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**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

FILE: B-196053

DATE: February 29, 1980

MATTER OF: Steve Coleman, Jr. - Claim for Backpay Following Improper Demotion

- DIGEST:
1. Employee of Government Printing Office (GPO), who was improperly demoted from Policeman (First Class) to Printing and Plant Worker (Janitor) and later restored to former position as Policeman, suffered reduction in actual rate of pay upon restoration. Employee seeks to retain higher rate of pay under highest previous rate rule, 5 U.S.C. § 5334(a). However, section 5334(a) does not apply to GPO employees whose positions are not subject to chapter 51 of title 5, United States Code. Employee may not retain higher rate of pay.
  2. Employee, who was demoted from Policeman (First Class) to Printing and Plant Worker (Janitor), was restored to former position retroactively upon decision of Federal Employee Appeals Authority. Employee argues that but for improper demotion he would have been promoted to Sergeant. However, absent evidence that he would have been chosen among eligible candidates or that he would have been promoted pursuant to law, regulation, or collective bargaining agreement, he is not entitled to retroactive promotion.
  3. Employee, who was improperly demoted and later restored to former position retroactively, claims backpay during period of demotion. Agency computed pay as if improper demotion had not occurred and determined employee's backpay would be less than interim earnings. Employee may retain interim earnings but is not entitled to any backpay. See Warren H. Kummer, B-194777, October 30, 1979.

3979 - This decision is in response to a request from Mr. Stuart A. Kirsch, National Representative, Local 2738, American Federation of Government Employees, concerning the claim of Mr. Steve Coleman, Jr., an employee of the Government Printing Office (GPO), for retention of his current rate of pay and a retroactive promotion with backpay

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incident to an improper reduction in grade. The questions presented for our decision are: (1) whether Mr. Coleman was entitled to retain the higher rate of pay he received prior to restoration to his former position; and (2) whether he was entitled to a retroactive promotion and backpay during the period of the improper demotion.

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Mr. Coleman was employed by GPO as a Policeman (First Class), GG-5, Step 6, when he was demoted effective August 15, 1976, to the position of Printing and Plant Worker (Janitor), PPW Grade 1, Step 2. Mr. Coleman appealed that adverse action to the Federal Employee Appeals Authority (FEAA), and the FEAA decision, as affirmed by the Merit Systems Protection Board (MSPB), held that GPO's action was arbitrary and capricious and not taken for such cause as will promote the efficiency of the service. On May 7, 1979, GPO cancelled the demotion action and restored Mr. Coleman to his position as Policeman (First Class). This action resulted in a reduction in Mr. Coleman's annual rate of pay from \$13,540.80 to \$12,607.

The union argues that in restoring Mr. Coleman to his former position he should not suffer any reduction in his annual rate of pay. It points out that under the provisions of 5 U.S.C. § 5334(a) (1976) and 5 C.F.R. § 531.203(c) (1978) when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate. The union also contends that but for the improper demotion Mr. Coleman would have been promoted to the rank of Sergeant. Thus, the union argues that GPO should have restored Mr. Coleman to the position of Sergeant at a step no less than his current rate of pay and that GPO should award him backpay.

The report from GPO states that, pursuant to the MSPB decision, GPO cancelled the demotion action and restored Mr. Coleman to the position he would have held if the demotion had never occurred, Policeman (First Class). In doing so, GPO restored Mr. Coleman to grade GG-5, Step 7, a rate of pay which credited him with a within-grade increase effective in 1977. The report from GPO disputes the contention that Mr. Coleman would have been promoted to the rank of Sergeant during the period of his demotion. The report states that for the four Sergeant vacancies filled during this period there were several qualified candidates for each vacancy and, thus, Mr. Coleman is not entitled to a promotion and backpay under those circumstances. Finally, GPO argues that Mr. Coleman is not otherwise entitled to

backpay since his actual gross earnings including overtime were \$34,163.52, an amount which exceeded what he would have earned as a Policeman (First Class) including overtime, which the agency has computed as \$33,448.93.

