



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL.

B-219216

December 11, 1985

Mr. [REDACTED]

Dear Mr. [REDACTED]:

This responds to your letter of June 4, 1985, expressing dissatisfaction with our Claims Group settlement dated May 6, 1985. In that settlement, our Claims Group advised you: (1) that your claim for backpay based on the Mobile District of the U.S. Army Corps of Engineers' failure to consider you for several promotion opportunities was not remediable under the Back Pay Act of 1966, 5 U.S.C. § 5596 (1982); (2) that, although the General Accounting Office (GAO) may review certain aspects of an agreement informally settling a discrimination complaint, we have no authority to investigate or render decisions on allegations of employment discrimination; and (3) your allegations that the Mobile District violated its promotion program may not be considered by GAO, but must be pursued with the Army and the Merit Systems Protection Board (MSPB).

In your letter, you list several factors which you believe our Claims Group failed to consider. First, you state that you have submitted relevant documents to the MSPB and the Office of Special Counsel, but that both offices declined to assume jurisdiction over the matters you presented to them. Next, you state that the Army has in effect agreed to award you backpay, insofar as: (1) an equal employment opportunity (EEO) counselor assisting you with a discrimination complaint advised you that funds could be made available to resolve your complaint; and (2) the Mobile District assisted you in preparing private relief legislation which, although not enacted, provided for the payment to you of money damages. Based on these factors, you have asked us which avenues you may pursue to obtain the monetary relief which you allege has been offered to you by the Army.

Because your letter does not present any new or material evidence not previously considered by our Claims Group, we will not render a decision on this matter. However, we are

offering the following comments on the concerns you have expressed, with the hope that this information will be of some assistance to you.

While the record pertaining to this matter is voluminous, the relevant facts can be summarized as follows. Effective October 17, 1976, the Mobile District reassigned you from the position of Electrical Engineering Technician, grade GS-12, to the position of Electrical Engineer, grade GS-12. This reassignment was effected because you had been certified by the State of Wisconsin as a registered professional engineer.

In January 1978, your engineering rating was canceled and you were restored to the position of Electrical Engineering Technician. The Mobile District explained that your classification as an Electrical Engineer had been erroneous, because of a change in the then Civil Service Commission's (CSC) (now Office of Personnel Management) engineering qualification standards. According to advice provided to the Mobile District by CSC, the revised standards required a candidate to qualify for professional engineering registration by passing a written examination. Since the State of Wisconsin had not administered a written test at the time you were certified as an engineer, the Mobile District determined that you did not qualify for an engineering rating.

In May 1981, Army headquarters determined that you should have been "grandfathered" under the prior engineering qualification standards which did not require professional certification based on a written test. In accordance with this determination, the Mobile District restored your engineering rating effective June 29, 1981, retroactive to October 17, 1976.

In July 1981, you filed a grievance alleging that you had been denied promotion opportunities as a consequence of the Mobile District's rating error. While Mobile District officials agreed with your allegation, they determined that there was no statutory basis for awarding you monetary relief. However, the Mobile District decided to afford you priority consideration for future promotion opportunities in

a number equal to the opportunities you had lost because of the rating error. On September 24, 1981, you withdrew your grievance.

In September 1981, you filed a discrimination complaint with the Mobile District, seeking monetary relief under a consent decree which had settled a race discrimination suit against the district. Among other things, the decree satisfied black employees' claims of race discrimination in promotion by awarding them the difference between the compensation they would have received if they had been promoted and the amounts they actually earned. Although you were not a member of the class subject to the decree, you contended in your discrimination complaint that the decree set a general precedent for awarding backpay to all individuals who had been improperly denied promotion opportunities, regardless of race.

An agency report included in our records indicates that the EEO counselor handling your complaint advised you that there was no basis for a finding of discrimination in your case, and that you were excluded from coverage by the consent decree. In your statements appended to the agency report, you maintain that the EEO counselor advised the Mobile District Commander that your complaint was valid, and that he would secure the funds necessary to afford you monetary relief. According to your statements, the District Commander refused to accept the counselor's offer because, "it would set an EEO precedent he was not willing to live with."

In November 1981, you resolved your discrimination complaint with the Mobile District. The District Commander agreed to pursue your request for monetary relief through departmental channels, and, if necessary, to assist you in drafting private relief legislation.

After the Army decided that the only relief administratively available to you was limited to priority consideration for promotion, you requested that the Army audit two position vacancies for which you believed you should have, but were not afforded such priority consideration. The audit report disclosed that you had been given priority consideration for one of the position vacancies

in question, but not for the other. Accordingly, the Army decided to afford you priority consideration for the next position vacancy for which you were qualified.

