DECISION

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

FILE: B-209414 DATE: December 7, 1983

MATTER OF: Eric E. Bahl - General Schedule Within-Grade Increase - Pay Retention - Repromotion to Prior Position After Demotion - Reconsideration

DIGEST: A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. § 1586 (1976 & Supp. IV 1980) to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. § 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. § 5363 (Supp. IV 1980). The employee's subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an "equivalent increase" under 5 U.S.C. § 5335(a) (1976 & Supp. IV 1980); 5 C.F.R. § 531.403 (1982). B-209414, January 31, 1983, 62 Comp. Gen. ____ reversed based on new information furnished.

The issue in this case is whether the repromotion of an employee to his former position, occurring while the employee is receiving a retained rate of pay under 5 U.S.C. § 5363 (Supp. IV 1980), constitutes an "equivalent increase" under 5 U.S.C. § 5335(a) (1976 & Supp. IV 1980), and 5 C.F.R. § 531.403 (1982), so as to require the commencement of a new waiting period for periodic step increases. We hold that the repromotion of an employee under these circumstances constitutes an "equivalent increase" within the meaning of the applicable law and regulations, even though the employee's actual salary remains the same throughout the period of demotion and repromotion.

Michael E. George, Acting Personnel Officer, Department of the Army, Kansas City District, Corps of Engineers, requests that we reconsider our decision in Eric E. Bahl, B-209414, January 31, 1983, 62 Comp. Gen. _____. That

decision was handled as a labor-relations matter under our procedures in 4 C.F.R. Part 22 (1982). Pursuant to those procedures, the National Federation of Federal Employees, Local 29 (NFFE), representing Mr. Bahl, served the Army with a copy of its request for a decision. The Army did not file responsive comments with our Office, and, therefore, we rendered a decision based on information supplied to us by NFFE. The Army now advises us that NFFE incorrectly reported the facts surrounding Mr. Bahl's claim. For the reasons that follow, we reverse our prior determination.

Information furnished to us by NFFE, upon which our prior decision was based, set forth the relevant facts as follows. In June 1975, Mr. Bahl, a General Schedule employee, was transferred to the Army Real Estate Agency in Europe and simultaneously was promoted to step 1 of grade GS-11. Due to subsequent pay adjustments and within-grade increases, Mr. Bahl had attained step 4 of grade GS-11 in June 1978. Had Mr. Bahl remained in that position and grade, his next two within-grade increases would have occurred in June 1980 and June 1982. However, on July 1, 1980, Mr. Bahl was demoted to grade GS-9 when he was transferred back to Kansas City. Concurrently, he received a within-grade increase to step 5 of his former grade. At that time, he was afforded grade retention under the provisions of 5 U.S.C. § 5362, and, hence, for pay administration purposes, his grade remained the same (grade GS-11, step 5). In November 1980, Mr. Bahl was repromoted to his former position at grade GS-11, step 5.

The NFFE further reported that the Army denied Mr. Bahl's request for a retroactive within-grade increase effective on or about July 1, 1982, stating that it was not due until November 1982, and citing our decision in 42 Comp. Gen. 702 (1963). That decision, in conjunction with others discussed more fully below, expresses the general rule that repromotion during a period of pay retention constitutes an "equivalent increase" within the contemplation of 5 U.S.C. § 5335(a), requiring the commencement of a new waiting period for within-grade increases.

Relying on the facts presented by NFFE, we held that Mr. Bahl was entitled to be retroactively awarded a within-grade increase under the provisions of 5 U.S.C.

§ 5335(a), based on the schedule in effect prior to his demotion. Specifically, we distinguished pay retention under 5 U.S.C. § 5363 from grade retention under 5 U.S.C. § 5362, determining that, under the latter provision, the retained grade of an employee is to be treated as the grade of his position for all purposes, including eligibility for within-grade advancement, during the 2-year period of grade retention. Consequently, we decided that Mr. Bahl's repromotion to his former position, occurring during a period of grade retention, did not constitute an "equivalent increase" under 5 U.S.C. § 5335(a) and its implementing regulations, and did not require commencement of a new waiting period for within-grade increases.

