

DOCUMENT RESUME

08000 - [C3288407]

[Employee's Claim for Retroactive Promotion because of Delay of Promotion]. B-192434. November 21, 1976. 8 pp.

Decision re: Barry S. Vestal; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Personnel Law Matters II.

Organization Concerned: Veterans Administration: Regional Office, Nashville, TN.

Authority: 5 U.S.C. 5596. 33 Comp. Gen. 140. 39 Comp. Gen. 582. 21 Comp. Gen. 95. 55 Comp. Gen. 836. 54 Comp. Gen. 888. B-187046 (1974). F.P.H. 550.8. United States v. Testan, 424 U.S. 392 (1976).

An employee appealed the denial of his claim for a retroactive promotion and backpay. Approval of the promotion was delayed because the Civil Service Commission disagreed with the agency's contention that the employee had acquired the necessary experience which involved an unsupported conclusion that positions were improperly classified. Denial of the claim was sustained since the delay was not unjustified, and the employee does not have the right to a promotion at any specified time.
(HTW)

DECISION



C. Brown 11/21/78

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

8407

FILE: B-192434

DATE: November 21, 1978

MATTER OF: Barry S. Vestal - Retroactive Promotion

DIGEST:

Approval of promotion from Veterans Claims Examiner GS-7 to GS-9 was delayed some months beyond recommended date because CSC disagreed with VA contention that employee acquired necessary specialized examiner experience as Claims Clerk GS-5 and GS-6. VA contention requires conclusion that claims clerk positions were improperly classified. This is neither adequately supported by the record nor consistent with CSC findings. Employee is not entitled to retroactive promotion and back pay. Delay was not an unwarranted or unjustified personnel action since it resulted from a substantial qualification question and employee has no absolute right to promotion at any specified time.

Mr. Barry S. Vestal appeals the action of our Claims Division in its Certificate of Settlement issued June 12, 1978, which denied his claim for a retroactive promotion and backpay.

Mr. Vestal is an employee of the Veterans Administration Regional Office in Nashville, Tennessee. He was proposed for a promotion from grade GS-7 to GS-9 effective September 27, 1976. The delay in his proposed promotion was explained to him in pertinent part by the local Personnel Officer, on October 15, 1976, as follows:

"1. This is in response to your memorandum of October 13, 1976 in which you question the delay in your promotion to Veterans Claims Examiner GS-9. The Civil Service Commission in an audit of promotions under the station's Merit Promotion Plan in April 1976 concluded that the experience gained as a GS-998 Claims Clerk GS-5/6 did not meet the specialized experience requirement for the Veterans Claims Examiner GS-7.* * *

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"2. It is our contention that experience as a Claims Clerk GS-5/6 does meet the specialized experience requirement for the Veterans Claims Examiner Series. This matter is now being pursued with the Civil Service Commission, who has final jurisdiction."

On October 18, 1976, Mr. Vestal filed a grievance regarding his delayed promotion. Additionally, Mr. Vestal sent a letter dated November 2, 1976, to Mr. David Caldwell, Regional Director of the Civil Service Commission, Atlanta Region. Mr. Caldwell responded on November 9, 1976, in part as follows:

"As a result of your letter, we have reviewed your qualifications based on the information submitted with your letter. It is our finding that you did not meet the qualification requirements for Veterans Claims Examiner, GS-996-7, at the time of your promotion to that position on August 31, 1975, and that you do not now meet the qualification requirements for promotion to Veterans Claims Examiner, GS-996-9. By virtue of having served in the position for over a year (August 31, 1975 to the present) you currently meet the qualification requirements for grade GS-7 but will not meet the qualification requirements for grade GS-9 until August 31, 1977."

And, on February 14, 1977, the Veterans Administration denied Mr. Vestal's grievance on the basis of Mr. Caldwell's letter.

Mr. Vestal was promoted to Veterans Claims Examiner, effective August 14, 1977, incident to receipt of pertinent information from the Civil Service Commission set forth below. On August 26, 1977, R. S. Bielak, Director, Nashville Regional Office, Veterans Administration, wrote to Mr. Caldwell at the Civil Service Commission requesting permission to promote Mr. Vestal to the position of Veterans Claims Examiner, GS-9, retroactively effective to October 10, 1976. In his letter Mr. Bielak stated in pertinent part:

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"Based on a long standing practice of this office, one of our employees, Barry Vestal, would normally have been eligible for promotion to Veterans Claims Examiner, GS-996-9 on September 11, 1976. We were unable to promote Mr. Vestal as your office ruled that experience as a Claims Clerk, GS-998-5 and GS-998-6 did not count as specialized experience toward meeting the specialized experience requirements for Veterans Claims Examiner, GS-996-7. * * *

