

DECISION

21694 *Pool 21751*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-206181

DATE: May 5, 1982

MATTER OF: Jeffery K. Bishop and Peter S. Szilassy -
Retroactive promotion

DIGEST: Employees of Customs Service in noncompetitive career ladder positions are not entitled to retroactive promotions with backpay based on the agency's delay in certifying and approving their promotion requests. In the absence of a nondiscretionary requirement mandating promotion within a particular time frame or in accordance with specified criteria, administrative delay in processing promotion requests prior to approval by the authorized official does not constitute such administrative error as will support award of retroactive promotion and backpay.

The two claimants, Mr. Jeffrey K. Bishop and Mr. Peter S. Szilassy, who are represented by National Treasury Employees Union, were GS-11 employees with the U.S. Customs Service. They were both in noncompetitive career ladder positions to the GS-12 level. The claimants met the time in grade requirements, and were recommended by their supervisor for promotion to the GS-12 level. Mr. Bishop was recommended on May 22, 1979, and Mr. Szilassy on July 18, 1979. Following delays in processing, both claimants were promoted effective November 4, 1979.

STATEMENT OF THE ISSUE

The issue presented is whether these employees are entitled to retroactive promotions with backpay based on the agency's inordinate delay in certifying and approving the promotion requests. In the absence of any agency regulation, negotiated policy, or other requirement regarding processing time for promotion requests, we conclude that these employees are not entitled to retroactive promotions.

This action is in response to a joint submission from the Regional Commissioner of Customs, Los Angeles, California, and the National Treasury Employees Union concerning the similar claims of Mr. Jeffery K. Bishop

and Mr. Peter S. Szilassy for retroactive promotion and backpay. A decision is being rendered pursuant to 4 C.F.R. Part 22 (1981), which contains the provisions under which this Office settles issues on the legality of appropriated fund expenditures that arise in the Federal Labor-Management Relations program. The issue presented was initially the subject of a grievance. The grievance has been withdrawn in favor of a joint request for decision pursuant to 4 C.F.R. § 22.7(b)

BACKGROUND

Mr. Bishop's and Mr. Szilassy's promotions were processed in accordance with Customs Personnel Manual 335, Section 1-5a(1) that provides the following requirements for career ladder promotions which may be made without the use of competitive promotion procedures:

"* * * These noncompetitive promotions are permissible in established career ladder positions in which the employee may receive successive career promotions until he reaches the full performance or journeyman level in the career ladder. However, career promotions of this kind are not automatic upon completion of time-in-grade or training requirements. Rather, the following conditions must be met: the position must have an established career ladder; the employee must be one of a group in which all employees are given grade building experience and there is enough work at the full performance level for all employees in the group; the employee must have demonstrated the ability to perform at the next higher grade level; and all qualification and administrative requirements are met. * * *"

The agency admits that many of these required conditions were in fact met during the extended period during which Mr. Bishop and Mr. Szilassy were waiting for their promotions to be processed. However, the agency maintains that the reason these promotions were not accomplished in a timely fashion was that all administrative requirements had not been met, since the Headquarters Classification Section was not able to review these

requests for promotion to verify that the positions were in an established career ladder and that for each position duties at the GS-12 level existed at that time. Thus, because the Merit Promotion Plan stipulates that career promotions may not occur prior to the time when all qualification and administrative requirements have been met, it would not have been possible to implement these promotions until the request for personnel action had been reviewed by the Headquarters Classification and Staffing Sections. This action was accomplished on November 1, 1979, when the promotion requests were cleared by the classification specialist and the staffing specialist. Then on November 3, 1979, the Director of Personnel--whom the agency stresses has final approval authority on all personnel actions--signed approval on the final personnel actions effectuating the promotions of Mr. Bishop and Mr. Szilassy.

The claimants assert that they are entitled to retroactive promotions with all attendant benefits and time-in-grade. They advance two arguments in support of their position. First, that Customs Personnel Manual 335, Section 1-5a(1) constitutes a nondiscretionary provision which entitled them to be promoted within a reasonable period of time. Alternatively, they contend that they were entitled to promotion when their supervisor signed his approval of the promotion requests.

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 an 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). For purposes of the Back Pay Act, a nondiscretionary provision is any provision of law,

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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) (1981). See John Cahill, 58 Comp. Gen. 59 (1978).

Generally, retroactive promotions may not be awarded solely on the basis of administrative delays in the processing of personnel actions. Clem H. Gifford, B-193834, June 13, 1979. 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 promotions have been fully carried out. 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. See Douglas C. Butler, 58 Comp. Gen. 51 (1978), and decisions cited therein.

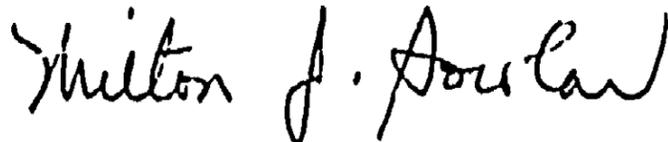
There is nothing in the record to indicate that the promotions of Mr. Bishop and Mr. Szilassy were nondiscretionary. No statute, regulations, labor-management agreement, or other binding agency directive mandated the promotion of the claimants after a given time had passed. In fact, the governing provision of the Customs Personnel Manual quoted above, specifically states that career ladder promotions are not automatic after time-in-grade requirements are met. 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 inordinate delay in processing these promotion requests. In our estimation agency officials should take steps to ensure that promotion actions are promptly and

properly processed to insure the success of their promotion program. However, the delay itself in this case does not amount to an error that would support the granting of retroactive promotions.

In Cahill, cited above, the promotion of an employee in a career-ladder position was delayed because the promotion request was clerically misplaced before it reached the authorized official. Finding that this type of administrative mistake did not in itself provide a basis for an award of backpay, we held that in the absence of a nondiscretionary requirement mandating promotion within a particular time frame or in accordance with specified criteria, the loss of a promotion request prior to approval by the authorized official does not constitute such administrative error as will support an award of retroactive promotion and backpay. The facts presented in the record of Mr. Bishop's and Mr. Szilassy's case bring it within this ruling.

CONCLUSION

In accordance with the analysis set out above we hold that Mr. Bishop's and Mr. Szilassy's promotions to GS-12 may not be effected retroactively.



Acting Comptroller General
of the United States