

DECISION



11434 PHM-1 Mr. Volpe
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-194743

DATE: September 14, 1979

MATTER OF: Joseph G. May - [Claim for Retroactive Promotion and Backpay]

- DIGEST:
1. Employee, who was initially selected to fill vacancy, claims retroactive promotion and backpay where vacancy was filled instead by priority candidate. Claim is denied since promotions are discretionary with agency and may not be made retroactive absent violation of nondiscretionary regulation or policy.
 2. Employee, whose claim for retroactive promotion and backpay was denied by GAO Claims Division, questions whether GAO interviewed witnesses and reviewed all documents in file. GAO does not conduct hearings or interview witnesses but adjudicates claim based upon review of written record. Finally, it is not within jurisdiction of GAO to decide whether grievance should have been reviewed by Civil Service Commission, now Merit Systems Protection Board. DLG 00166

This decision is in response to the appeal by Mr. Joseph G. May of our Claims Division settlement dated August 22, 1978, denying his claim for a retroactive promotion and backpay.

Briefly stated, the facts in this case are as follows. Mr. May, an employee of the Department of the Army, was among 15 candidates who were listed as qualified to fill the position of Maintenance Management Specialist, grade GS-13. On January 8, 1975, the selecting official chose Mr. May for the position. However, before that selection was approved by the Army Civilian Personnel Office, it was brought to the attention of the personnel officer that another employee, who was on the competitive list, should have been referred on a non-competitive list as a priority candidate. Corrective action was initiated, and the priority candidate was selected for the position. Mr. May filed a grievance with his agency alleging violation of merit promotion procedures, but this grievance was denied by the grievance examiner. DLG 02789

Mr. May claims that he should have been promoted to the grade GS-13 position effective January 8, 1975, and is entitled to backpay from that date until August 15, 1976. However, as our Claims Division

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settlement pointed out, the granting of promotions is discretionary with the administrative agency concerned. In addition, retroactive adjustments of salary rates may not be made except where an agency has failed to follow a nondiscretionary administrative regulation or policy or has deprived an employee of a right granted by statute or regulation.

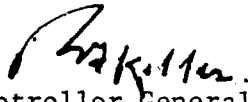
Mr. May has not submitted any additional evidence supporting his claim, and he has not set forth the errors which he believes were made in the Claims Division settlement. See 4 C.F.R. § 32.2. We have reviewed the Claims Division's settlement of Mr. May's claim, and we had no basis upon which to overturn that determination.

Mr. May questions whether certain Army employees were interviewed in connection with the adjudication of his claim. There is no provision under our claims procedures contained in 4 C.F.R. Part 30, for our Office to conduct adversary hearings or to interview witnesses. All claims are considered on the basis of the written record only, and the burden of proof is on the claimants to establish the liability of the United States and the claimants' right to payment. 4 C.F.R. § 31.7.

Mr. May also questions whether our Office reviewed all the documentation which he submitted in connection with his claim. Each claim which is submitted to our Office for adjudication is carefully reviewed, but, as stated above, the burden is on the claimant to establish the liability of the United States and the claimant's right to payment. We have reviewed all of the documentation and find no reason to disagree with the Claims Division settlement.

Finally, Mr. May questions whether it was proper for the Federal Employee Appeals Authority of the U.S. Civil Service Commission (now the Merit Systems Protection Board (MSPB)) to refuse to consider his grievance alleging merit promotion violations by his agency. However, it is not within our jurisdiction to determine whether an action may be reviewed by the MSPB.

Accordingly, we sustain our Claims Division determination denying Mr. May's claim for a retroactive promotion and backpay.


Deputy Comptroller General
of the United States