

PLM - I

13531

DECISION



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

FILE: B-196019

DATE: April 23, 1980

MATTER OF: Martha B. Poteat - [Claim for Retroactive Promotion and Backpay]

- DIGEST:**
1. Employee seeks retroactive promotion after agency failed to promote her to grade GS-9 within 2 years under training program. Absent nondiscretionary agency regulation or policy to promote at stated intervals, employee is not entitled to retroactive promotion. See Thomas Davis, B-189673, February 23, 1978.
 2. Employee filed sex discrimination complaint for agency's failure to promote her to grade GS-11. Agency found there had been discrimination and proposed immediate promotion which employee accepted. Since GAO does not have authority to investigate or decide discrimination claims in other agencies, claim for retroactive promotion based on sex discrimination is denied.
 3. Employee seeks reimbursement of attorney fees in connection with claims for retroactive promotions to grades GS-9 and GS-11. With regard to her promotion to GS-9, claim is denied since employee was not found to be affected by unjustified or unwarranted personnel action. With regard to her promotion to GS-11, we find no authority for payment of attorney fees incident to settlement of her discrimination complaint.

AGC00023

Ms. Martha B. Poteat, an employee of the Department of Housing and Urban Development (HUD), has appealed our Claims Division settlement of October 30, 1978, denying her claim for a retroactive promotion and backpay based upon her successful completion of a training program. Ms. Poteat has also submitted claims for a retroactive promotion and backpay based on sex discrimination and for attorney fees in connection with both claims. For the reasons stated below, we sustain our Claims Division determination concerning her retroactive promotion and we deny Ms. Poteat's additional claims.

~~009974~~ 112142

Retroactive Promotion - Training Program

Ms. Poteat entered HUD's Technical Training Program for Underwriting Personnel on September 7, 1971, as a grade GS-5. The literature accompanying this program indicated that employees would be trained for journeyman grade GS-9 level positions, and that:

"Trainees who enter the program at the GS-5 level will spend two years in training status while those who enter at the GS-7 level should qualify for the journeyman grade in one year."

Ms. Poteat was promoted to grade GS-7 after 1 year, but, when her promotion to grade GS-9 was not granted the following year, she filed a classification appeal with the Civil Service Commission (CSC) in March 1974. The CSC determined that her position was classified at grade GS-9, and she was therefore promoted to that grade on September 1, 1974. Ms. Poteat seeks a retroactive promotion and backpay for the period from September 17, 1973, to September 1, 1974, on the ground that HUD made a "firm commitment" to promote her to grade GS-9 after successful completion of 2 years in the training program.

Ms. Poteat's claim was the subject of an agency grievance proceeding in which a CSC grievance examiner concluded that Ms. Poteat had been given a "firm commitment" with respect to promotions to grades GS-7 and GS-9. However, the grievance examiner also held that " * * * the record fails to disclose any specific or direct language which states employees so entering [the training program] would receive promotions as a matter of right." Findings and Recommendations, September 8, 1975.

Both Ms. Poteat and the agency have focused on a memorandum on promotion policy for interns and trainees dated March 28, 1973, which stated, in pertinent part, as follows:

- "1. The promotion of an employee from an intern or trainee status into the target position is exempt from competition under applicable merit promotion procedures, provided the employee was selected competitively for the

intern or trainee position. Promotion eligibility to the target position is based on the following:

- successful completion of the formal training plan;
- demonstrated ability to perform the duties at the next higher level of the target position, as determined by the supervisor to whom the employee is permanently assigned;
- recommendation by the supervisor for promotion; and
- satisfying the time-in-grade requirements established by the Civil Service Commission and the Department.

"2. The promotion of an employee beyond the target position and successively to the full journeyman level in a career ladder will follow normal merit staffing procedures and career management plans. It is not automatic and is contingent on demonstrated ability to perform the duties at the next higher level; recommendation of the supervisor; and completion of time in grade."

The record shows that Ms. Poteat met all the criteria for promotion listed above as of September 1973, but HUD has refused to grant a retroactive promotion in the absence of a written agreement or policy requiring promotions at stated intervals.