The first issue to be decided is whether Mr. Coleman was entitled to retain the higher rate of pay he received prior to restoration to his former job as a Policeman (First Class). After the FEAA concluded, and the MSPB affirmed, that GPO had improperly demoted Mr. Coleman, the agency was required to cancel the demotion retroactive to the date of the improper action. See 5 C.F.R. §§ 752.401 and 752.402 (1978). Under the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1976), and the implementing regulations, contained in 5 C.F.R. Part 550, Subpart H, when an appropriate authority corrects an unjustified or unwarranted personnel action, the agency shall recompute the pay of the employee as if the unjustified or unwarranted personnel action had not occurred. See 5 C.F.R. § 550.804(a). Thus, Mr. Coleman is deemed to have served in the position of Policeman (First Class) for the entire period of the improper demotion from August 1976 to May 1979. During this period Mr. Coleman became eligible for a within-grade increase, and this increase was properly granted to him effective November 1977. See Federal Personnel Manual (FPM) Supp. 990-2, Book 550, S8-6c(9).

As to whether Mr. Coleman was entitled to retain his highest previous rate of pay, the union cites the provisions of 5 U.S.C. § 5334(a) and the implementing regulation. However, this statute applies only to employees and positions under chapter 51 of title 5, United States Code. See 5 U.S.C. § 5331(b). Both of the positions occupied by Mr. Coleman were established under the Kiess Act, 44 U.S.C. § 305 (1976), and are not subject to chapter 51 of title 5, United States Code. See 5 U.S.C. § 5102(c)(9). Thus, the highest previous rate rule contained in 5 U.S.C. § 5334(a) does not apply to Mr. Coleman, and he is not entitled to retain the higher rate of pay of his Printing and Plant Worker position after the date of his restoration to the position of Policeman (First Class).

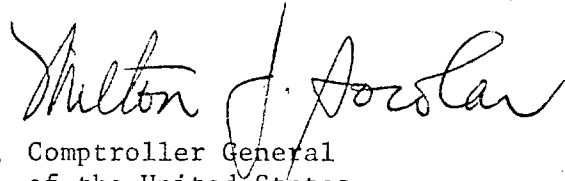
The second issue to be decided is whether Mr. Coleman was entitled to a retroactive promotion and backpay during the period of the improper demotion. The union contends that but for the improper demotion Mr. Coleman would have been promoted to the rank of Sergeant sometime between August 1976 and May 1979. However, there is no evidence in the record before us to support this contention. As the

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agency has pointed out, there were several qualified candidates for each Sergeant vacancy, and there is nothing before us which indicates that Mr. Coleman would have been chosen among those candidates to fill one of those vacancies. See FPM Supp. 990-2, Book 550, S8-4b(2). Furthermore, there is no indication that under an applicable law, Executive order, agency regulation, or collective bargaining agreement provision, Mr. Coleman would have been selected for promotion under these circumstances. See, for example, 54 Comp. Gen. 888 (1975). Therefore, we conclude that Mr. Coleman is not entitled to a retroactive promotion to the rank of Sergeant.

Finally, the union argues that Mr. Coleman is entitled to backpay incident to cancellation of the improper demotion. As noted above, GPO has compared what Mr. Coleman would have earned during this period as a Policeman (First Class) with what he actually earned and has concluded that his total backpay would be less than his total interim earnings. As we held in Warren H. Kummer, B-194777, October 30, 1979, where the total interim earnings exceed the total amount of backpay due the employee, the excess amount may be retained by the employee but he may not be paid any backpay. See 5 C.F.R. § 550.804(a) (1978). We know of no other basis to award Mr. Coleman any additional amount for backpay.

Accordingly, we conclude that Mr. Coleman is not entitled to retention of his higher rate of pay, a retroactive promotion, or backpay incident to his improper demotion.



FOR THE Comptroller General  
of the United States