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[Arbitration Award of Retroactive Promotion and Backpay].
B-192455. November 1, 1978. 8 pp.

Decision re: John Cahill; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Personnel Law Matters I.
Organization Concerned: General Electrodynamics Corp.; Federal Labor Relations Council; Social Security Administration: Philadelphia District.
Authority: Back Pay Act of 1966 (5 U.S.C. 5596). 5 U.S.C. 5584. 45 C.F.R. 2411. 44 C.F.R. 91. 45 C.F.R. 550. 54 Comp. Gen. 538. 54 Comp. Gen. 403. 54 Comp. Gen. 888. 55 Comp. Gen. 42. 54 Comp. Gen. 312. 54 Comp. Gen. 1071. 54 Comp. Gen. 1073. 55 Comp. Gen. 171. 55 Comp. Gen. 173. 55 Comp. Gen. 405. 55 Comp. Gen. 407. 55 Comp. Gen. 427. 54 Comp. Gen. 320. 56 Comp. Gen. 57. 56 Comp. Gen. 59. B-190408 (1977).

The legality of an arbitration award of retroactive promotion and backpay as a remedy for the failure of the agency to timely process a promotion request was questioned. In the absence of a nondiscretionary requirement mandating promotion within a particular time frame or in accordance with specified criteria, loss of the promotion request prior to approval by an authorized official does not constitute such administrative error as will support an award of retroactive promotion and backpay. (Author/SC)

DECISION

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

8474

FILE: B-192455 DATE: November 1, 1978

MATTER OF: John Cahill - Arbitration Award of Retroactive Promotion and Backpay

DIGEST: 1. Promotion of employee in career-ladder position was delayed because the promotion request was clerically misplaced before it reached the authorized official. Arbitrator's finding of administrative mistake does not itself provide a basis for award of backpay to grievant. In the absence of a nondiscretionary requirement mandating promotion within a particular time frame or in accordance with specified criteria, loss of promotion request prior to approval by authorized official does not constitute such administrative error as will support award of retroactive promotion and backpay.

2. Provision of negotiated agreement calling for consistent and equitable application of merit promotion principles does not constitute a nondiscretionary agency policy requiring agency to make promotions at any specified time or under specified criteria. The inclusion of a provision in a negotiated agreement does not automatically make it nondiscretionary for purposes of the Back Pay Act. A nondiscretionary provision for such purposes is defined at 5 C.F.R. § 550.802(d) to mean one requiring an agency to take prescribed action under stated conditions or criteria.

By letter dated July 18, 1978, the Federal Labor Relations Council (FLRC) requested a decision as to the legality of the arbitration award rendered September 16, 1976, in American Federation of Government Employees, Local 2327 and Social Security Administration, Philadelphia District (Quinn, Arbitrator), FLRC No. 76A-144. The award of retroactive promotion and backpay was granted by the arbitrator as a remedy for the failure of the Social Security Administration (SSA) to timely process Mr. John Cahill's promotion request.

The FLRC had initially, on June 7, 1977, denied the agency's petition for review of the award because it failed to meet the Council's requirements for review set forth in 5 C.F.R. § 2411.32. Subsequent to the Council's denial of review, we issued a decision in Matter of Janice Levy, B-190408, December 21, 1977, which invalidated an arbitrator's award issued under similar circumstances. Based on that decision, the SSA asked the FLRC to reconsider its denial of review in the present case.

The Council granted the agency's request for reconsideration and accepted its petition for review of the arbitrator's award. In its letter of July 18, 1978, the Council stated:

> "* * * The Council determined that the agency's request for reconsideration should be granted and its petition for review of the arbitrator's award accepted because of the apparent precedential significance of your decision in Janice Levy to the facts of this case and because of the apparent departure in Janice Levy from the general principle established in previous decisions of your Office that a provision in a negotiated agreement, if otherwise proper, becomes a nondiscretionary agency policy for purposes of applying the provisions of the Back Pay Act of 1966.
>
> "Because, as indicated, this case involves an issue within the jurisdiction of your Office and since the Council is uncertain, in light of the decision in Janice Levy, as to the applicability of prior Comptroller General decisions to the facts of this case, we request your decision as to whether the arbitrator's award in this case violates applicable law or appropriate regulation. * * *"

The facts in Mr. Cahill's case are not in dispute. The arbitrator found that the grievant met the requirements for a career-ladder promotion from GS-7 to GS-9 as of November 23, 1975. He was recommended for promotion by his Branch Manager and the required request for promotion action was prepared in September 1975 in the SSA District Office in Philadelphia. The request was forwarded to the SSA Regional Staff for processing and forwarding to the Regional Personnel Office of the Department of Health, Education, and Welfare (HEW) where final authority to approve promotion requests

rests. However, neither the SSA Regional Staff nor the HEW Regional Personnel Office have any record of receiving Mr. Cahill's promotion request. After an investigation into the processing delay and an administrative determination that there was no authority to effect Mr. Cahill's promotion on a retroactive basis, he was prospectively promoted to GS-9 effective February 1, 1976.

