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DECISION

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

50865

FILE: B-183061 DATE: JUL 2 1975

MATTER OF: Internal Revenue Service employees - Retroactive promotion with backpay

DIGEST: Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotion of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, GAO will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement.

This matter concerns a request on behalf of a District Director of the Internal Revenue Service (IRS), Department of the Treasury, for a decision as to whether the office concerned may retroactively adjust the promotion dates of seven IRS employees whose promotions were erroneously delayed for various periods of time up to approximately 2 months beyond the date they should have become effective pursuant to a collective-bargaining agreement between the IRS and the National Treasury Employees Union (NTEU).

The record, as provided by the agency, indicates that the seven employees, employed as Revenue Agent Trainees and assigned to work in the Stabilization Program were placed in career-ladder positions. All seven employees progressed satisfactorily in the Internal Revenue Agent Training Program. It was erroneously presumed by the IRS supervisors concerned that career-ladder type promotions were automatically processed so that employees would be promoted on their eligibility date in the absence of an unacceptable performance certification. The fact that promotion action requests were not submitted was not discovered until November 22, 1974, whereupon promotion requests for the seven employees were processed and made effective on November 24, 1974.

The delayed effective date of the promotions prompted the seven employees to file a grievance on December 6, 1974, through

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their union representative, alleging a violation of article 7, section 5, of the Multi-District Agreement between the IRS and the NTEU which states:

> "All employees in career ladder positions will be promoted on the first pay period after a period of one year or whatever lesser period may be applicable provided the employer has certified that the employee is capable of satisfactorily performing at the next higher level."

The grievance has been held in abeyance pending our decision, which could conceivably resolve the matter if the retroactive adjustment is held to be proper and is administratively implemented by IRS.

The data on the subject IRS employees is as follows:

Agent	Appointment Date	Promotion Action	Eligibility Effective Date
Aldinger, Evelyn E.	9/24/73	GS-7 to GS-9	9/29/74
Booth, Barbara J.	9/24/73	GS-7 to GS-9	9/29/74
Dittmann, Donald A.	9/24/73	GS-5 to GS-7	9/29/74
Harvel, Charles M.	9/24/73	GS-7 to GS-9	9/29/74
Wallins, Sanford H.	10/ 1/73	GS-7 to GS-9	10/13/74
Wiechec, Donald A.	10/ 9/73	GS-7 to GS-9	10/13/74
Zingaro, David J.	10/ 1/73	GS-5 to GS-7	10/13/74

Our decisions have generally held that personnel actions, including promotions, cannot be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. See 54 Comp. Gen. 263 (1974), and decisions cited therein; 52 id. 920 (1973); and 50 id. 850 (1971). We have also recognized that the above-stated exceptions to the general rule, prohibiting retroactively effective personnel actions, may constitute "unjustified or unwarranted personnel action[s]" under 5 U.S.C. § 5596 (1970), and consequently be remediable through the payment of backpay (B-180056, May 28, 1974, and 54 Comp. Gen. 312 (1974)).

Furthermore, our recent decisions considering the legality of implementing binding arbitration awards, which relate to Federal employees covered by collective-bargaining agreements, have held that the provisions of such agreements may constitute nondiscretionary agency policies if consistent with applicable laws and regulations, including Executive Order No. 11491, as amended. Therefore, when an arbitrator acting within proper authority and consistent with applicable laws and Comptroller General decisions, decides that an agency has violated an agreement, that such violation directly results in a loss of pay, and awards backpay to remedy that loss, the agency head can lawfully implement a backpay award for the period during which the employee would have received the pay but for the violation, so long as the relevant provision is properly includable in the agreement. See 54 Comp. Gen. 312 (1974); B-180010, December 2, 1974, 54 id. ___; and B-182734, April 18, 1975, 54 id. ___. Similarly, an agency head on his own initiative, without waiting for the matter to come before an arbitrator, may conclude that the agreement has been violated and institute the same remedy.

In this case, no challenge to the propriety of including article 7, section 5, of the Multi-District Agreement has been presented either to this Office or to the Federal Labor Relations Council in accordance with Executive Order No. 11491, as amended. Since that issue is not before us, our consideration is limited to the question of whether compliance with the provision in question would constitute a violation of existing statutes, regulations, or Executive orders. It does not appear that compliance would be such a violation in the instant case. The provision is a lawful exercise of the agency's discretion to effect promotions in a timely manner.

In view of the foregoing, we would have no objection to prearbitration administrative action changing the effective dates of promotion for the seven employees to the eligibility effective dates indicated above, if the agency determines that subject employees would have been promoted to the positions indicated on the eligibility dates indicated, but for the administrative failure to timely process such promotions. Changes in the promotion dates would also require adjustment of waiting periods for within-grade step increases.

R. F. Keller

Deputy Comptroller General
of the United States