DECISION

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

FILE: B-221525 DATE: April 23, 1986

MATTER OF: Barbara J. Cox -- Claim for Retroactive Salary Adjustment

DIGEST:

Employee accepted grade GS-3, step 1 position with Veterans Administration (VA) but seeks retroactive salary adjustment and backpay because the VA did not allow her additional steps in grade GS-3 based on her highest previous rate (grade GS-6, step 8). The employee's claim is denied since (1) payment of the highest previous rate is discretionary with the agencies, (2) applicable VA regulations do not require payment of the highest previous rate in these circumstances, and (3) the VA's determination was not shown to be arbitrary, capricious, or an abuse of discretion.

ISSUE

The issue in this decision concerns the claim of an employee to receive the benefit of her highest previous rate upon appointment to a position with the Veterans Administration (VA). We hold that since payment of the employee's highest previous rate by the VA is discretionary under the circumstances, the employee is not entitled to the benefit of her highest previous rate, absent evidence that the agency action was arbitrary, capricious, or an abuse of discretion.

BACKGROUND

This decision is in response to a request from the National Federation of Federal Employees (NFFE), reference: 153-RE-53, seeking a retroactive salary adjustment and backpay based on the highest previous rate rule for Mrs. Barbara J. Cox. The request for our decision was filed under our labor-management procedures contained in 4 C.F.R. Part 22 (1985).

The letter from NFFE states that, in 1979, Mrs. Cox transferred from her position as an Accounting Technician at the National Security Agency (NSA), Ft. Meade, Maryland,

to a similar position at the Naval Air Station in Jacksonville, Florida. Both positions were permanent positions, but the transfer involved a downgrade from her grade GS-7, step 6, position with NSA to a grade GS-5, step 10, position with the Naval Air Station. Mrs. Cox was subsequently promoted at the Naval Air Station in 1980 to the level of grade GS-6, step 8.

On April 21, 1981, Mrs. Cox was granted leave without pay for 90 days from her position at the Naval Air Station, and effective June 14, 1981, she received a temporary appointment as a Clerk-Typist, grade GS-3, step 1, with the Veterans Administration (VA) Regional Office in St. Petersburg, Florida. In December 1981, Mrs. Cox transferred to another temporary appointment as an Accounting Technician, grade GS-4, step 1, at MacDill Air Force Base, Florida. Finally, in February 1981, Mrs. Cox received a permanent appointment at MacDill AFB as a Budget and Accounting Technician, grade GS-7, step 1.

The union argues that the VA improperly denied Mrs. Cox the benefit of her highest previous rate and should have fixed her salary in grade GS-3 at a step comparable to her highest previous rate of pay. The union states that by denying Mrs. Cox the benefit of her highest previous rate, she has lost step increases and pay in the VA position and in her subsequent positions at MacDill AFB.

The union concedes that the VA has discretion in applying the highest previous rate rule, but the union argues that the VA granted another employee this benefit and that all employees must be treated equally. The union points out that Mrs. Cox should have been paid the highest previous rate since she has 5 years of prior Federal service as a clerk-typist. The union also cites several prior decisions from our Office as precedent for granting employees the benefit of their highest previous rate upon transfer, promotion, demotion, or other personnel action. Therefore, the union seeks a retroactive adjustment in Mrs. Cox's rate of pay in her VA position based on her previous rate of grade GS-6, step 8, along with retroactive adjustments to her rates of pay in her subsequent positions.

We requested and received comments from the Personnel Officer, VA Regional Office, St. Petersburg, Florida, and

that report states that under agency regulations, salary rates received in non-VA positions may be taken into account in mixing salary rates, if appropriate in the judgment of the authorizing official, but there is no vested right to receive a higher rate based on that service. In addition, the VA report also states the authorizing official must determine that the experience gained in the prior position would enhance the employee's qualifications for the new position. The VA report concludes that based on these regulations, Mrs. Cox was denied her highest previous rate, but that consistent with these regulations, the other employee cited by the union, Mrs. Joie A. Stiles, received a higher rate for a similar position.

