



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

B-179324

40060
October 11, 1973

The Honorable William H. Brown, III
Chairman, Equal Employment Opportunity Commission

Dear Mr. Brown:

Further reference is made to your letter dated July 30, 1973, in which you request our approval to waive the time-in-grade restriction provided by the Whitten Amendment, 5 U.S.C. 3101, note, for promotion from GS-5 to GS-7, in the case of Mr. Cordell Hughes, an employee of the Equal Employment Opportunity Commission.

You indicate that due to an administrative error, Mr. Hughes was promoted on May 14, 1972, from GS-5, step 6, to GS-7, step 1, after having served at the GS-5, step 6, level for only 6 months, a violation of the Whitten Amendment. You say that to require Mr. Hughes to now return to the GS-5 level after having served at the GS-7 level for more than 13 months would be unjust and impose an undue hardship on him.

This Office has no authority to waive the requirements of the Whitten Amendment, that being a matter within the jurisdiction of the Civil Service Commission. See 5 U.S.C. 3101, note supra. Therefore, any request for such a waiver should be addressed to the Civil Service Commission.

We have long held that a promotion in violation of the Whitten Amendment is illegal and such a promotion would not entitle the person purportedly so promoted to the salary of that position. See 31 Comp. Gen. 564 (1952), 33 Comp. Gen. 541 (1954), and 36 Comp. Gen. 230 (1956). However, we have also held that when an employee is promoted to a higher grade in violation of the Whitten Amendment and thereafter, before the error is discovered, meets the time-in-grade requirements for promotion to such grade, no overpayment need be considered as having occurred in the higher grade between the date the employee otherwise would have been promoted under the agency policy or regulation upon his having completed the time-in-grade requirements and the date the error was discovered. See 49 Comp. Gen. 18 (1969), copy enclosed. Since it appears that Mr. Hughes' case falls within this rule, appropriate administrative action should be taken to make his promotion to GS-7 effective on the date he would have been promoted under the agency policy or regulation upon his completion of the time-in-grade requirements of the Whitten Amendment. Pay he received at the GS-7 level on and after such corrected effective date would then be proper.

~~720657~~

091559

B-179324

While, as we indicated above, we have no authority to waive the requirements of the Whitten Amendment, pursuant to 5 U.S.C. 5584 the Comptroller General or the head of an executive agency (when the claim is not more than \$500) may waive a claim of the United States arising out of an erroneous payment of pay or allowances (with certain exceptions) where collection would be against equity and good conscience and not in the best interests of the United States. The increased pay Mr. Hughes received at the GS-7 rate prior to the proper effective date of his promotion to the GS-7 level may be for consideration for waiver under that statute.

Consideration for waiver pursuant to 5 U.S.C. 5584 must be in accordance with the procedures set forth in the Comptroller General's Standards for Waiver of Claims for Erroneous Payment of Pay and Allowances, 37 Federal Register 26095, December 8, 1972. Also, it should be noted that such a waiver does nothing more than validate the erroneous payments which are waived under that statute and it does not validate the erroneous personnel actions giving rise to such payments.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States