"On August 15, 1977, we received copies of two documents that significantly affect the above determination. The documents are attached for your information and specifically are: a letter dated December 28, 1976 from Donald L. Holum, Chief, Office of Examination and Plans (CSC) to Mr. Conrad Alexander, Director, Recruitment and Placement Service (VA); and a Report of Contact dated June 23, 1977 involving Mr. Holum (CSC) and Mr. Tonge (VA). Based on the information in these documents, we promoted Mr. Vestal to Veterans Claims Examiner, GS-996-9, on August 14, 1977. Cecil Miller, our Personnel Officer, consulted with Mr. Gordon Pressley of your office before taking the action.

"We now ask your approval to retroactively promote Mr. Vestal to a GS-9 effective October 10, 1976, as this is the date we determined that he would have been eligible to be promoted if we had been permitted to use the percentage of time he was actually performing non-clerical duties while in the position of Claims Clerk, GS-998 as outlined in Mr. Donald L. Holum's letter of December 28, 1976. The amount of time he spent in clerical functions was not computed in making this determination. Your prompt consideration of this matter would be appreciated."

The Civil Service Commission responded on September 27, 1977, stating:

"This office has no authority to approve your request to retroactively promote Mr. Vestal to Veterans Claims

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Examiner, GS-996-9, effective October 10, 1976. Furthermore, it is our judgment that this case does not meet the criteria of the 'back pay' provisions of Title 5, United States Code, as implemented by Federal Personnel Manual 550.8. It is our interpretation that this provision was intended to 'make whole' an employee who was found to have undergone an unjustified or unwarranted personnel action. In the case at hand, Mr. Vestal has not undergone an unwarranted or unjustified personnel action; rather, you are alleging that a warranted personnel action was delayed. It must be emphasized, however, that the Comptroller General of the United States is the final authority in deciding questions on the applicability of the back pay provisions of the law. Any further questions on this issue should be directed to that office."

"In your letter, you state that the employee was treated unjustly as a result of a Civil Service Commission evaluation; that you could not promote Mr. Vestal because this office had ruled that experience as a Claims Clerk, GS-998-5 or 6, did not meet the specialized experience requirements for Veterans Claims Examiner, GS-996-7; and that information received from Mr. Donald Holum of the Commission's Bureau of Recruiting and Examining significantly affected our prior determination. We wish to emphasize that there is no inconsistency in the advice provided by Mr. Holum and the prior determinations made by this Office. As a result of our review in your office (April 5-9, 1976), we pointed out the impropriety in your practice of crediting clerical experience as meeting the specialized experience requirement for Veterans Claims Examiner positions. In Mr. Holum's letter of December 28, 1976, he stated that only that portion of an employee's time which was spent on non-clerical examining duties could be credited toward the specialized experience requirement.

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In your letter, you state that October 10, 1976, is the date you have determined that Mr. Vestal would have been eligible to be promoted "...if we had been permitted to use the percentage of time he was actually performing non-clerical duties while in the position of Claims Clerk, GS-998 as outlined in Mr. Donald L. Holum's letter of December 28, 1976..." This Office has never prevented your agency from applying the principles outlined in Mr. Holum's letter."

You state that, by applying the principles outlined in Mr. Holum's letter, you have determined that Mr. Vestal would have met specialized experience requirements for promotion to GS-996-9 in October 1976. A review of the file indicates that this would require crediting approximately 50-60 percent of his experience in clerical positions as meeting the specialized examining experience requirement. If in fact this was the case, the Claims Clerk positions previously held by Mr. Vestal were improperly classified."

On October 6, 1977, Mr. Vestal wrote to our Claims Division. His claim, which was forwarded to the Veterans Administration for administrative processing, was returned as a doubtful claim to the General Accounting Office on February 27, 1978. As noted earlier, Mr. Vestal's claim for a retroactive promotion and backpay was denied in the Certificate of Settlement issued by the Claims Division on June 12, 1978, now on appeal before the Comptroller General in this decision. The Claims Division predicated its disallowance of Mr. Vestal's claim primarily on the ground that the Personnel Officer, the official having authority to approve the promotion, had not done so until August 12, 1977.

