DECISION

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

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FILE: B-184646 DATE: FEB 20 1976

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MATTER OF: Mary H. Harris--Claim for Retroactive Promotion and Backpay

DIGEST:

1. Employee, classified as grade GS-11, alleges that she performed grade GS-12 duties and was wrongfully denied promotion for 6 years. Claim for retroactive pay is denied since employees are entitled only to salary of position they hold regardless of the duties they perform.

2. Employee, classified as grade GS -11, alleges she was wrongfully denied promotion to grade GS-12 because of sex discrimination. Claim for retroactive pay is denied since there has been no determination that employee suffered unwarranted or unjustified personnel action under Back Pay Act because of discrimination. Employee apparently failed to file formal complaint of discrimination with employing agency or Civil Service.

This action is a request for reconsideration of the denial on May 1, 1975, by our Transportation and Claims Division (now Claims Division) of the claim of Ms. Mary H. Harris for backpay believed due as a former employee of the Department of the Air Force .

Briefly stated, the facts are that Ms. Harris was promoted in February 1966, from Procurement Agent , grade GS-9, to Contract Specialist, grade GS-11. In July 1966, she was reassigned to the position of Contract Administrator, grade GS-11, and she remained at the grade GS-11 level until she was promoted to Contract Administrator, grade GS-12, on December 10, 1972. Ms. Harris states that since she was issued a Certificate of Appointment as a contracting officer in July 1966, she had performed duties of a position normally compensated at grade GS-12, and, therefore, she claimed backpay for the period from July 26, 1966, to the date of her retirement, July 12, 1974. Her claim was denied on the grounds that an employee is entitled only to the salary of the position to which he or she is appointed, regardless of duties, and that there was no evidence that she had suffered sex discrimination or an unjustified personnel action regarding her promotion or classification.

On appeal Ms. Harris argues that a grade GS-11 Contract Specialist works with and assists warranted contracting officers while warrants (Certificates of Appointment) issued to contracting officers were granted to "GS-12s and above only." Therefore, she claims that since she was issued a warrant in 1966 but was not promoted to grade GS-12 until 1972 she is entitled to backpay. In addition, when Ms. Harris was issued a new warrant on June 30, 1972, she was advised that she would not be promoted as a result of this action. On appeal she questions how her duties and responsibilities can be "unilaterally altered without changing the position description."

The administrative report disputes Ms. Harris' contention that warrants are issued only to employees at grade level GS-12 or above. The report notes that there are three types of warrants issued, one for Terminating Contracting Officers, one for Limited Administrative Contracting Officers, and one for Administrative Contracting Officers. The report states further:

> "Warrants have been issued as low as the GS-9 level and go up through the GS-15 level in our organization. However, employees are classified to grade levels based on duties and responsibilities assigned by management (CSC classification standards) and not on the type of warrant issued."

With regard to her position classification, the report states:

> "A review of classification and other personnel actions indicates that Mrs Harris's official position duties were annually reviewed and certified by the supervisor as accurate and current during the time period claimed. Several different desk audits were made by our Position Classification Specialists adjusting her grade, series and title to conform to her current work assignments during annual surveys. During these reviews, no allegations or classification appeals or grievances concerning discrimination were received from Mrs Harris to our knowledge. Under AF and CSC regulations, an employee may appeal the grade, series, title

> and accuracy of his position description at any time. Our records indicate that Mrs Harris did not file any classification appeals while under different supervisors from 1966. We, therefore, must assume that she felt her position was classified correctly for she did not exercise her employee appeal rights."

As noted in our Transportation and Claims Division Settlement, the general rule in cases of this nature is that an employee of the Government is entitled only to the salary of the position to which he is actually appointed, regardless of the duties he performs. See B-183218, March 31, 1975. When an employee performs duties normally performed by one in a grade level higher than the one he holds, he is not entitled to the salary at the higher level until such time as he is promoted to the higher level. United States v. McLean, 95 U.S. 750 (1877); Coleman v. United States, 100 Ct. Cl. 41 (1943); Dianish, et al. v. United States, 183 Ct. Cl. 702 (1968); 52 Comp. Gen. 631 (1973). In Coleman v. United States, supra, a claimant sued to recover money allegedly owed him because he had been required to perform duties at a grade level higher than the one he held. The Court of Claims stated:

> "There are innumerable instances in the Government service where employees of a lower classification perform the duties of a higher classification * * * The salaries fixed by Congress are the salaries payable to those who hold the office and not to those who perform the duties of the office. One may hold the office only by appointment by his superior, and the law vests in the superior the discretion as to whether or not appointment to the office shall be made. Where the plaintiff has received the salary of the office to which he is appointed he has received all to which he is entitled under the law. * * *" (Emphasis supplied.)

