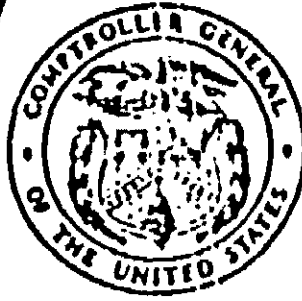


117461
DECISION



20748
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Mr. Gibson

FILE: B-204019

DATE: February 8, 1982

MATTER OF: George Twohy - Retroactive Promotion
and Backpay

DIGEST: Although employee in grade GS-9 became eligible for career-ladder promotion on July 15, 1979, he was not promoted to grade GS-11 until June 15, 1980. Employee is not entitled to promotion with backpay retroactive to the date of his eligibility since agency has discretion as to time of promotion and there existed no administrative error warranting retroactive promotion.

This decision is in response to a request from Zane G. Smith, Jr., Regional Forester, U.S. Department of Agriculture (U.S.D.A.), and Local 1650, National Federation of Federal Employees (NFFE), concerning the claim of Mr. George Twohy for a retroactive promotion. This decision has been handled as a labor-relations matter under our procedures in 4 C.F.R. Part 21, as amended, 45 Fed. Reg. 55689-92 (August 21, 1980).

The claim is denied since the granting of promotions is a discretionary matter primarily within the province of the agency involved.

The U.S.D.A. Forest Service, Pacific Southwest Region, hired Mr. Twohy as a GS-9, Airplane Pilot, on July 16, 1978. At that time, the Forest Service advised Mr. Twohy in a job offer letter that he would be given the opportunity to receive a career-ladder promotion to GS-11 after 1 year's service provided he was determined by the agency to meet certain performance requirements. Although Mr. Twohy received a within-grade increase on July 15, 1979, his subsequent request for promotion to grade GS-11 was denied. In this connection, Mr. Twohy's immediate supervisor informed him that he had not demonstrated sufficient ability to perform at the higher grade level. The claimant was not promoted to grade GS-11 until June 15, 1980.

Mr. Twohy filed a grievance with the Forest Service under procedures outlined in the U.S.D.A. Forest Service - NFFE Master Agreement, claiming backpay for the difference between the GS-9 salary he received and the GS-11 salary

he claims he should have received for the period July 15, 1979, to June 14, 1980. Forest Service management denied Mr. Twohy's claim for the reason that he had no vested right to a career promotion effective July 15, 1979.

The NFFE Local 1650, representing Mr. Twohy, disputed the agency's determination and requested arbitration. Subsequently, the Forest Service and NFFE agreed to defer arbitration and submit the matter for consideration by our Office.

The NFFE, on behalf of the claimant, argues that the Forest Service was required to promote Mr. Twohy to GS-11 upon his completion of 1 year in grade GS-9, and fulfillment of the performance requirements prescribed for the higher level position.

In a career-ladder, the classification of a position depends on the grade the incumbent has reached through promotion. Unless an administrative regulation, instruction, or policy states otherwise, a career-ladder promotion is not mandatory. Ivey N. Brown, B-195229, September 14, 1979. In this case there is no evidence of any agency policy that employees who meet the qualifications for GS-11 must be promoted. Therefore, the fact that Mr. Twohy was in a career-ladder, by itself, does not entitle him to promotion at any particular time. Alyse Rebel, et al., B-197394, October 9, 1980.

In support of its contention that the claimant is entitled to retroactive promotion, NFFE maintains that the agency's rejection of Mr. Twohy's promotion request constituted administrative error. It is well settled that a promotion may not be made retroactively effective in the absence of specific statutory authority. This Office has permitted retroactive promotions in cases where through an administrative or clerical error a personnel action was not effected as originally intended, where an agency has failed to carry out nondiscretionary regulations or policies, or where an administrative error has deprived the employee of a right granted by statute or regulation. Ruth Wilson, 55 Comp. Gen. 836 (1976); William Scott, B-182565, May 29, 1975.

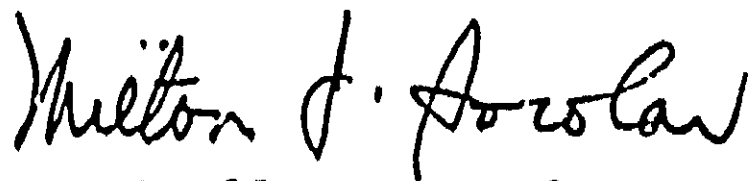
It is clear in this case that there exists none of the above exceptions to the general rule against retro-active promotions. Indeed, the NFFE does not present an argument that the facts of this case fall within one of these exceptions. Instead, the record indicates that Mr. Twohy's supervisor participated in the decision denying his promotion request. In this connection, he informed the claimant that he did not demonstrate abilities required at the higher level. As we have noted in previous decisions, deficient performance is the type of factor which a supervisor must consider with regard to any discretionary promotion. Lawrence Brown, Jr., B-199843, April 29, 1981.

The NFFE further contends that Mr. Twohy performed the same duties as other employees in his agency who were classified at the GS-11 level, as well as the duties of the GS-12 level. Generally, Federal employees are entitled only to the salaries of the positions to which they are appointed regardless of the duties they actually perform. United States v. Testan, 424 U.S. 392 (1976). However, we have held that employees officially detailed to higher positions for more than 120 days, without Office of Personnel Management approval, are entitled to retro-active temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. Turner-Caldwell, 55 Comp. Gen. 539 (1975), and 56 id. 427 (1977). However, in the present case the record does not show that the claimant was ever detailed to the higher grade position. Therefore, the Turner-Caldwell decisions are not applicable to this claim. Thomas Davis, B-189673, February 23, 1978.

The NFFE also alleges that the agency's failure to promote amounts to a breach of contract since the job offer stated that Mr. Twohy would have the opportunity of being advanced to a GS-11 in 1 year, upon meeting the prescribed performance requirements. This argument is without merit. The relationship between the Federal Government and its employees is not a simple contractual relationship. Since Federal employees are appointed and serve only in accordance with the applicable statutes and regulations, the ordinary principles of contract law do not apply. See William J. Elder and Stephen M. Owen, 56 Comp. Gen. 85 (1976), citing Hopkins v. United States, 513 F.2d 1360 (Ct. Cl. 1975).

Additionally, the NFFE alleges that the Forest Service covertly and improperly based its denial of Mr. Twohy's promotion request on a pending agency investigation concerning the claimant's involvement in an aircraft incident in Mexico. While the NFFE contends that the Forest Service's actions contravened certain merit system principles of the Civil Service Reform Act, 5 U.S.C. §§ 2301(b)(2) and 2302(b)(1), the union has not substantiated its allegations of agency misconduct nor explained how the merit principles are applicable here. Consequently, the claimant has not met his burden of proving liability on the part of the Government. See 4 C.F.R. § 31.7 (1981).

For the reasons stated above, we hold that Mr. Twohy's promotion to GS-11 may not be effected retroactively.

for 
Comptroller General
of the United States