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DECISION

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

FILE: B-219220 **DATE:** April 14, 1986

MATTER OF: John R. MacDonald

DIGEST:

When an agency assigns employees to the merit pay system and then reassigns them back to the General Schedule system, those employees are not entitled to retroactive pay and within-grade waiting time credit equal to what they would have accrued if they had remained in the General Schedule system, unless administrative error occurred. An agency that properly converted an employee to merit pay status and then reconverted him to the General Schedule upon its prospective adoption of a new standard of employee coverage under the merit pay system, and properly assigned the employee to comparable pay levels, acted in conformity with the relevant statutes and regulations, and did not commit administrative error. Therefore, the employee is not entitled to additional pay and within-grade waiting time credit based on his claim that he was improperly assigned to the merit pay system.

We have been asked to review a settlement of our Claims Group denying the claim of Environmental Protection Agency (EPA) employee John R. MacDonald for backpay and within-grade step increase waiting time credit arising out of his assignment to the merit pay system. In light of the facts presented, and the applicable provisions of statute and regulation, we deny Mr. MacDonald's claim and sustain our Claims Group's settlement in the matter.

Background

The Civil Service Reform Act of 1978 established a merit pay system for federal supervisors and management officials in GS-13, 14 and 15 positions. Employees assigned to the merit pay system receive pay adjustments based upon performance appraisals and are eligible for cash awards in recognition of superior service. See, generally, 5 U.S.C. §§ 5401-5405.

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Mr. MacDonald, a grade GS-13, step 4, employee at the EPA, was determined to be a "management official" and was consequently assigned to the merit pay system on October 4, 1981. As a result he was also found ineligible for membership in his labor-management bargaining unit. He was classified as a GM-13, and placed into a pay scale comparable to GS-13, step 4, which resulted in an increase in his pay at that time equal to the comparability increase applicable to GS-13, step 4, which became effective on that date, under 5 U.S.C. § 5402(c)(2). On November 30, 1982, the American Federation of Government Employees brought charges against the EPA on Mr. MacDonald's behalf before the Federal Labor Relations Authority (FLRA). The union alleged that the EPA improperly removed Mr. MacDonald from membership in a bargaining unit. The charges were subsequently withdrawn on March 29, 1983, and we have been advised that an informal settlement was reached. Based upon the FLRA interpretation of the term "management official" announced in Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 24, October 30, 1981, the agency reviewed its implementation of the merit pay system. Under the new standard, several hundred employees, including Mr. MacDonald, no longer qualified for merit pay, and were reassigned to the General Schedule. The EPA reassigned Mr. MacDonald to the General Schedule on April 3, 1983, in grade GS-13, step 5, pursuant to 5 C.F.R. § 531.204(d).

Mr. MacDonald petitioned the EPA for additional amounts he believed he would have earned if he had not been assigned to the merit pay system. He also asked that the waiting period for his increase to step 6 be deemed to have begun on March 9, 1982, because his grade GS-13 within-grade step increase qualifying date prior to his conversion to merit pay had been March 9.

The EPA referred this claim to the Claims Group of our Office. The Claims Group determined that Mr. MacDonald was not entitled to backpay and restoration of his initial within-grade qualifying date because the EPA did not commit administrative error in assigning him to merit pay status. The Claims Group found that the EPA violated no statutory, regulatory or nondiscretionary policy, and there was therefore no reason for allowing his claim. Mr. MacDonald has now requested a review of our Claims Group's determination.

Discussion

The law governing merit pay was enacted in Title V of the Civil Service Reform Act of 1978, Public Law 95-454, approved October 13, 1978, 92 Stat. 1179, as amended and codified, 5 U.S.C. §§ 5401-5405. It is provided under 5 U.S.C. § 5402 that:

> "(a) * * * the Office of Personnel Management shall establish a merit pay system * * *.
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> "(c)(2) Any employee whose position is brought under the merit pay system shall, so long as the employee continues to occupy the position, be entitled to receive basic pay at a rate of basic pay not less than the rate the employee was receiving when the position was brought under the merit pay system * * *."

Implementing federal regulations issued by the Office of Personnel Management state that when an employee loses merit pay status, "the employee shall receive his or her existing rate of basic pay, plus * * * (4) In the case of an employee whose resulting rate of basic pay falls between two steps of a General Schedule grade * * * the amount of any increase that may be necessary to pay the employee the rate for the next higher step of that grade * * *." 5 C.F.R. § 531.204(d).

Our decisions have generally held that personnel actions cannot be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended; (2) deprived an employee of a right by statute or regulation; or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. Benedict C. Salamandra, B-212990, July 23, 1984; Internal Revenue Service, 55 Comp. Gen. 42 (1975). We have specifically held that agencies have the authority to determine coverage under the merit pay system, and that a redetermination of an employee's status returning him to a General Schedule position is not viewed as resulting from administrative error which would warrant

correction of the personnel action. Benedict C. Salamandra, B-212990, supra.

The determination of whether each individual employee should be under the merit pay system is the responsibility of the head of each agency. 5 C.F.R. § 540.102(c) (1980) (currently 5 C.F.R. § 540.103(b)(1)). That determination is to be made under the definitions of the terms "supervisor" and "management official" as contained in 5 U.S.C. § 7103(10) and (11) relating to labor-management relations for federal employees. The same definitions are applied by the Federal Labor Relations Authority in determining whether employees are eligible for inclusion in a bargaining unit, i.e., supervisors and management officials may not be included. Under this authority to place positions under the merit pay system, some agencies adopted a broad definition of "management official" which resulted in the inclusion of all or most individuals in General Schedule levels GS-13, 14 and 15 in the merit pay system. A secondary result was the removal of some of these individuals from labor bargaining units. Employee appeals of such removals to the Federal Labor Relations Authority resulted in the adoption of a narrow definition of "management official" by the Authority for purposes of bargaining unit inclusion. Thus the Authority determined that many individuals included in the merit pay system should not be excluded from the bargaining units of their activities but, in making that decision, the Authority specifically noted that it had no authority to determine whether these same employees were properly included under the merit pay system because this responsibility had been given to the heads of government agencies. 4 FLRA 99, December 16, 1980, as applied in Department of the Navy, Automated Data Processing Selection Office, 7 FLRA 24, supra.

The agency determination to include the affected employees in the merit pay system was not and could not be overturned by the Federal Labor Relations Authority. However, upon reevaluation in light of the Federal Labor Relations Authority interpretation of the terms being applied, the agency removed hundreds of individuals from the merit pay system.

In similar circumstances, we have held that no administrative error occurs when individuals are converted to the merit pay system based upon reasonable agency

classification of positions. Thus, when the employees are returned to General Schedule positions they are not entitled to have their pay recomputed as if they had never been included in the merit pay system. Instead, the employees are subject to the pay computation applied to individuals removed from the merit pay system by authorized administrative action. Benedict C. Salamandra, B-212990, supra.

In the present case, the EPA established Mr. MacDonald's pay upon conversion to the merit pay system in conformance with 5 U.S.C. § 5402(c)(2). After adopting the FLRA interpretation of "management official," the EPA reassigned Mr. MacDonald to the General Schedule as a GS-13, step 5, as provided by 5 C.F.R. § 531.204(d). Since that action did not involve the correction of an administrative error, recomputation of pay for the period of time Mr. MacDonald was subject to the merit pay system and allowing him pay as if never assigned to that system is not authorized. Accordingly, there is no basis for retroactively adjusting Mr. MacDonald's pay or within-grade waiting credit. We therefore deny the claim of Mr. MacDonald to backpay and within-grade waiting time credit.

Milton J. Socolar

for Comptroller General
of the United States