Mr. Cahill grieved his failure to be timely promoted and the matter was submitted to arbitration. By award dated September 16, 1976, the arbitrator awarded Mr. Cahill a retroactive promotion to GS-9 with backpay, effective November 23, 1975, having specifically found:

> "* * * All the facts in this case lead to an administrative mistake at the Receiving Department of the Regional Personnel Office (RPO). The Grievant met the contractual and regulatory requirements for a merit promotion. The properly completed and timely-filed request for personnel action 'fell through a bureaucratic crack' that is, was probably clerically misplaced. When the mistake was noted the Grievant was promoted--but no one was able to pinpoint the administrative cause(s) ('bureaucratic crack') and no retroactivity was awarded.
>
> "The facts before us, the testimony and exhibits introduced indicate a violation of Article 6 (Merit Promotion), Section 1. The merit promotion principles were not applied in a consistent manner and the Grievant was not treated with equity because someone misplaced the proper and timely request for personnel action. * * *"

Section 1 of article 6 of the labor-management agreement found to be violated by the arbitrator is as follows:

> "Section 1. The Employer and the Union mutually agree that the purpose and intent of the provisions contained herein is to implement the Region's Merit Promotion Plan, which will help insure that merit promotion principles are applied in a consistent manner, with equity to all employees."

As noted above, the arbitrator in the instant case found that an administrative error had resulted in the grievant's not being

promoted effective November 23, 1975; that the merit promotion principles were not applied in a consistent manner and the grievant was not treated with equity; and, therefore, that article 6, section 1 of the collective-bargaining agreement had been violated. In Mr. Cahill's case, as in the Janice Levy case, the misplacing of the grievant's promotion request occurred before the authorized official had exercised his authority to approve or disapprove the promotion. With respect to delays or omissions in processing a promotion request that will support a retroactive promotion and an award of backpay under 5 U.S.C. § 5596, we explained in Janice Levy, supra, page 8:

> "With respect to delays or omissions in processing of promotion requests that will be regarded as administrative or clerical errors that will support retroactive promotion, applicable decisions have drawn a distinction between those errors that occur prior to approval of the promotion by the properly authorized official and those that occur after such approval but before the acts necessary to effective promotion have been fully carried out. The rule is as stated in B-180046, quoted above. See also 54 Comp. Gen. 538 (1974); B-183969, July 2, 1975; and B-184817, November 28, 1975. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request unless his exercise of disapproval authority is otherwise constrained by statute, administrative policy or regulation. Thus, where the delay or omission occurs before that official has had the opportunity to exercise his discretion with respect to approval or disapproval, administrative intent to promote at any particular time cannot be established other than by after-the-fact statements as to what that official states would have been his determination. After the authorized official has exercised his authority by approving the promotion request, all that remains to effectuate that promotion is a series of ministerial acts which could be compelled by writ of mandamus. In that category of case, administrative intent can be ascertained with certainty and retroactive promotion as a remedy for failure to accomplish those ministerial acts is appropriate."

We believe that the reasoning of the Levy decision is equally applicable to the case now before us. Since the arbitrator's award here is predicated upon clerical or administrative error prior to action by the authorized official, it is contrary to applicable authorities, except to the extent that the authorized official's exercise of discretion to approve or disapprove the grievant's promotion request is limited by statute, regulation, or collective-bargaining agreement. As we recognized in Janice Levy, while employees have no vested right to promotion at any specific time, an agency, by negotiation of a collective-bargaining agreement or by promulgation of a regulation may limit its discretion so that under specified conditions it becomes mandatory to make a promotion on an ascertainable date. See, for example, 54 Comp. Gen. 403 (1974); 54 id. 538 (1974); 54 id. 888 (1975); 55 id. 42 (1975); and B-180010, August 30, 1976. In those cases, however, in contrast to the present case, the negotiated agreements contained specific provisions requiring promotions to be made under specified conditions.

Since the arbitrator found that the misplacing of Mr. Cahill's promotion request resulted in a violation of article 6, section 1 of the negotiated agreement, the question remaining for decision is whether that provision constituted a nondiscretionary provision so as to support an award of a retroactive promotion with backpay based on the violation. The FLRC originally refused to review the Cahill award based on its understanding that, under 54 Comp. Gen. 312 (1974) and later decisions of the Comptroller General, a violation of a collective-bargaining agreement coupled with a determination that but for that violation the grievant would have been promoted at an earlier date provides a proper basis for retroactive promotion and award of backpay. We note that this was essentially the basis for the Council's refusal to review the award in the Janice Levy case. Notwithstanding our decision in the Levy case, it appears from the above-quoted language of the Council's July 18, 1979, letter to this Office that there is still some question as to the effect under the Back Pay Act, 5 U.S.C. § 5596, of an arbitrator's determination that an agency has violated a provision of a negotiated agreement. Specifically, we refer to the Council's statement that the Levy decision is an "apparent departure * * * from the general principle established in previous decisions of your Office that a provision in a negotiated agreement, if otherwise proper, becomes a nondiscretionary agency policy for purposes of applying the provisions of the Back Pay Act of 1966."