Generally, Federal employees are entitled only to the salaries of the positions to which they are appointed regardless of the duties they actually perform. Dianish v. United States, 183 Ct. Cl. 702 (1968); and Thomas Davis, B-189673, February 23, 1978. The granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. 54 Comp. Gen. 263 (1974). Moreover, salary increases may not ordinarily be

made retroactive. 40 Comp. Gen. 207 (B-144022) (1960); and 39 id. 583 (1960). However, retroactive adjustments of salary rates may be made where an administrative or clerical error (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in the failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. See 55 Comp. Gen. 42 (1975); 54 id. 888 (1975); and decisions cited therein. We have recognized that these above-cited exceptions may constitute unjustified or unwarranted personnel actions under the Back Pay Act, 5 U.S.C. § 5596 (1976). See 55 Comp. Gen. 42 supra.

In the present case Ms. Poteat argues that HUD violated a "firm commitment" to promote her from grade GS-5 to grade GS-9 after 2 years and that, therefore, she is entitled to a retroactive promotion and backpay. However, it has not been shown that HUD's promotion policy in this situation was nondiscretionary or that Ms. Poteat had a vested right to promotion upon successful completion of the training program. As the CSC grievance examiner pointed out, the literature describing the program did not promise or guarantee a promotion within certain time frames. In addition, HUD's promotion policy dated March 28, 1973, was not a nondiscretionary policy to promote the participants if they met certain requirements; it was a statement as to when the employee would be eligible for promotion. These statements did not deprive the agency of its discretion in the matter of promotions and, therefore, these statements do not afford a legal basis for retroactive promotion in this case. See Davis, supra. Accordingly, we sustain our Claims Division determination denying Ms. Poteat's claim for a retroactive promotion to grade GS-9.

Retroactive Promotion - Sex Discrimination

Ms. Poteat's second claim is for a retroactive promotion and backpay to grade GS-11 effective October 1974, on the basis that she was denied this promotion because of sex discrimination.

Under procedures set forth in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (1976), and 29 C.F.R. Part 1613, Ms. Poteat filed her sex discrimination

B-196019

complaint with her employing agency, HUD. The agency determined that she had been denied a promotion to grade GS-11 due to sex discrimination and proposed to immediately promote her to grade GS-11. Ms. Poteat agreed to this proposal in 1977 and did not pursue her opportunities for appeal to higher authority.

Ms. Poteat now seeks a retroactive promotion to grade GS-11, as of October 1974 with backpay, but it is not within the jurisdiction of this Office to conduct investigations into or render decisions on claims of discrimination in employment in other agencies of the Government. See Clem H. Gifford, B-193834, June 13, 1979. Hence, we are not empowered to grant Ms. Poteat a retroactive promotion and backpay based on sex discrimination.

Attorney Fees

Finally, Ms. Poteat has submitted a claim for attorney fees in connection with her claims for retroactive promotions to grades GS-9 and GS-11. We shall consider this as two separate claims for attorney fees.

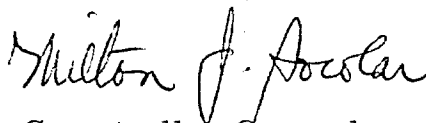
With regard to Ms. Poteat's claim for a retroactive promotion to grade GS-9, we note that under the provisions of Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1216, 5 U.S.C. § 5596(b)(1)(A)(ii), effective January 11, 1979, the Back Pay Act has been amended to allow payment of reasonable attorney fees where an employee is found to have been affected by an unjustified or unwarranted personnel action. Without deciding the issue of the retroactive effect of this amendment to the Back Pay Act, we deny Ms. Poteat's claim since there has been no determination that Ms. Poteat has been affected by an unjustified or unwarranted personnel action with regard to her claim for a retroactive promotion and backpay to grade GS-9.

In connection with Ms. Poteat's claim for a retroactive promotion to grade GS-11, we note that HUD agreed Ms. Poteat had been denied the promotion due to sex discrimination. However, it has been the position of this Office that Federal agencies have no authority to pay attorney fees incident to the settlement of discrimination complaints under title VII of the Civil Rights

B-196019

Act of 1964, as amended (42 U.S.C. § 2000e-16(b)), in the absence of specific legislation, further clarification of conflicting court decisions, or appropriate regulations. See B-167015, May 16, 1978, and April 7, 1978. We note that the Equal Employment Opportunity Commission has recently issued interim regulations authorizing the payment of attorney fees by Federal agencies incident to the settlement of discrimination complaints. See 45 Fed. Reg. 24,130 (1980). These interim regulations will apply only to pending and future complaints and, therefore, we find no basis for the payment of attorney fees in connection with Ms. Poteat's claim for a retroactive promotion and backpay to grade GS-11.

Accordingly, we sustain our Claims Division determination and deny Ms. Poteat's additional claims for a retroactive promotion and attorney fees.



Acting Comptroller General
of the United States