

C. Dwyer, PL 81-1

DECISION



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

8232

FILE: B-192295

DATE: November 1, 1978

MATTER OF: Douglas C. Butler - Retroactive Promotion

DIGEST: Employee grieved due to delay in processing promotion papers. Grievance Examiner found that although promotion papers reached personnel office and were acted upon by classification officers prior to beginning of new pay period, grievant's papers were not approved by Personnel Officer until after beginning of new pay period. Grievance Examiner concluded that classification officer acted for Personnel Officer and ordered retroactive promotion. Award may not be implemented since agency regulations delegate authority to approve promotions to Personnel Officer and he has not further delegated that authority in writing.

This action is at the request of Leonard L. Nahme, Director, Office of Finance, U.S. Patent and Trademark Office, Department of Commerce, for an advance decision concerning their authority to implement a grievance decision awarding a retroactive promotion to an employee of that office, Douglas C. Butler.

Mr. Butler was one of three employees who were recommended for promotion to grade GS-13 Patent Examiner. While their promotion papers were logged in the Personnel Office on the same day, the effective dates of the promotions varied in that one was effective on January 16, 1977, and the other two were effective on January 30, 1977. The two employees whose promotions were made effective on January 30, 1977, filed grievances to have the effective dates made retroactive to January 16, 1977.

In a "Decision on Formal Grievance" dated March 29, 1978, the Deciding Official, the Deputy Assistant Commissioner for Patents, decided in favor of Mr. Butler. The essential portion of his decision is set forth below:

"Under the circumstances of this case, I agree with the Grievance Examiner that the approval of the promotion by the classification

officer must be deemed to be the act of the Personnel Officer and hence of the authorizing official. The record in this grievance file shows that the promotion of Charles E. Frankfort was approved by Classification Officer Smith on January 18, 1977, whereas the promotion of Douglas C. Butler was approved by Classification Officer Jeter on January 12, 1977. Since January 16, 1977 is the proposed effective promotion date, it is apparent that the Patent and Trademark Office does not have authority to authorize a retroactive promotion to Charles E. Frankfort because his promotion was not approved by the authorized official prior to the proposed effective promotion date. Moreover, I am not aware of any nondiscretionary agency regulation, policy or collective bargaining agreement provision or right granted by statute which mandates that promotion take place by a specific date which would also authorize retroactive promotion."

Since a retroactive promotion was not recommended for Mr. Charles E. Frankfort, no further consideration will be given here to his attempt to obtain a retroactive promotion.

Mr. Nahme questions whether it is proper to grant backpay to Mr. Butler for the period January 16-30, 1977, as required by the grievance award. He states that while the Grievance Examiner found that the Classification Officer had approved Mr. Butler's promotion on January 12, 1977, the record shows that the Personnel Officer did not approve the promotion until January 30, 1977. Mr. Nahme argues that the authority for final approval of promotions had not been delegated to the Classification Officer. He states that:

"Department of Commerce Administrative Order (DOC AO) 202-250, entitled 'Delegation of Authority for Personnel Management' sets forth those DOC officials to whom authority for personnel management is delegated. Appendix A to this agency regulation notes that this authority has been delegated to the following:

B-192295

'Commissioner
Deputy Commissioner
Assistant Commissioners (statutory)
Assistant Commissioner for Administration
Personnel Officer'

"The approval authority for personnel actions including promotions is also set forth in DOC AO 202-250 and in pertinent part states:

"SECTION 4. FINAL APPROVAL OF PERSONNEL ACTIONS.

".01 Personnel actions involving accessions, changes in employment status, and separations of employees will become legally valid on the effective date specified on CD-251, 'Notification of Personnel Action,' or other document specified by the Civil Service Commission or General Accounting Office for a similar purpose, upon approval (individually or on 'cover sheets') of the CD-251 or equivalent documents, or other document approved by the Director of Personnel, by one of the appointing officers listed in Appendix A of this order, or by some other person to whom authority has been delegated under paragraph 3.01 of this order...(Emphasis added).

"As indicated above, some other person in addition to those noted in Appendix A may have delegated authority to approve personnel actions. This authority has not been so delegated to other persons."

As a general rule a personnel action may not be made retroactive so as to increase the rights of an employee to compensation. We have made exceptions to this rule where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation. See 55 Comp. Gen. 42 (1975); 54 id. 888 (1975), and decisions cited therein. The parties agree that the second and third exceptions are not applicable to this case.

With respect to delays or omissions in processing of promotion requests that will be regarded as administrative or clerical errors that will support retroactive promotion, applicable decisions have drawn a distinction between those errors that occur prior to approval of the promotion by the properly authorized official and those that occur after such approval but before the acts necessary to effective promotions have been fully carried out. See 54 Comp. Gen. 538 (1974); B-183969, July 2, 1975; and B-184817, November 28, 1975. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request unless his exercise of disapproval authority is otherwise constrained by statute, administrative policy, or regulation. Thus, where the delay or omission occurs before that official has had the opportunity to exercise his discretion with respect to approval or disapproval, administrative intent to promote at any particular time cannot be established other than by after-the-fact statements as to what that official states would have been his determination. After the authorized official has exercised his authority by approving the promotion request, all that remains to effectuate that promotion is a series of ministerial acts which could be compelled by writ of mandamus.

In the instant case the Grievance Examiner found that the act of the Classification Officer must be deemed to be the act of the Personnel Officer, and that finding was approved by the deciding official. Such a finding is tantamount to finding that the Classification Officer was an official having been delegated the authority to approve promotions. The Department of Commerce Administrative Order DOC AO 202-250, section 4 provides that approval of personnel actions may be exercised by one of the officials listed in Appendix A of that order or " * * * by some other person to whom authority has been delegated under paragraph 3.01 * * * ." Paragraph 3.01 is set forth below:

"Authority is hereby further delegated to officers and employees who are listed in Appendix A of this order, and to such other employees of the Government as may be specified in this order or designated or approved by the Director of Personnel in writing, to administer and conduct

B-192295

personnel management activities and process personnel actions in both the Department and Field Service, subject to the limitations and authorizations outlined in this order." (Emphasis added.)

The other provisions of the order are not capable of being interpreted as delegating to the Classification Officer the authority to approve promotions. Thus, unless the Director of Personnel has made the delegation in writing as required by DOC AC 202-250, section 3.01, the grievance award would be in violation of valid agency regulations and, as such, unenforceable. B-180010.11, March 9, 1977. Mr. Nahme on behalf of the agency states that no further delegations were made.

Accordingly, since there exists no administrative error which would form the basis for a retroactive promotion, we hold that the grievance award may not be implemented.

R. F. K. 114
Deputy Comptroller General
of the United States