We have held that an agency may bargain away its discretion and thereby make a provision of a collective-bargaining agreement a nondiscretionary agency policy, if the provision is consistent with applicable laws and regulations. The violation of such a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances of differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, thus entitling the aggrieved employees to retroactive compensation for such violation of a negotiated agreement. 54 Comp. Gen. 1071, 1073 (1975); 55 id. 171, 173 (1975); 55 id. 405, 407 (1975); 55 id. 427, 429 (1975).

Thus, we are fully committed to upholding awards of backpay for violations of mandatory provisions in negotiated agreements. However, as we stressed in the Levy case, not every violation of a collective-bargaining agreement will support a retroactive promotion and award of backpay. The violation must be of a provision in a collective-bargaining agreement amounting to a nondiscretionary agency policy. Our prior decisions in this area have not held that any provision, by the mere fact of its inclusion in a collective-bargaining agreement, becomes a nondiscretionary policy for purposes of awarding backpay.

In John H. Brown, 56 Comp. Gen. 57 (1976) we specifically addressed the suggestion that any provision in a collective-bargaining agreement becomes a nondiscretionary agency policy. The arbitrator in that case had directed that a special achievement award be given the grievant as a remedy for the agency's violation of a clause in the agreement providing the awards shall be used exclusively for rewarding employees for the performance of assigned duties and that the awards program shall not be used to discriminate or effect favoritism. In holding that the agreement did not change the granting of awards i. to a mandatory agency policy, we stated at 56 id. 59:

> "In recent decisions this Office has attempted to give meaningful effect to the labor-management program established under Executive Order 11491 and to arbitration awards rendered thereunder if such awards are consistent with laws, regulations and our decisions. 54 Comp. Gen. 312, 320 (1974). We have held that provisions in collective bargaining agreements under the Executive Order may become

> nondiscretionary agency policies and, if the agency has agreed to binding arbitration, that the arbitrator's decision is entitled to the same weight as the agency head's decision would be given. Id. at 316. But we further stated therein that our decision 'should not be construed to mean that any provision in a collective bargaining agreement automatically becomes a nondiscretionary agency policy,' and we added that '[w]hen there is doubt as to whether an award may be properly implemented, a decision from the Council or from this Office should be sought.' Id. at 319, 320."

Any doubt as to the nature of contractual violations that will support awards of backpay is resolved by the Civil Service Commission's amended backpay regulations found in title 5, Code of Federal Regulations, Part 550, Subpart H (1978). At 5 C.F.R. § 550.802(d), the term "nondiscretionary provision" is defined to mean:

> "* * * any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria."

Although that regulation was not adopted by the Commission until March 25, 1977, well after the Cahill award was rendered, it primarily restates the standards of specificity applied in our decisions rendered under the Back Pay Act. Under that definition, action which should or should not be taken, as well as the conditions and criteria under which that action should or should not be taken must be prescribed in the collective-bargaining agreement or in agency regulations or policies. Thus, while an arbitrator may appropriately find that an agency's actions were "inequitable" and hence contravened general language of a negotiated agreement calling for equitable treatment of all employees, that violation does not itself provide a basis for award of backpay, even when the arbitrator finds that the inequitable actions resulted in a loss of pay.

In the instant case, although the arbitrator found that clerical error in failing to process the grievant's promotion request in timely fashion resulted in a violation of article 6, section 1 of the

negotiated agreement, he did not find, nor do we believe he properly could find, that article 6, section 1, specifically required promotions to be made within any prescribed time frame or in accordance with any stated conditions or criteria. Nothing in that provision limits or qualifies the discretion of the HEW Regional Personnel Office to approve or disapprove promotions or requires the agency to make promotions within any specified time period. Hence, this case is clearly distinguishable from those cases, such as 55 Comp. Gen. 47, supra, where the agency and the union had agreed upon a specified time frame for promotions under stated conditions.

Accordingly, since article 6, section 1, does not constitute a nondiscretionary agency policy, the award of a retroactive promotion and backpay to Mr. Cahill was improper.

Under the circumstances of this case, we believe that collection of overpayments of backpay made to Mr. Cahill in satisfaction of the arbitration award would be against equity and good conscience and not in the best interests of the United States. In particular, we refer to the facts that the issue of Mr. Cahill's entitlement was appealed through proper administrative channels and was deemed finally settled as of July 7, 1977, that payment was made to Mr. Cahill and received by him in good faith satisfaction of the award, and that the Council's determination denying the SSA's petition for review of the award apparently was based in part on its uncertainty as to the import of our prior decisions under the Back Pay Act. Accordingly, Mr. Cahill's indebtedness to the United States as a result of overpayments received pursuant to the arbitration award is waived pursuant to the provisions of 5 U.S.C. § 5584 and 4 C.F.R. Part 91.

R. F. Keller

Deputy Comptroller General
of the United States