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**DECISION**



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

**FILE: B-189673**

**DATE: February 23, 1978**

**MATTER OF: Thomas Davis - Claim for Retroactive Promotion and Backpay**

- DIGEST:**
1. Employee of NASA reassigned from a position as warehouseman to that of boiler operator under a Merit Promotion Plan, with an informal agreement that he would be considered for promotion to higher grade levels after 6, 18, and 30 months under the plan, did not acquire a vested right to be promoted at those intervals and is not entitled to retroactive promotions due to delays in promotion actions, since the granting of promotions from grade to grade is a discretionary matter primarily within the province of the agency involved.
  2. Decisions 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), concerning the promotion of employees on official temporary details to higher grade positions, have no application to a claim for retroactive promotion by an employee who was not officially detailed to higher grade position.

This action is in response to correspondence received from Mr. Thomas Davis, 8211 Belgrade Drive, Huntsville, Alabama, which constitutes an appeal of settlement Z-2492315 dated April 27, 1977, issued by our Claims Division, disallowing his claim for retroactive promotions to higher grade positions from and after November 1971, and for backpay, incident to his employment with the National Aeronautics and Space Administration (NASA).

On May 17, 1970, while employed at the George C. Marshall Space Flight Center, Huntsville, Alabama, Mr. Davis was reassigned under a Merit Promotion Plan from the position of Warehouseman Forklift Operator, WB-5402-5 step 3, to that of Operating Engineer, Steam, Helper, WB-5402-5 step 3. NASA authorities report that at the time of this reassignment, in which Mr. Davis undertook new duties as a boiler operator, an "informal agreement" was made that he would be

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considered for promotion to WB-6 after 6 months, to WB-8 after 18 months, and to WB-10 (journeyman level) after 30 months.

It is further reported that when the Coordinated Federal Wage System went into effect on June 28, 1970, Mr. Davis' position was reclassified from WB-5 step 3 to WG-8 step 3. On October 18, 1970, he was promoted to the position of Operating Engineer, Steam, WG-5402-7 step 3. On May 2, 1971, Mr. Davis' position was converted from a wage board system of pay to the General Schedule, and as a result of this conversion he was classified as an Aerospace Engineering Technician, grade GS-802-5 step 3. On June 17, 1971, NASA authorities determined that his pay rate had been incorrectly calculated in the conversion process, and his salary was retroactively adjusted to grade GS-5 step 5.

Mr. Davis did not receive a promotion from grade GS-5 step 5 in November 1971, 18 months after he began working as a boiler operator in connection with the Merit Promotion Plan. He states that he made inquiries about the promotion he believed was then due to him, and was advised that there was a "freeze" on all promotions at the Marshall Space Flight Center. He subsequently filed a classification appeal in April 1972, but action on the appeal was deferred until July 1972. It is reported by NASA officials that during this period the Marshall Space Flight Center was undergoing a reduction in force of its employees, and implementation of this reduction required that all personnel actions such as promotions, reassignments, job reclassifications, etc., be postponed until after the reduction had been completed. Apparently this had been accomplished by July 1972, and on July 23, 1972, Mr. Davis was given a "career promotion" to the position of Aerospace Engineering Technician, grade GS-502-7 step 1. He received yearly in-grade step increases each July for the following 3 years.

Mr. Davis has expressed the belief that ever since November 1971 when he was reassigned under a Merit Promotion Plan his grade classifications have been incorrect and that he has performed work at a higher grade level. He contends that he should have been promoted to grade GS-7 step 6 in November 1971, which promotion he believes would have fulfilled the promises he says were made to him concerning his career progression. He also asserts that such promotion would have given him parity with other boiler operators with whom he was working and who received higher pay than he for doing the same type of work.

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Mr. Davis subsequently submitted his claim for backpay to the Claims Division of this Office. In reviewing the personnel actions that had occurred, our Claims Division determined that Mr. Davis should have been placed in step 6 of grade GS-5 instead of step 5 when his position was converted from wage board to the General Schedule on May 2, 1971, and he was paid the salary difference for the period May 2, 1971, to July 23, 1972. However, in the settlement of April 27, 1977, the Claims Division determined that Mr. Davis was not entitled to the retroactive promotions he had requested on the principle that the granting of promotions from grade to grade is a discretionary matter primarily within the province of the agency concerned.

