DECISION

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

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FILE: B-209942 DATE: September 23, 1983

MATTER OF: Robert Donovan, Jerry Holmes and Albert Rettenmaier - Repromotions and Within-grade Step Increases after Voluntary Downgrading

DIGEST:

1. Claimants held GS-9, step 5, positions and voluntarily accepted different GS-7, step 10, positions in order to enter a merit promotion program. They claim entitlement, upon repromotion, to GS-9, step 6, positions. Claim is denied since agency exercised its discretion and correctly applied the highest previous rate rule in accord with its authorizing statute and regulations when claimants were voluntarily demoted.

2. Federal Personnel Manual Supplement 990-2, Book 531, Subchapter S2-4b(3) (revised July 1969), and similar agency personnel manual provision do not constitute guarantees to employees that upon repromotion they would be entitled to the rates of pay they would have attained had they remained in the higher grade. Rather, these provisions are a cautionary statement to agencies not to set employees' rates of pay upon voluntary demotion in a manner which upon repromotion would cause employees to be entitled to rates of pay exceeding the rates they would have attained had they remained in the higher grade.

3. Claimants' repromotions after voluntary downgrading constitute "equivalent increases," and they were correctly required to begin a new waiting period without counting service at the grade and step before the demotion as part of the new waiting period. Federal Personnel Manual Supplement 990-2 Book 531, Subchapter S4-8c(1).

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This matter comes before us as a joint submission from the Pacific Region, United States Customs Service, Department of the Treasury (agency), and the National Treasury Employees Union (union). It involves the claims of three Customs Service employees, Robert Donovan, Jerry Holmes, and Albert Rettenmaier (claimants) for proper calculation of their compensation after their voluntary acceptance of positions in a lower grade in order to enter a merit promotion program, and their subsequent repromotions. This matter was initially the subject of an arbitration proceeding, but the parties have agreed, as an alternative to arbitration, to submit it to the Comptroller General. The request has been handled as a labor-relations matter under our procedures contained in 4 C.F.R. Part 22 (1983). For the following reasons, their claims are denied.

FACTS OF THE CASE

Robert Donovan, Jerry Holmes, and Albert Rettenmaier were employed as Customs Patrol Officers at GS-9, step 5, and had partially completed their 104-week waiting periods for advancement to step 6. Their waiting periods began on July 2, 1978, July 31, 1977, and June 4, 1978, and would have been completed on June 29, 1980, July 28, 1979, and June 1, 1980, respectively. The agency admits that they would have attained step 6 had they remained as GS-9 Customs Patrol Officers.

Effective August 12, 1979, Mr. Donovan and Mr. Rettenmaier, and effective July 1, 1979, Mr. Holmes, became Customs Inspectors, voluntarily accepting lower grades of GS-7. Their rates of pay were set at GS-7, step 10. Each employee had been competitively selected for his new position through the agency merit promotion program. Each employee accepted the change to a lower grade with the understanding that his new position was being filled below the full performance level, and that he could be promoted through GS-9 without further competition. Since they had voluntarily accepted lower grades of GS-7, they received no grade or pay retention benefits. See, respectively, 5 U.S.C. §§ 5362(d)(2), and 5363(c)(3) (Supp. III 1979).

Effective August 24, 1980, Mr. Donovan and Mr. Rettenmaier, and effective July 13, 1980, Mr. Holmes, were repromoted, respectively, to Customs Inspectors, GS-9. Mr. Donovan's and Mr. Rettenmaier's rates of pay were set at step 5 of grade GS-9 and they were required to begin a new

104-week waiting period for advancement. In Mr. Holmes' case, the record indicates that the agency initially advanced him to step 6 of GS-9 on July 13, 1980, but rescinded it in November 1980. For all practical purposes, therefore, the agency set all three employees' rates of pay at step 5 of grade GS-9 as of the date of their repromotions, and they were required to begin a new 104-week waiting period for advancement to step 6.

CONTENTIONS OF THE PARTIES

The union contends the relevant statutes and regulations guarantee employees in the claimants' situation entitlement, upon repromotion, to the rate of pay they would have attained had they remained in the higher grade, and that upon their repromotions, they should not have been required to begin a new 104 week waiting period for advancement to step 6 of grade GS-9. In particular they refer to Federal Personnel Manual (FPM) Supplement 990-2, Book 531, subchapter S2-4b(3) (revised July 1969) which provides:

> "(3) Objectional use of highest previous rate. When an employee is demoted at his own request with the prospect of repromotion back to the former grade as soon as possible under merit promotion rules (e.g., a demotion to acquire status), agencies should select a rate in the lower grade which upon promotion back will place the employee in the rate in the higher grade which he would have attained had he remained in that grade."

The agency's policy is stated in Chapter 531, paragraph 2-1 of the Customs Personnel Manual and is equivalent to the foregoing FPM Supplement provision.

