



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Antonio O. Lee - Retroactive Placement in Higher  
Step and Grade - Backpay  
File: B-229447  
Date: September 14, 1988

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### DIGEST

An employee who was hired at a certain grade level may not receive backpay retroactive to the date of his appointment merely because the employing agency subsequently placed him in a higher step of the grade level and then promoted him to a higher grade level, after it had determined that his education and experience qualified him for the higher grade and step than he was given when appointed. An appointment at a higher level would have been discretionary rather than mandatory. Consequently, at the time of appointment there was no administrative error depriving the employee of a legal right to be hired above grade level in which he was appointed.

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### DECISION

This decision sustains our Claims Group's denial of backpay to Antonio O. Lee, an employee of the National Security Agency (NSA).

Mr. Lee contends that he is entitled to a retroactive promotion to GS-9 from the time he was initially hired by NSA based on his experience and the hiring practices of the agency.

Prior to his employment, a representative of the agency informed Mr. Lee that he would recommend an appointment at grade level GS-9 because of Mr. Lee's qualifications and experience. However, he was hired on September 30, 1985, at the lower entry grade of GS-7, step 1. Subsequently, he learned that some individuals with similar experience had been hired at grade level GS-9. He then questioned the propriety of hiring him at the lower GS-7 grade. The agency reassessed his education and experience qualifications, and his pay level was raised to step 4 of grade level GS-7 in February 1986. Subsequently, he was promoted to

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grade level GS-9, evidently in October 1986. The agency denied his request that the promotion be made retroactive to September 30, 1985, the date he was hired. Our Claims Group sustained this action.

Mr. Lee expresses the view that he should have been hired at the GS-9 level, but for the agency's mistake in not considering his military service as related experience. He points out that other similarly qualified persons were hired at the GS-9 level. Finally, he argues that by raising his level to GS-7, step 4, and later promoting him to the GS-9 level, the agency acknowledged its mistake at the time he entered on duty and as a result either the GS-9 level or the GS-7, step 4 level, should be made retroactive to the time he entered on duty.

#### ANALYSIS

Backpay may be awarded under the authority of 5 U.S.C. § 5596 for an unjustified or unwarranted personnel action affecting pay or allowances. We have recognized as an unjustified or unwarranted personnel action an administrative error preventing a personnel action from taking effect as originally intended, with error occurring after the deciding official has exercised discretion approving the personnel action. Also, where agency discretion is not involved but the personnel action is mandatory backpay may be required if the administrative error deprives the employee of a right granted by law or regulation or results in a failure to carry out a non-discretionary administrative regulation or policy. Debra L. Raskin, 63 Comp. Gen. 50 (1983).

The agency maintained discretion to appoint Mr. Lee to either a grade level GS-7 or GS-9 position. We are unaware of any law, regulation, or agency practice making it mandatory to appoint him at the highest grade warranted by his qualifications. The appointing officer's intent to hire Mr. Lee at grade level GS-7 was governed by the officer's understanding at the time of appointment. The employing agency's subsequent understanding that military experience qualified Mr. Lee for a higher grade does not change the intent to hire at the grade level GS-7 and that intent governed the appointment. Adopting this approach in a case substantially identical to Mr. Lee's, the United States District Court for the Southern District of New York upheld our decision Debra L. Raskin, 63 Comp. Gen. 50, supra. Debra L. Raskin v. William Foley, et al., No. 84 Civ. 1698, slip op. (S.D. NY Feb. 21, 1985). Compare Richard Siriani, B-181223, Feb. 19, 1976, requiring a retroactive promotion with backpay because of a mandatory agency practice to

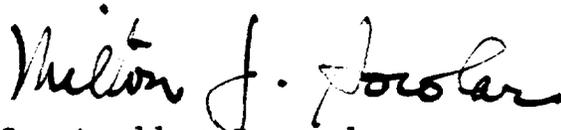
appoint at the highest grade permitted by the applicant's qualifications.

Mr. Lee also points out that NSA regulations provide:

"When an administrative error is made in determining the correct rate of pay attaching to a position or payable to an employee, correction of the administrative error shall be made retroactively to the effective date of the action."

This provision relates to retroactive correction of pay errors, not the discretionary placement of an employee in a particular position, which is involved in the present case.

Finally, as to whether the increase from step 1 to step 4 of grade level GS-7 in February 1986 should be retroactive to the date Mr. Lee was hired, it is clear that an appointment above the minimum step of the grade would have been discretionary, not mandatory. The agency's regulations provide that appointments above the minimum step of the grade "may be effected" for certain reasons, including superior qualifications or previous experience. The term "may" generally signifies discretionary authority rather than a mandatory rule. Since the regulations require approval of appointments above the minimum step by designated officials, it is clear that the practice is to be discretionary. Consequently, Mr. Lee's increase to step 4 may not be made retroactively. Susan E. Murphy, 63 Comp. Gen. 417 (1984).

*for*   
Comptroller General  
of the United States