Mr. Davis questions the correctness of that settlement. He contends, in substance, that the matter would be simply and easily resolved if he were to be granted the promotions that were due him under the Merit Promotion Program. In addition, he asserts that after he began working as a boiler operator he was only a helper for 30 days and that thereafter he was doing exactly the same work as the other higher paid boiler operators. He suggests that he was therefore entitled to equal pay for equal work, at the same pay rates established for those other boiler operators, and he also questions the accuracy of the position title descriptions and dates of classification actions recited in the settlement. In reporting to this Office on the matter, NASA officials have stated that at the time Mr. Davis became an Operating Engineer, Steam Helper, at the WB-5 step 3 level in May 1970, there were 2 other employees at the WB-10 step 3 level whose positions were classified as Operating Engineer, Steam, at the Marshall Space Flight Center. The position these employees occupied were subsequently converted from grades WG-11 step 3 to grade GS-7 step 5 and at the same time the position occupied by Mr. Davis was converted from WG-6 step 3 to grade GS-5 step 5. It is stated that the difference in Mr. Davis' grade and the grade of the other employees reflected Mr. Davis' trainee status.

Generally, Federal employees are entitled only to the salaries of the positions to which they are appointed regardless of the duties they actually perform. B-175372, April 13, 1972; Dainish v. United States, 183 Ct. Cl. 702 (1968). The granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. 54 Comp. Gen. 263 (1974); B-168715,

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January 22, 1970; Tierney v. United States, 168 Ct. Cl. 77 (1964); Weinberg v. United States, 192 Ct. Cl. 74 (1970); United States v. Testan, 424 U.S. 392 (1976). Moreover, salary increases may not ordinarily be made retroactively. 40 Comp. Gen. 207 (1960); 39 Comp. Gen. 583 (1960). However, retroactive adjustments of salary rates may be made when errors occurred in failure to carry out nondiscretionary administrative regulations or policies. See 34 Comp. Gen. 380 (1955) and 39 id. 550 (1960). Retroactive adjustments are also allowed where an administrative error has deprived the employee of a right granted by statute, regulation or labor-management agreement. See 21 Comp. Gen. 369, 373 (1941); 37 id. 300 (1957); 37 id. 774 (1958); 54 id. 263 (1974); 54 id. 403 (1974).

With respect to the question of Mr. Davis' entitlement to promotions under the Merit Promotion Plan through which he states he became a boiler operator, it has not been shown that NASA's promotion policy under such plan was nondiscretionary, and it does not otherwise appear that Mr. Davis had a vested right to promotions upon the completion of 18 and 30 months of participation in the plan. Hence, it is our view that any informal agreement or understanding he may have had concerning his career progression did not deprive the agency of discretion in the matter of his promotions and does not afford a legal basis for retroactive promotion in his case. See B-186649, January 3, 1977.

With regard to Mr. Davis' assertions that he was denied equal pay for performing the same work as the other boiler operators with whom he worked, and that he was the subject of racial discrimination, it is not indicated that a formal discrimination complaint has ever been filed in this matter or that any proceedings have otherwise been initiated for the purpose of resolving the questions of fact raised by such assertions.

Finally, Mr. Davis has referred to decision B-183036 as possibly substantiating his claim for retroactive promotion. In B-183086, of December 5, 1975, and March 23, 1977, published in 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), we held that employees officially detailed to higher positions for more than 120 days, without Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. The rationale of

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those decisions was that an agency has no discretion to continue employee details beyond 120 days without the Commission's approval. When an agency continues a detail without authority, corrective action in the form of a retroactive temporary promotion with backpay is required as of the 121st day of the detail, for the employee, provided the employee was otherwise qualified and could have been temporarily promoted into the position at that time. In the present case the record does not show that Mr. Davis was ever officially detailed to perform the duties of a higher grade position, and the decision referred to is not for application in his claim. B-180144, October 20, 1976.

Accordingly, the settlement of our Claims Division is sustained.

Deputy

*W. K. Sullivan*  
Comptroller General  
of the United States