OPINION

Under the provisions of 5 U.S.C. § 5334(a) (1982) and 5 C.F.R. § 531.203(c,d) (1985), an employee who is reemployed, reassigned, promoted, or demoted, or who changes the type of appointment may be paid at the highest rate of the grade which does not exceed the employee's highest previous rate. This is referred to as the highest previous rate rule. Carma A. Thomas, B-212833, June 4, 1984.

Our decisions have consistently held that it is within the agency's discretion to fix the initial salary rate at the minimum salary of the grade to which appointed and that an employee has no vested right upon transfer or reemployment to receive the highest salary rate previously paid to the employee. See 31 Comp. Gen. 15 (1951), Thomas, cited above, and Barbara S. McCoy, B-196686, January 17, 1980. Each agency may formulate its own policy regarding application of the highest previous rate rule, and such policy may allow for mandatory or discretionary application of the employee's highest previous rate. Thomas, cited above.

The VA regulations applicable to Mrs. Cox's appointment provide, as noted above, that salary rates received in non-VA positions may be taken into account in fixing salary rates, if appropriate in the judgment of the authorizing official. VA Regulation MP-5, Part I, chap. 531, sec. B, para. 4c. The VA regulations also provide the earned rate (highest previous rate) rule will be controlling:

> "* * * only where the record indicates, in the authorizing official's judgment, that

> the experience gained in the position on which the rate is proposed to be based was of such quality and duration that the individual's total qualifications were likely thereby to have been enhanced. * * *" VA Regulation MP-5, Part I, chap. 531, sec. B, para. 4d.

As noted above, the report from the VA Regional Office states that the grades and step rates for Mrs. Cox and the other employee cited by the union were selected in accordance with these regulations. The report continues by stating that the authorizing official "apparently determined that Mrs. Cox's experience would not enhance her ability to perform basic typing duties in this office."

The agency regulations in this case are clearly discretionary with respect to applying the highest previous rate rule to an employee whose previous rate was earned in a non-VA agency. Our decisions have held that where the agency exercises its discretion to set the salary rate below the highest previous rate, there may be no retroactive adjustment of the salary rate in the absence of administrative error. 31 Comp. Gen. 15, cited above, McCoy, cited above, and Crystal G. Sharp, B-190257, September 13, 1978. Administrative error would be found only where the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 54 Comp. Gen. 310 (1974), and McCoy, cited above.

There is no evidence in the record before us to indicate that the VA's action in setting Mrs. Cox's salary rate at step 1 of grade GS-3 was arbitrary, capricious, or an abuse of discretion. The union has submitted documents showing that the other VA employee in question, Mrs. Stiles, was placed in step 4 of grade 3 under the applicable VA regulations concerning use of the highest previous rate cited above. However, there is no evidence before us to indicate that granting the highest previous rate to Mrs. Stiles and denying the rate to Mrs. Cox was arbitrary, capricious, or an abuse of discretion. Therefore, in the absence of evidence supporting Mrs. Cox's claim, we have no legal basis to overturn the VA's pay-setting determination in this case.

The union cites four decisions of our Office holding that it is within the discretion of the employing agency to

use the highest previous rate rule upon the employee's transfer, promotion, demotion, or reinstatement. B-61181, November 27, 1946 (26 Comp. Gen. 368); 26 Comp. Gen. 530 (1947); B-11354, March 3, 1953, and B-118245, February 24, 1954. We agree that these prior decisions have not been overruled or modified, but these decisions provide no basis to allow Mrs. Cox's claim, as discussed above.

Finally, the union cites our decision in Bobby M. Siler, B-202863, January 8, 1982, sustained upon reconsideration, B-202863, February 8, 1984, where we held an Internal Revenue Service (IRS) employee was entitled to a rate of pay within grade GS-3 based on his highest previous rate of grade GS-4, step 1. We believe our decision in Siler is distinguishable since we held in Siler that, under the applicable IRS regulations concerning use of the employee's highest previous rate, the appointing official must use the employee's highest previous rate for the grade GS-3 position if the employee was eligible for appointment at the grade GS-4 level based on prior experience and education.

In the present case, the VA regulations do not require the mandatory or nondiscretionary use of the employee's highest previous rate in Mrs. Cox's situation, and, therefore, the application of the highest previous rate under these circumstances is discretionary. Accordingly, we must deny Mrs. Cox's claim for a retroactive adjustment and backpay.

for Comptroller General
of the United States