The courts have consistently held that a person's right to salary is determined by the position which he holds rather than the duties he performs.

It is also well settled that the power to appoint and to promote civilian employees of the Federal Government is an executive function and lies within the discretion of the head of the employing agency. See Tierney v. United States, 168 Ct. Cl. 77 (1964); Wienberg v. United States, 192 Ct. Cl. 24 (1970). Therefore, until Ms. Harris' position was classified upward and she was appointed, she does not appear entitled to the pay of the higher rated position. See Dianish, et al. v. United States, supra.

With respect to position classification we point out that the authority for the establishment of positions, the grading thereof, and the appointment of individuals thereto, rests with the administrative agency and the Civil Service Commission. When a position is classified in accordance with regulations, an employee may not be promoted retroactively, even though the agency may subsequently reconsider its classification determination and reclassify the position upwards. B-178562, July 10, 1973, and B-170500, October 29, 1970. As noted in the administrative report, an employee may appeal his position classification (see 5 C.F.R. Part 511 Subpart F (1975)), but Ms. Harris apparently did not exercise her appeal rights.

Our Office has held as a general rule that an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947); 39 id. 583 (1960); 40 id. 207 (1960). However, we have permitted adjustments (retroactively effective) of salary rates in certain cases when errors occurred in failures to carry out nondiscretionary administrative regulations or policies. See 34 Comp. Gen. 380 (1955) and 39 id. 550 (1960). Also, we have permitted retroactive adjustments in cases where the administrative error has deprived the employee of a right granted by statute or regulation. See 21 Comp. Gen. 369, 376 (1941); 37 id. 300 (1957); 37 id. 774 (1958). Under the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), and the Civil Service Commission's regulations implementing the Back Pay Act, 5 C.F.R. Part 550, Subpart H, there must be a determination by an appropriate decision-making authority that a personnel action taken by an authorized official was improper or erroneous and such action must have resulted directly in the withdrawal or reduction of pay or allowances of the employee. As noted above, Ms. Harris' position classification has not been determined to have been improper or erroneous, and Ms. Harris

apparently never exercised her classification appeal rights even though her position was reviewed annually.

Ms. Harris also argues on appeal that she was not promoted to grade GS-12 upon receipt of her warrant because of sex discrimination. As noted in our Transportation and Claims Division (now Claims Division) Settlement, there is no evidence in the record to indicate that a formal complaint regarding alleged discrimination was ever filed by Ms. Harris during the period in question. On appeal Ms. Harris states that she had discussed the "problem of sex discrimination" periodically with her agency's Civilian Personnel Representative and with her superiors, and apparently, on the basis of those discussions, she elected not to file a formal complaint because she felt it would either be futile or would reflect badly upon her record. Ms. Harris requests that we review the records which she claims would show that she was the only employee of the Defense Contract Management District holding a warrant but at grade level GS-11.

It is not within the jurisdiction of this Office to conduct investigations of allegations of discrimination in employment in other agencies of the Government. This is a matter for handling by the employing agency and/or the Civil Service Commission in accordance with Executive Order 11478, dated August 12, 1969, as well as 42 U.S.C. § 2000e, et seq. (Supp. II, 1972), and the regulations of the Civil Service Commission, as contained in 5 C.F.R. Part 713 (1973). The above-cited provisions set forth the procedures for the filing of a complaint with the employing agency or the Civil Service Commission. In addition, with the enactment of Public Law 92-261, 86 Stat. 103, the 1972 Amendments to the 1964 Civil Rights Act, an aggrieved Federal employee may file a civil action in Federal court under certain time restrictions. 42 U.S.C. §§ 2000e-5, 16 (Supp. II, 1972). Since there has been no determination by the Air Force or the Civil Service Commission that Ms. Harris was denied a promotion on the basis of sex discrimination, there is no authority to award backpay under the Back Pay Act.

Finally, Ms. Harris argues that a recent decision by the United States Supreme Court lends support to her case. However, the decision in Albemarle Paper Co. et al. v. Moody et al.,

422 U.S. 405 (1975), held that it is not necessary for employees to show that their employer acted in bad faith in order to be entitled to backpay under the 1964 Civil Rights Act, as amended. The case involved employees in the private sector who had made a showing of discrimination before the Court. Since Ms. Harris has failed to exercise her right to file a discrimination complaint with her employing agency or the Civil Service Commission and since there has been no determination that Ms. Harris suffered discrimination during the period in question, we must sustain the action of the Transportation and Claims Division (now Claims Division) in disallowing Ms. Harris' claim.

R.F. KELLER

Deputy Comptroller General
of the United States