

5142

C. Henry

DECISION



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

FILE: B-182950

DATE: January 23, 1978

MATTER OF: Angelo C. Zuaro - Implementation of
grievance examiner's recommendation

DIGEST: Grievance examiner recommended that employee be retroactively promoted on basis that employee was treated differently than other employees in similar positions. General rule is that retroactive promotion may be allowed only where administrative error or unjustified or unwarranted personnel actions have deprived employee of right granted by statute or regulation or where agency failed to follow nondiscretionary administrative regulation or policy. Failure to treat employee in precisely equal or identical manner as other similarly situated employees does not meet above standards so as to entitle employee to retroactive promotion.

This action is made at the request of Robert J. Blackwell, Assistant Secretary for Maritime Affairs, Department of Commerce, for an advance decision as to the propriety of implementing the recommendations of a grievance examiner to retroactively promote Mr. Angelo C. Zuaro.

Mr. Zuaro, an Associate Professor in the Department of Physical Education and Athletics at the U.S. Merchant Marine Academy, applied for a promotion to the academic rank of Professor on January 5, 1976. The request was denied by the Superintendent of the Academy on May 19, 1976, and Mr. Zuaro filed a grievance requesting, inter alia, that he be promoted to the rank of Professor, with back pay from July 1, 1976. In a report dated February 1, 1977, the grievance examiner found that Mr. Zuaro should have been promoted on the date upon which his promotion would have become effective had his request for promotion of January 5, 1976, been timely approved. The Maritime Administration accepted the grievance examiner's recommendation and promoted Mr. Zuaro to

the rank of Professor, effective March 13, 1977. However, it questions whether it has the authority to effect the promotion retroactively.

As a general rule, an employee has no right to be promoted at any specific time, as the matter of promoting an employee is within the administrative discretion of the agency. Also, as a general rule, an employee may not be retroactively promoted unless an administrative error or an unjustified or unwarranted personnel action has deprived him of a right granted by statute or regulation. However, we have permitted retroactive adjustments of salary rates in certain cases involving failures to carry out nondiscretionary administrative regulations or policies, or provisions of a labor-management agreement. Accordingly, the recommendation of the grievance examiner has been examined to determine if it meets any of the above conditions.

The report issued by the grievance examiner incident to Mr. Zuaro's grievance is lengthy and it would be difficult to summarize its many facets here. However, its major conclusion, which is stated in various forms, is that Mr. Zuaro was treated differently than his peers at the Maritime Academy. Thus, on page 44 of the grievance examiner's report, it is stated that:

"Mr. Zuaro has definitely been treated differently than his peers. In no other case has Superintendent Engel ever rejected the combined recommendations of the Faculty Committee and the Academic Dean that a faculty member be promoted. He has done so three times--in 1971, 1972, and 1976--in the case of Mr. Zuaro." (Emphasis in original.)

Again, on page 45, it is stated:

"Mr. Zuaro has been treated differently than his peers with respect to waivers of Qualifications Standards."

The grievance examiner also states that:

"The law extends to Mr. Zuaro the right to be treated comparably to his faculty peers, and binds the Superintendent to act within the limits of his authority."

D-182950

Citing the principle of equal pay for similar work set forth in 5 U.S.C. § 5101 (1970), the grievance examiner concludes:

"This record compels the conclusion that Superintendent Engel's refusal to promote Mr. Zuaro has been arbitrary and discriminatory, and thus an abuse of the discretionary authority vested in the Office of Superintendent."

The above conclusion does not provide a basis for the retroactive promotion of Mr. Zuaro. A review of the record does not indicate that Mr. Zuaro possessed any right to be promoted pursuant to statute or regulation. Also, there is no indication of any nondiscretionary administrative regulation or policy or provision of a labor-management agreement which would serve to mandate his promotion. Accordingly, since the conditions required in order to permit a retroactive promotion are not present in this case, Mr. Zuaro's promotion may not be effected retroactively.

Deputy

R. F. Kitter
Comptroller General
of the United States