

DECISION

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

FILE: B-211691

DATE: July 18, 1983

MATTER OF: Alan Scott Lutzer - Retroactive
Promotion and Backpay

DIGEST:

1. The promotion of an attorney-adviser from GS-13 to GS-14 was delayed 9 months by the Personnel Office's interpretation of a promotion moratorium. The employee is not entitled to a retroactive promotion and backpay because the promotion was discretionary, the employee did not have a right to the promotion granted by statute or regulation, and there was no nondiscretionary policy, regulation, or agreement entitling him to the promotion.
2. The employee alleges discrimination on the basis of disparate treatment of similarly situated employees among offices within the same Federal agency, as a result of differing interpretations of a promotion moratorium. Employee's claim on this basis is denied since there is no requirement that similarly situated employees be treated identically as to promotion actions.

Mr. Alan Scott Lutzer, formerly an attorney-adviser in the Office of Special Counsel of the United States Department of Energy (DOE) in Houston, Texas, appeals the February 23, 1983, denial by our Claims Group of his claim for a retroactive promotion and backpay.

STATEMENT OF THE ISSUES

Mr. Lutzer raises two related issues on this appeal. First, Mr. Lutzer alleges that a knowing misinterpretation by the Dallas Personnel Office of a moratorium on promotions resulted in a 9-month delay in the granting to him of a "career ladder" promotion. Further, Mr. Lutzer contends that the Dallas Personnel Office discriminated

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against Houston based attorney-advisers by interpreting the promotion moratorium as precluding a promotion from the GS-13 to GS-14 level despite having had knowledge that similarly situated attorney-advisers in other DOE offices had received such promotions under the "career ladder" exception to the moratorium.

The question presented is whether either of these arguments would provide a basis for an award of a retroactive promotion and backpay under 5 U.S.C. § 5596 (1976) (The Back Pay Act). For the following reasons, we hold that neither argument would support such an award.

BACKGROUND

In April 1980, Mr. Lutzer began his employment as an attorney-adviser, grade GS-13, in the Office of Special Counsel of DOE, based in the Houston Office. Mr. Lutzer contends that in interviews leading to his acceptance of this position, he had been told that upon the successful completion of 1 year of employment he would, if his performance was satisfactory, be promoted to the GS-14 level. According to Mr. Lutzer, his performance over the ensuing year was evaluated as satisfactory by his supervisors, and, at the direction of one of his supervisors, applicable forms were prepared in anticipation of his promotion from the GS-13 to GS-14 level.

The record indicates that Mr. Lutzer did not receive this promotion as he had expected he would. Mr. Lutzer maintains that a misinterpretation by the Dallas Personnel Office of DOE of a promotion moratorium resulted in his not being promoted at that time. It is Mr. Lutzer's contention that the promotion he had anticipated was a "career ladder" promotion, an explicit exception to the moratorium. Mr. Lutzer further states that similarly situated attorney-advisers in other DOE offices did receive such promotions under the "career ladder" exception, and that the Dallas Personnel Office had knowledge that such promotions were taking place. Finally, Mr. Lutzer contends that the continued insistence of the Personnel Office that the promotion of the Houston based GS-13 attorney-advisers to the GS-14 level was prohibited by the promotion moratorium, despite having had knowledge that other DOE offices had allowed such promotions within the "career ladder" exception to the moratorium, constituted discrimination against the Houston based attorney-advisers. On these bases, Mr. Lutzer has claimed

an entitlement to a retroactive promotion with backpay for the period of April 10, 1981, the date on which he alleges his promotion would have become effective if not for the Personnel Office's interpretation of the moratorium, through January 1982.

ANALYSIS

Our cases have consistently held that, for purposes of a backpay award under 5 U.S.C. § 5596 (1976), a retroactive promotion may be awarded only if the facts of the case bring it within an exception to the general rule prohibiting such promotions. The recognized exceptions to this rule are those situations in which (1) the employee has a right granted by statute or regulation to the promotion; (2) the promotion is a matter of nondiscretionary policy, regulation or agreement; or (3) the promotion has not been affected as originally intended by the person(s) having authority to grant the promotion. See Douglas C. Butler, 58 Comp. Gen. 51 (1978); Jeffery K. Bishop and Peter S. Szilassy, B-206181, May 5, 1982.

There is no indication in the record that Mr. Lutzer had a statutory right to the promotion he retroactively seeks. Nor is there any indication of a nondiscretionary policy, regulation or agreement entitling Mr. Lutzer to such a promotion. An informal agreement, such as that Mr. Lutzer contends occurred during his preemployment interviews regarding the attorney-adviser position, has been held insufficient to form the basis of a nondiscretionary policy, regulation or agreement for these purposes. See Thomas Davis, B-189673, February 23, 1978. And finally, the record indicates that it was the Personnel Office which had the authority to grant a promotion to Mr. Lutzer. By Mr. Lutzer's own statement, we have been informed that this authority was never exercised. We thus agree with the Claims Group that the April 1981 promotion to which Mr. Lutzer claims an entitlement remained, at all times, discretionary. We therefore have no authority, under 5 U.S.C. § 5596 (1976), to grant the retroactive promotion with backpay which Mr. Lutzer seeks.

We now address, more specifically, the arguments Mr. Lutzer has raised by this appeal. First, as to the contention that the Dallas Personnel Office refused to grant a promotion to Mr. Lutzer despite knowledge that other DOE offices had interpreted such promotions as permissible

within the "career ladder" exception to the moratorium, we find that, even if accurate, such facts would not establish a basis for an award of retroactive promotion and backpay. The "career ladder" exception to the promotion moratorium was no more than that, an exception. It did not alter the discretionary nature of such promotions. The discretion to promote Mr. Lutzer remained with the Personnel Office, and, according to the record, was not exercised. Nor would the preparation of applicable papers, in anticipation of the promotion, change the discretionary nature of that promotion. See Douglas C. Butler, cited above. There is no indication that anyone with valid authority to grant Mr. Lutzer a promotion did so. The crucial point is that, since the power to grant the promotion remained discretionary, and those possessing the power did not exercise it, there exists no authority under which a retroactive promotion with backpay may be awarded. John Cahill, 58 Comp. Gen. 59 (1978); Joseph G. May, B-194743, September 14, 1979.

Mr. Lutzer's second argument on this appeal maintains that the alleged disparate treatment of the Houston based attorney-advisers vis-a-vis similarly situated attorney-advisers in other offices of DOE constitutes discrimination against those in the Houston office. Our cases have consistently held that similarly situated employees are not entitled to identical treatment in promotion actions. 53 Comp. Gen. 926 (1974); William Scott, B-182565, May 29, 1975. As we stated in 53 Comp. Gen. 926, 928, "we are not aware of any law or regulation that requires the promotion of Federal employees in one office because employees holding similar positions in other offices are promoted." Mr. Lutzer does not contend that the delay in his promotion from GS-13 to GS-14 was due to discrimination based on race, color, religion, sex or national origin. Cf. B-180042, June 5, 1974. He alleges only that the Dallas Personnel Office interpreted such a promotion as being prohibited by the moratorium despite having had knowledge that such promotions were being granted to similarly situated employees in other offices of DOE. Such alleged disparate treatment would not provide a sufficient basis for an award of retroactive promotion with backpay. B-180313, June 5, 1974.

CONCLUSION

In accordance with the foregoing analysis, we sustain the settlement of our Claims Group, denying Mr. Lutzer's claim for retroactive promotion and backpay.

for *Harry D. Van Cleave*
Comptroller General
of the United States