In his appeal Mr. Vestal contends that the agency's intent to promote him was established in September 1976. He states that the fact that the Personnel Officer did not sign his promotion "does not preclude the fact that both he and my director fully intended to do so as evidenced both orally and in letters dated Oct 15, 1976, Jan 9, 1978, and Jan 24, 1978." Additionally,

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Mr. Vestal enclosed a letter dated June 23, 1978, from the Personnel Officer which states:

"This information is furnished in response to your request regarding my failure to sign the Personnel Action, VA Form 5-4652-4, which would have promoted you from Veterans Claims Examiner, GS-996-7, to Veterans Claims Examiner, GS-996-9, on September 12, 1976."

"A 'Request for Personnel Action,' VA Form 5-4652-4, dated September 27, 1976, signed by your Division Chief, was received in the Personnel Office on September 27, 1976. I would have signed this request and the promotion would have been made effective if we had not received instructions, both verbally and in writing, from representatives of the Atlanta Region of the Civil Service Commission that Claims Clerk, GS-998 experience did not count as specialized experience for the position of Veterans Claims Examiner, GS-996. Your Claims Clerk experience would have had to be counted in order for you to qualify for Veterans Claims Examiner, GS-996-9."

"Evidence was in your file in September 1976 that you had sufficient experience as a Veterans Claims Examiner, GS-996, and as a Claims Clerk, GS-998, to qualify for Veterans Claims Examiner, GS-996-9, if we had been permitted to count the Claims Clerk, GS-998 as specialized experience."

The question Mr. Vestal has asked us to consider in his appeal is whether the letter of June 23, 1978, signed by the Personnel Officer, and earlier letters of October 15, 1976, and January 9, 1978, indicate sufficient intent on the part of the Veterans Administration to promote Mr. Vestal on September 27, 1978, so as to warrant entitlement to a retroactive promotion and backpay.

Generally promotions may not be made retroactively effective, and retroactive promotions as such are not sanctioned by this Office. 33 Comp. Gen. 140 (1953); 39 id. 582 (1960). The effective date of a change in salary

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resulting from administrative action is the date action is taken by the administrative officer vested with the necessary authority or a subsequent date specifically fixed by him. 21 Comp. Gen. 95 (1941). However, backpay may be awarded under the authority of 5 U.S.C. § 5596 (1976) as a remedy for wrongful reduction in grade, removals and suspension, and other unjustified and unwarranted personnel actions affecting pay or allowances. A prerequisite for the award of backpay is a determination by the appropriate authority that an employee has undergone an unjustified or unwarranted personnel action. We have recognized as unwarranted or unjustified personnel actions, clerical or administrative errors that (1) prevented a personnel action from taking effect as originally intended, (2) deprived employee of a right granted by statute or regulation, or (3) resulted in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. See 55 Comp. Gen. 836 (1976) and 54 id. 888 (1975). Where, due to a clerical or administrative error, a personnel action was not effected as originally intended, the error may be corrected retroactively to comply with the original intent without violating the rule prohibiting retroactive promotions. In such cases it is necessary that the official having delegated authority to approve the promotions has done so. If, subsequent to such approval, formal action to effect the promotion is not taken on a timely basis as intended by the approving officer, consideration may be given to authorizing a retroactive effective date. B-180046, April 11, 1974.

In the present case the Personnel Officer indicates that he would have signed Mr. Vestal's promotion but for instructions from the Civil Service Commission indicating that Mr. Vestal did not have sufficient specialized experience. Even were we to agree with the claimant's view that the Personnel Officer's intent in September 1976 was to approve the promotion retroactive promotion and backpay would not be authorized. The CSC concluded at that time that the employee was not qualified for promotion to the position of Veterans Claims Examiner since the clerical experience (claims clerk) which he had did not meet the specialized experience necessary for such promotion. The Commission did not later change its view. Rather, it

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subsequently stated that it would require crediting of 50-60 percent of his experience in a clerical position as meeting the specialized examining experience requirement. The Commission further held that if in fact that was the case the Claims Clerk positions previously held by Mr. Vestal were improperly classified. We find no basis to disagree with those views of the Commission. Thus, the record before us does not support the agency conclusion that experience as a Claims Clerk GS-998 meets the qualification requirement for promotion to a position in the Veterans Claims Examiner series GS-996. If in fact the required amount of specialized experience may be acquired in the clerical positions, such position would have had to be wrongfully classified, and the situation would appear to fall within the purview of United States v. Testan, 429 U.S. 392 (1976). In Testan the Supreme Court held that neither the Classification Act nor the Back Pay Act creates a right to backpay for a period of wrongful classification.

Accordingly, the settlement of our Claims Division denying Mr. Vestal's claim for a retroactive promotion and backpay is sustained.

R. F. Kellan

Deputy Comptroller General
of the United States