsection (b) are not to be interpreted to imply automatic promotion, but merely establish a progression rate where employees who have demonstrated their ability to perform the work of the next higher grade level will be promoted. . . .'

"While Article VI, Section 4, of the extended contract does not call for the automatic promotion of those employees who occupy the job classifications listed therein, it does require that the Regional Director consider an employee's performance at the end of the specified time period, determine at that time if the employee has demonstrated the ability to perform at the next higher grade level, and promote the employee if the Regional Director is satisfied that the employee has demonstrated such performance.

"I have been advised by the Regional Director that the above-described delay in considering and evaluating the ability of Worden and Lockyer to perform at the next higher grade resulted solely from his belief, albeit incorrect, that Article VI, Section 4(b) did not require him to take any such action at the conclusion of the 6-month time in grade requirement. I have been further advised by the Regional Director that he is satisfied that on

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the dates that they concluded their 6 months in grade both Worden and Lockyer possessed and had demonstrated the ability to perform the work of the next higher grade and that they would have been promoted effective the first pay period after 6 months in grade had it not been for his failure to timely consider their performance in accordance with Article VI, Section 4(b) of the extended Agreement.

"In view of the above, it is clear that had their performance been timely considered, both Worden and Lockyer would have been promoted as of the first pay period following the completion of 6 months in grade. \* \* \*

"Accordingly, subject to the approval of the Comptroller General, the grievance is hereby granted by making the promotions of Worden and Lockyer to GS-4 retroactively effective to February 27, 1977, and March 13, 1977, respectively, and by awarding them appropriate backpay."

The General Counsel concurred in the above-quoted decision and has referred it to this Office for a ruling on the legality of the proposed remedy. He correctly points out that the remedy is supported by our decision 55 Comp. Gen. 42, 44 (1975) that permitted an agency to take prearbitration administrative action to retroactively change the effective dates of promotion for certain employees to the dates they became eligible for promotion, subject to a determination by the agency that the particular employees would have been promoted to certain specified positions on their eligibility dates, but for the administrative failure to timely process such promotions in violation of the agreement. Although the remedy adopted for these employees appeared to be authorized under the cited decision and similar decisions, the General Counsel in his submission questioned whether our holding in decision B-180010, May 26, 1976, would prohibit implementation of the retroactive promotions for Worden and Lockyer.

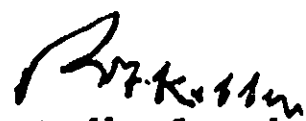
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The violation of mandatory provisions properly included in a bargaining agreement or agency policy that directly results in the reduction of pay and allowances of specified employees is an unjustified or unwarranted personnel action which may be corrected under the Back Pay Statute, 5 U.S.C. § 5596, and Civil Service Commission Back Pay Regulations contained in 5 C.F.R. Part 550, subpart H, which authorizes retroactive remedial action. B-186916, April 25 1977; 55 Comp. Gen. 42, supra.

Our decision of May 26, 1976, supra, involved a proposed retroactive promotion effective on a date prior to the date the position had been reclassified to a higher grade. That decision held that, pursuant to Civil Service Commission regulations contained in Federal Personnel Manual, chapter 511, section 7-1(a) (July 1969 ed.), a reclassification action may not be made retroactively effective in the absence of a statute so providing. Testan v. United States, 424 U.S. 392 (1976). Inasmuch as the instant case does not involve a reclassification action, B-180010, May 26, 1976, is inapposite to the remedy adopted.

Accordingly, the retroactive promotions with backpay ordered for Worden and Lockyer may be implemented pursuant to authority contained in 5 U.S.C. § 5596 and 5 C.F.R. Part 550, subpart H.

Deputy

  
Comptroller General  
of the United States



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

*Johnnie Lupton*  
CP

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October 7, 1977

Mr. William G. Kocol  
Grievance Committee Chairperson  
NLRB Union  
c/o National Labor Relations  
Board, Region 13  
Room 881  
Everett McKinley Dirksen Building  
219 South Dearborn Street  
Chicago, Illinois 60604

Dear Mr. Kocol:

We refer to your letter of July 29, 1977, subject: Payment of Backpay for Retroactive Promotions Pursuant to a Grievance Decision, expressing your views on a case submitted by the General Counsel, National Labor Relations Board for a decision.

We have considered your position in rendering our decision of today, Matter of Patricia Worden and J. Kim Lockyer - National Labor Relations Board - Retroactive Promotions, B-189675, copy enclosed, wherein we allow the retroactive promotions of the above-named employees.

Your letter also contains comments concerning our statement in 54 Comp. Gen. 312 (1974) that when an agency has doubt as to whether an award may be legally implemented, it should request a decision on the matter. You indicate that "doubt" is subject to a wide range of interpretations and that our instructions could be employed by agencies merely to delay implementation of awards.

We would point out that our instruction merely implements authority that agency officials already have in 31 U.S.C. §§ 74 and 82d. The purpose of these statutes is to grant agency officials the right to obtain a ruling on the legality of a payment before it is made. Accordingly, our instruction merely states in our decision the authority that agency officials have by statute to obtain rulings in advance of payments. Thus, we have no power to limit these agency officials in the exercise of their rights.

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For this reason, it would be improper for us to indicate that decisions should only be requested when the factual situation under consideration conflicted with one of our decisions.

We trust this above information is responsive to your inquiry.

Sincerely yours,

  
Deputy Comptroller General  
of the United States

Enclosure