Subsequently, a congressman acting on your behalf introduced private relief legislation in two sessions of the Congress. The legislation provided that you would be awarded money damages, but it was not enacted.

In August 1933, you renewed your claim for backpay with the Army, maintaining that you were entitled to backpay in the amount of \$16,688. You announced your intention to retire from federal service effective December 21, 1983, and contended that your annuity should be calculated based on the higher amounts you allegedly would have earned had you been afforded proper consideration for promotion. The Army responded by stating that your claim was not remediable under the Back Pay Act because, under the act, backpay may be awarded only if it can be established that the employee would have received the pay in question but for an improper personnel action. While the Army acknowledged that you had not been referred for several promotion opportunities because of the erroneous cancellation of your engineering rating, it stated that, even if you had been referred for consideration, you would have been only one of several candidates qualifying for promotion. Consequently, the Army stated that it could not establish that, had you been referred for consideration, you would have been selected for promotion.

In your letter to our Claims Group, you requested backpay for the promotion opportunities you had lost, stating that the EEO counselor handling your discrimination complaint had offered to supply the funds necessary to award you backpay and that the District Commander's refusal to accept these funds was discriminatory. Additionally, you alleged that the Mobile District had preselected candidates for promotion and in several other respects had violated its promotion program.

As indicated previously, our Claims Group advised you that there was no basis under the Back Pay Act for awarding you backpay. Our Claims Group also stated that, while GAO will review certain aspects of an informal agreement settling

a discrimination complaint, we have no authority to conduct investigations into or to render decisions on allegations of employment discrimination. Finally, our Claims Group advised you that the Army and the MSPB, not our Office, would be responsible for determining whether the Mobile District had been following proper procedures in selecting candidates for promotion.

At the outset, we find no basis for disagreeing with our Claims Group's conclusion that you are not entitled to backpay under the Back Pay Act, 5 U.S.C. § 5596. Under the Back Pay Act, an employee who is found to have undergone an unjustified or unwarranted personnel action may be awarded backpay only if it is clearly established that he would have been entitled to the pay in question but for the improper personnel action. Thus, even if an agency wrongfully fails to consider an employee for a promotion, the employee would not be eligible for backpay if he was only one of several candidates qualifying for the promotion and the record does not clearly establish that he would have been selected. See Samuel H. Stern, B-202098, April 22, 1982; and Steve Coleman, Jr., B-196053, February 29, 1980, copies enclosed.

In your case, the record does not establish that you would have been selected for promotion if your engineering rating had not been canceled and you had been properly considered for promotion opportunities. The Army has stated that, even if you had been considered for promotion to suitable position vacancies during the period of the erroneous rating, you would have been only one of several candidates qualifying for each vacancy. Furthermore, the fact that you were designated as a "priority candidate" after your engineering rating was restored did not entitle you to a promotion because, even under such circumstances, an agency's authority to grant promotions is discretionary. See Stern, cited above.

Furthermore, although we have recognized that an agency has authority to settle a discrimination complaint by agreeing to award backpay independent of the Back Pay Act's requirements and without a specific finding of discrimination, we find no evidence of such an agreement in your case. The consent decree to which you have referred

covers a defined class of black employees and applicants for employment in the Mobile District, and does not by its terms apply to you. Also, while you allege that an EEO counselor advised the Mobile District Commander that funds could be made available to resolve your discrimination complaint, there is nothing in the record to substantiate this allegation, and, in any event, you acknowledge that the remedy proposed by the counselor was not accepted by the District Commander. Additionally, although the Mobile District may have assisted you in drafting private relief legislation for submission to the Congress, the legislation was not enacted and therefore does not provide any basis for granting you monetary relief.

Finally, as our Claims Group suggested, we do not have authority to consider your allegations that the Mobile District preselected candidates for promotion and in other respects violated its promotion program. Since it appears that your efforts to pursue these allegations with MSPB have been unsuccessful, your only remaining recourse is to file an action in Federal court. We point out, however, that claims cognizable by the United States District Court or Claims Court are barred if they are filed more than 6 years after the date they first accrued. See 28 U.S.C. §§ 2401(a) and 2501, respectively.

Sincerely yours,



Robert L. Higgins
Assistant General Counsel

Enclosure(s)

cc: U.S. Army Engineer District
P. O. Box 2288
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Attention: Personnel Office