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DECISION

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

FILE: B-200669

DATE: May 6, 1981

MATTER OF: Melissa T. LeSeur - Retroactive promotion and Backpay

DIGEST: Agency improperly evaluated a GS-3 employee's prior experience when employee applied for a new position under merit promotion procedures causing employee to be selected for new position at a GS-3 grade instead of GS-4. Employee is not entitled to retroactive promotion since the error did not prevent a personnel action from taking effect as originally intended, the employee was not deprived of a right granted by statute or regulation, nor was a nondiscretionary agency regulation or policy violated.

Mr. James J. Costello, Director of Personnel for the Railroad Retirement Board, asks whether Melissa T. LeSeur may be retroactively promoted to the GS-04 grade level in circumstances where an agency staffing specialist erred in determining her eligibility for the higher GS-04 grade level in connection with a promotion action. The proposed course of action may not be permitted since an employee of the Federal Government is entitled only to the salary of his or her appointed position and a promotion may not be made effective retroactively in the absence of specific statutory authority.

FACTS

In December 1978, Ms. LeSeur, then a GS-03 clerk-typist in the Board's bureau of data processing and accounts, applied for the position of personnel clerk (typing) GS-0203-03/04 in the bureau of personnel. Following agency merit promotion procedures, a staffing specialist reviewed the personnel folders of all of the competing applicants to determine their eligibility for the position and the grade level (at GS-03 or GS-04) for which the applicants were eligible. A register of applicants was prepared and forwarded to the merit promotion panel along with the merit promotion materials on the eligible candidates including grade level qualification. The administrative report then points out as follows:

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"* * * The normal process at the Board is for the staffing specialist (during the eligibility determination) not the selecting official, to determine the grade level at which the candidates will be assigned. Therefore, after the panel completed the ranking process and the selecting official made a selection (in this case Melissa), the selected candidate was assigned to the new position at the grade level indicated on the register of applicants."

In this connection the agency has also advised this Office that when a vacancy at the Board may be filled at more than one grade level, the personnel staffing specialists always rate eligible applicants at the highest grade for which the applicants qualify. All experience, training and education that is part of an employee's Official Personnel Folder as of the closing date of a vacancy announcement is used in making the determination of basic eligibility for the position, and the grade level at which the applicant is eligible.

It was subsequently determined that, in Ms. LeSeur's case, the personnel staffing specialist failed to include her junior college degree which had been part of her official personnel file since she was originally hired in July of 1978, in the determination of her overall eligibility profile. As a result, since the selecting official makes no determination concerning the grade level to which an employee is assigned under the agency's merit promotion process, and since the staffing specialist had erroneously rated her eligible at the GS-03 level instead of the GS-04 level, Ms. LeSeur was assigned to the position of personnel clerk (typing) at the GS-03 level. In view of these circumstances, the agency's report concludes that Ms. LeSeur served in the promoted position at the erroneously established pay level of GS-03 from February 19, 1979, to January 13, 1980. On January 14, 1980, the agency states that Ms. LeSeur was "properly adjusted to the GS-04 level and given the promotion she should have been entitled to almost one year prior to that date."

ANALYSIS

Backpay may be awarded under the authority of 5 U.S.C. § 5596 as a remedy for wrongful reduction in grade, removals

and suspensions, and other unjustified or unwarranted actions affecting pay or allowances. A prerequisite for the award of backpay is a determination by appropriate authority that an employee has undergone an unjustified or unwarranted personnel action. We have recognized as unjustified and unwarranted actions, clerical or administrative errors 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 Ruth Wilson, 55 Comp. Gen. 836 (1976) and 54 id. 888 (1975). For purposes of the Back Pay Act, a nondiscretionary provision is 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. 5 C.F.R. § 550.802(d) (1978). See John Cahill, 58 Comp. Gen. 59 (1978).

It is a well settled rule that the granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. 54 Comp. Gen. 263 (1974); William Scott, B-182565, May 29, 1975. By statute, regulation or agency policy mandating promotion within a particular time frame or under specific conditions, the granting of a promotion may become nondiscretionary, or a matter of right so as to warrant backpay under the standards cited above. See Joseph Pompeo, B-186916, April 25, 1977. However, absent such law, regulation or policy, a promotion may be made retroactively effective only on the basis of a clerical or administrative error that prevented its taking effect as originally intended.

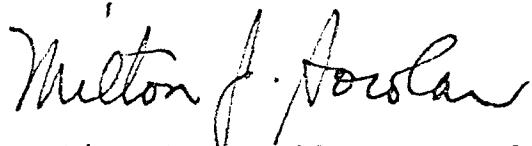
There is nothing in the record to indicate that the promotion of Ms. LeSeur was nondiscretionary. No statute, regulations, labor-management agreement, or other binding agency directive mandated the promotion of Ms. LeSeur's after a given time had passed. Nor does there appear to be any agency regulation, policy or procedure regarding processing time for promotion requests. The record does indicate that there was an error in evaluating Ms. LeSeur's qualifications. The particular error, however, was not of a type that would support the granting of a retroactive promotion.

In our recent decision, Barbara W. Scheaffer, B-200717, January 28, 1981, we pointed out that the type of clerical or administrative error that will support retroactive promotion must occur after approval of the promotion by the authorized official but before the acts necessary to effectuate the promotion have been carried out. Because promotions are discretionary, an error that occurs before the authorized official has had the opportunity to exercise his discretion with respect to approval or disapproval does not establish an intent to promote at any particular time. After-the-fact statements by that official as to what would have been his determination had the error not occurred are not sufficient to establish the necessary intent. See also, Janice Levy, B-190408, December 21, 1977.

In Ms. LeSeur's case the error in evaluating her qualifications occurred prior to approval of her promotion. As a practical matter, while it prevented the authorized official from exercising his discretion and forming an intent with respect to her promotion to GS-4, it cannot be said to have prevented that promotion from taking effect as originally intended. As we held in Maureen Barry, B-189678, December 21, 1977, also involving an agency's improper evaluation of the claimant's experience which delayed her promotion, an error in evaluating an employee's qualifications is not an administrative or clerical error which would warrant giving retroactive effect to a delayed promotion.

CONCLUSION

In accordance with the analysis set out above we hold that Ms. LeSeur's promotion to GS-04 may not be effected retroactively.



Acting Comptroller General
of the United States