The Army now advises us that Mr. Bahl was ineligible for grade retention under 5 U.S.C. § 5362 because he was not demoted as the result of a reduction-in-force (RIF) or reclassification process. He was, however, afforded pay retention under 5 U.S.C. § 5363, because he was reduced in grade as a consequence of exercising his right under 10 U.S.C. § 1586 (1976 & Supp. IV 1980) to return to a position in the United States following the completion of overseas duty. Specifically, section 1586 guarantees an employee that he will be placed, upon his return from overseas duty, in the same position he vacated to accept the foreign assignment. Thus, even though Mr. Bahl had been promoted from grade GS-9 to grade GS-11 concurrent with his overseas transfer, subsequently attaining step 5 of grade GS-11, he was reemployed in the United States in the grade GS-9 position he had vacated to accept the overseas assignment. He was, however, paid at the rate for grade GS-11, step 5, in accordance with Department of Defense Instruction 1404.8 (April 10, 1968), which implements 10 U.S.C. § 1586 and provides in relevant part that:

> "An employee whose exercise of reemployment rights would result in a reduction from his current grade shall be given assistance through return placement programs for at least a six-month period in locating a position at his present grade before being required to exercise his return rights. Employees returning to a lower grade will be entitled to pay savings benefits if otherwise eligible." (Emphasis added.)

The NFFE has responded to the Army's request for reconsideration, renewing its contention that Mr. Bahl was entitled to grade retention under 5 U.S.C. § 5362, as implemented by 5 C.F.R. § 536.103 (1982). Specifically, the union states that, while Mr. Bahl may not have been demoted through RIF or reclassification procedures, he had served for at least 52 consecutive weeks in a higher graded position prior to the reduction in grade, and, therefore, was eligible for grade retention under 5 C.F.R. § 536.103(c)(3). Section 536.103(c)(3) states that:

> "(3) In situations other than those covered by paragraphs (c)(1) and (c)(2) of this section, an employee is eligible for grade retention if he or she, immediately prior to being placed in the lower grade, has served in a position in any pay schedule for 52 consecutive weeks or more provided that the service was in an agency as defined in 5 U.S.C § 5102 at a grade(s) higher than the position in which the employee was placed."

Applying the requirements of 5 U.S.C. § 5362 and its implementing regulations, we are unable to find that Mr. Bahl was entitled to grade retention. Section 5362 authorizes grade retention only for those individuals who are reduced in grade as a result of a RIF or reclassification process. 5 U.S.C. §§ 5362(a) and (b). See also H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 159, 160 (1978). In this regard, the implementing regulations in 5 C.F.R. § 536.103(a) state that:

> "(a) Grade retention shall apply to an employee who moves to a position in a covered pay schedule which is lower graded than the position held immediately prior to the demotion in the following circumstances:
>
> > "(1) As a result of reduction-in-force procedures; or
> > "(2) As a result of a reclassification process."

Subsection 536.103(b) provides that an employee who is not entitled to grade retention under the above-cited provisions may, at the employing agency's option, be granted grade retention if he has been reduced in grade as the result of a reorganization or reclassification decision announced by management in writing.

The provisions of 5 C.F.R. § 536.103(c), cited by NFFE, do not delineate additional circumstances under which an employee may be afforded grade retention, but, instead, prescribe eligibility requirements applicable to an employee who is reduced in grade as a result of the processes specifically identified in subsections 536.103(a) and (b). See Federal Personnel Manual, Chapter 536, Subchapter 2 (October 1, 1981). Since Mr. Bahl was not reduced in grade as the result of a RIF or reclassification process, he is not entitled to grade retention under 5 U.S.C. § 5362, as implemented by 5 C.F.R. § 536.103, and the eligibility requirements stated in 5 C.F.R. § 536.103(c) do not pertain to him.

Additionally, NFFE states that 10 U.S.C. § 1586 was enacted in 1960 to provide minimum protection for an employee returning to a position in the United States following overseas duty, and, therefore, should not be construed as diminishing the grade and pay retention benefits authorized by 5 U.S.C. §§ 5362 and 5363, added by the Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, 92 Stat. 1218. The union further contends that the grade and pay retention provisions of the CSRA supercede 10 U.S.C. § 1586, since the former provisions are "more specific" than the latter. We see no useful purpose to be served by addressing these contentions, since we have determined that Mr. Bahl was not entitled to grade retention under 5 U.S.C. § 5362, and the Army states that the employee was afforded pay retention under 5 U.S.C. § 5363. Accordingly, the issue for our determination is whether the repromotion of an employee placed on pay retention under 5 U.S.C. § 5363 is an "equivalent increase" under 5 U.S.C. § 5335(a), as implemented by 5 C.F.R. § 531.403, so as to require the commencement of a new waiting period for periodic step increases.