The agency does not view the relevant statutes and regulations as constituting such guarantees, and believes the new waiting period was required. It relies on the governing statutory provision for setting the rate of basic pay to which the claimants were entitled upon their demotions in July and August 1979, 5 U.S.C. § 5334(a)(3) (1976), and Supp. III 1979, which provides:

> "(a) The rate of basic pay to which an employee is entitled is governed by regulations

prescribed by the Office of Personnel Management in conformity with this subchapter and chapter 51 of this title when

* * * * *

(3) he is demoted to a position in a lower grade."

The agency further relies on the text of the implementing regulation at the time of these demotions, commonly known as the highest previous rate rule, which provided, in relevant part:

"(c) Position or appointment changes. Subject to §§ 531.204, 531.515, 539.201 of this chapter, and section 5334(a) of title 5, United States Code, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate." 5 C.F.R. § 531.203(c) (1979).

ANALYSIS

The union has misinterpreted FPM Supplement 990-2, Book 531, Subchapter S2-4b(3), as granting the employee the "higher" step he would have attained had he remained in the higher grade without a demotion. The headnote to the paragraph states, "objectional use of highest previous rate." These provisions are a cautionary statement to agencies not to set employees' rates of pay upon voluntary demotion in a manner which, upon repromotion, would cause the employees to be entitled to rates of pay exceeding the rates they would have attained had they remained in the higher grade. Therefore, it is within this context of the agency's discretionary application of the highest previous rate rule that the FPM Supplement and Customs Personnel Manual provisions should be viewed. We note that the claimants took these voluntary demotions in order to enter a merit promotion program. Thus, we believe the agency has properly interpreted the foregoing provisions as not constituting a

guarantee to employees that upon repromotion they would be entitled to the rates of pay they would have attained had they remained in the higher grade.

In setting the pay rate of the three employees upon their voluntary demotion, the Customs Service properly exercised its discretion under the highest previous rate rule in 5 C.F.R. § 531.203(c) (1979), quoted above, by placing them in step 10 of grade GS-7. Since the employees were not entitled to grade or pay retention, the agency had no authority to set their pay above step 10.

Upon repromotion to GS-9, the "two-step increase" rule of 5 U.S.C. § 5334(b) (Supp. III 1979), became applicable. It provides:

> "(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If, in the case of an employee so promoted or transferred who is receiving basic pay at a rate in excess of the maximum rate of his grade, there is no rate in the higher grade which is at least two step-increases above his existing rate of basic pay, he is entitled to--
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> "(1) the maximum rate of the higher grade; or
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> "(2) his existing rate of basic pay, if that rate is the higher."

In the present case the claimants were clearly entitled to a rate of pay of step 5 of grade GS-9 (then $19,307) because it was the lowest rate of the GS-9 grade which exceeded GS-7, step 10 (then $18,101), by two GS-7 increases (then $928 = 2 x $464). See General Schedule for Fiscal Year 1980, 5 U.S.C. § 5332 note (Supp. III 1979). The agency's actions herein were thus in accord with the "two-step increase" rule of section 5334(b).

In this regard, we believe that the union's reliance on Clark v. United States, 599 F.2d 411 (Ct.Cl. 1979), rev'd on other grounds, 454 U.S. 555 (1982), to support higher step increases is misplaced. As Clark states, it may very well be that Congress intended a promotion to mean additional compensation of at least two steps. Id. at 414. As the foregoing paragraph demonstrates, however, the claimants did actually receive such additional compensation under the two-step increase rule upon repromotion. Thus, they received all that they were entitled to under Clark.

The other issue in this case is whether the claimants, upon their repromotions, were required to begin a new 104-week waiting period for advancement to step 6 of grade GS-9. We now observe that 5 U.S.C. § 5335(a) (1976 and Supp. III 1979), provides that an employee is eligible for periodic step increases in pay rates 4, 5 and 6, as long as the employee did not receive an "equivalent increase" in pay from any cause during that period, and, as conceded here, the work is of an acceptable level of competence. An equivalent increase has been defined as an increase or increases in an employee's rate of basic pay equal to or greater than the amount of the within-grade increase for the grade in which the employee is serving. 5 C.F.R.§ 531.406(a) (1980).

A pay increase granted under the "two-step increase" rule of 5 U.S.C. § 5334(b) is an equivalent increase in pay. See FPM Supp. 990-2, Book 531, Subchapter S4-8c(1), which cites 43 Comp. Gen. 507 (1964) and 43 Comp. Gen. 701 (1964). Since the three employees, upon promotion back to GS-9, received an equivalent increase, they must begin a new waiting period upon repromotion without counting service at the grade and step before the demotion as part of the new waiting period. See Richard C. Dunn, B-193394, March 23, 1979, and Duane E. Tucker, B-193336, March 23, 1979.

Accordingly, the claims of Robert Donovan, Jerry Holmes and Albert Rettenmaier are denied.

for Milton J. Socolar
Comptroller General
of the United States