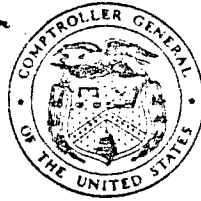


DECISION

18005 *Valpe*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-201708

DATE: May 6, 1981

MATTER OF: Michael Kovalovsky - [Claim for backpay
and other benefits incident to delayed
appointment]**DIGEST:**

Individual's appointment as Deputy U.S. Marshal was delayed after agency sought to remove his name from list of eligibles on grounds he was over agency age limitation for appointment. Although Civil Service Commission ruled individual must be considered for appointment, agency retained discretion to appoint. Since individual has no vested right to appointment, he is not entitled to retroactive appointment, backpay, or other benefits under the Back Pay Act.

ISSUE

The issue in this decision is whether an applicant for employment with the U.S. Marshals Service is entitled to backpay and other benefits where the agency erroneously applied a maximum age limitation on appointments and delayed his appointment nearly 2 years. We hold that the employee is not entitled to a retroactive appointment and backpay under the Back Pay Act, 5 U.S.C. § 5596, where the agency retained the discretion to appoint.

BACKGROUND

This decision is in response to a request from the American Federation of Government Employees (union) concerning the claim of Mr. Michael Kovalovsky for backpay and other benefits incident to his delayed appointment as a Deputy U.S. Marshal. This decision has been handled as a labor-relations matter under our procedures contained in 4 C.F.R. Part 21 (1980), as amended in 45 Fed. Reg. 55689, August 21, 1980, and in this regard we have received comments on this matter from the U.S. Marshals Service (agency) and the Office of Personnel Management (OPM).

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The request from the union states that Mr. Kovalovsky was tested by the Civil Service Commission (now Office of Personnel Management) in 1973 and that his name appeared on a certificate of eligibles issued to the U.S. Marshals Service on March 24, 1975. The union further states that Mr. Kovalovsky soon received a letter of inquiry from the agency and that he was interviewed for the position. The union also argues that Mr. Kovalovsky was tentatively selected for appointment on October 20, 1975, but we note that there is no documentary evidence in the record before us to support that contention.

It appears that instead of appointing Mr. Kovalovsky, the Marshals Service requested from the Civil Service Commission that his name be removed from the list of eligibles on the grounds that he exceeded the maximum entry age requirement established under Public Law 93-350 (codified in 5 U.S.C. § 3307(d)) and a Department of Justice order dated July 16, 1975. Under the provisions of 5 U.S.C. § 3307(d), agencies, with the concurrence of the Civil Service Commission, may designate minimum and maximum age limits for appointments to law enforcement and fire fighter positions. However, the Commission refused to remove Mr. Kovalovsky's name from the list of eligibles because the Commission had not made the requisite determination under Public Law 93-350 with regard to Deputy U.S. Marshals until January 27, 1976. Therefore, the Commission held that the maximum entry age requirement did not apply to Deputy U.S. Marshal positions until on or after January 27, 1976, and the Marshals Service had no valid basis to object to candidates on the basis of age prior to that date.

Mr. Kovalovsky was again interviewed for the position and was eventually appointed on June 18, 1978. The union argues that the failure of the Marshals Service to comply with Commission directives caused a lengthy and unnecessary delay in Mr. Kovalovsky's appointment. The union contends that several employees who were lower on the register were hired prior to Mr. Kovalovsky, and, therefore, the union seeks on

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behalf of Mr. Kovalovsky backpay and other benefits which would have accrued but for the errors committed by the Marshals Service and the Commission.

We requested a report on this matter from the Office of Personnel Management (successor to the Civil Service Commission), and that report states that the Commission did determine that the age limitation could not be utilized prior to January 27, 1976. However, the report from OPM denies that the decision was a mandate or directive to the Marshals Service as to when or how soon the certified eligibles had to be considered for appointment since generally each agency makes the final decision as to who to select and when the appointments are effected. The report from OPM states that their decision related only to who had to be considered for appointment.

DISCUSSION

Generally, appointments are effective from the date of acceptance and entrance on duty, and appointments may be made retroactively effective only in limited circumstances. See David R. Homan, 59 Comp. Gen. 62 (1979), and decisions cited therein. For example, under the provisions of 42 U.S.C. § 2000e-16(b), the Civil Service Commission (now Office of Personnel Management) has the authority to order retroactive appointments with backpay based on findings of discrimination because of race, color, religion, sex or national origin. However, there has been no finding that Mr. Kovalovsky was discriminated against on these grounds. See Homan, supra. Similarly there has been no finding by an appropriate authority that Mr. Kovalovsky has been discriminated against on the basis of age under the provisions of 29 U.S.C. § 633a, as amended.

The union seeks a remedy on behalf of Mr. Kovalovsky based on the provisions of the Back Pay Act, 5 U.S.C. § 5596. However, our Office has held that the Back Pay Act is applicable only to employees, not applicants for

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employment, and that the Act allows retroactive appointments and backpay only where the individual has a vested right to employment status by virtue of statute or regulation. See Homan, supra. Our Office has permitted such a remedy in situations where an agency has violated a statutory right of reemployment, violated a mandatory policy on effecting appointments without a break in service following retirement, or improperly restrained an employee from entering upon the performance of his duties. See 54 Comp. Gen. 1028 (1975); B-175373, April 21, 1973; and B-158925, July 16, 1968.

We find no violation of a statute, regulation, or mandatory policy in this case. Instead, the facts in this case are similar to those in Homan, supra, where the Civil Service Commission ruled that the applicant was improperly denied consideration for a competitive service position in violation of veteran preference rules. Unlike the present case, in Homan the Commission ordered corrective action by one of three methods (the choice was left to the agency's discretion) and the agency appointed Mr. Homan 16 months after he claimed he should have been appointed. In Homan we held that since the agency retained the discretion to appoint, there was no basis to retroactively appoint and award backpay. See also James L. Hancox, B-197884, July 15, 1980.

In the present case there was no mandate or directive from the Civil Service Commission ordering corrective action or specifying that Mr. Kovalovsky must be appointed on a certain date. As in Homan, the agency in the present case retained the discretion to appoint, and, absent any evidence that Mr. Kovalovsky had a vested right to be appointed on a certain date, he is not entitled to relief under the Back Pay Act. See Raymond J. DeLucia, B-191378, January 8, 1979.

Accordingly, Mr. Kovalovsky's claim for a retroactive appointment, backpay, and other benefits is denied.



Acting Comptroller General
of the United States