Section 5335(a) of Title 5, United States Code, provides that an employee is eligible for periodic step increases in pay upon completion of 104 calendar weeks of

service in pay rates 4, 5, and 6, as long as the employee did not receive an "equivalent increase" in pay from any cause during that period. An "equivalent increase" is defined in 5 C.F.R. § 531.403 as follows:

> "'Equivalent increase' means an increase or increases in an employee's rate of basic pay equal to or greater than the difference between the rate of pay for the General Schedule grade and step occupied by the employee and the rate of pay for the next higher step of that grade."

In cases arising under the salary retention statutes in effect before the CSRA, we held that, after a demotion with retained pay and a later repromotion to the employee's former grade and step, the employee must begin a new waiting period upon repromotion without counting service at the grade and step before the demotion as part of the new waiting period. Richard C. Dunn, B-193394, March 23, 1979; Duane E. Tucker, B-193336, March 23, 1979. We explained that, upon repromotion, the constructive increase in pay from the applicable rate determined under 5 U.S.C. § 5334(b) for the lower grade held during demotion constitutes an "equivalent increase" within the meaning of 5 U.S.C. § 5335(a). See 43 Comp. Gen. 701 (1964); 43 Comp. Gen. 507 (1964); 42 Comp. Gen. 702 (1963).

The rule stated in the above-cited decisions applies to an individual who is repromoted while receiving a retained rate of pay under 5 U.S.C. § 5363, for several reasons. First, the provisions of 5 U.S.C. § 5334(b) (Supp. IV 1980), upon which our prior decisions were based, continue to require the use of constructive within-grade increases in determining the rate to be paid an employee who is promoted while receiving a retained rate of compensation.

Second, 5 U.S.C. § 5363 parallels the prior statutes authorizing salary retention in that it provides only for pay, and not grade retention. Thus, although an employee afforded pay retention under 5 U.S.C. § 5363 receives basic pay based on the rate for the grade and step he had attained prior to demotion, the lower grade held during demotion is relevant for other purposes of pay and pay administration.

In contrast, under the grade retention provisions of 5 U.S.C. § 5363, the grade the employee attained prior to his demotion is to be treated as his grade for all purposes, including eligibility for within-grade advancement, during the 2-year period of grade retention.

Finally, we advised the Office of Personnel Management of the foregoing considerations when that agency recently proposed revisions in the within-grade increase regulations set forth in 5 C.F.R. Part 531. Subsection 531.407(c)(7) of the proposed regulations provided that an increase in an employee's rate of basic pay should not be considered an "equivalent increase" when it results from the promotion of an individual receiving pay retention under 5 U.S.C. § 5363, as implemented by 5 C.F.R. Part 536, unless it results in an increase in pay of at least one within-grade increase for the grade to which the individual is promoted. 45 Fed. Reg. 50,338 (July 29, 1980). This rule was deleted from the final regulations because it conflicted with our prior decisions, discussed above. 46 Fed. Reg. 2,317 (January 9, 1981).

Thus, applying the relevant statutes and regulations in light of our prior decisions, Mr. Bahl's repromotion to grade GS-11, step 5, while he was receiving pay for that grade and step as a retained rate resulted in a constructive pay increase under 5 U.S.C. § 5334(b). This increase represented an "equivalent increase" within the meaning of 5 U.S.C. § 5335(a), as implemented by 5 C.F.R. § 531.403, and a new waiting period for within-grade increases commenced upon the employee's repromotion in November 1980. Mr. Bahl, therefore, would not have been eligible for within-grade advancement to grade GS-11, step 6, until November 1982, after he had completed 104 weeks of service in step 5. On this basis, we reverse our earlier determination that Mr. Bahl was entitled to a within-grade increase on or about July 1, 1982, based on the schedule in effect prior to his demotion.

The NFFE additionally asserts that "it is possible" that the Army incorrectly computed a pay raise granted to Mr. Bahl on October 1, 1980, and has requested that the employee be awarded backpay in an unspecified amount. We are unable to render a determination on this matter since

NFFE's allegation is speculative and has not been adequately substantiated. See 4 C.F.R. §§ 22.8, 31.7 (1982).

For the reasons stated above, we reverse our prior decision.

Milton J. Socolar

for Comptroller General
of the United States