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**DECISION**



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

**FILE:** B-212816

**DATE:** November 18, 1983

**MATTER OF:** Debra L. Raskin - Claim for Retroactive Appointment to Higher Grade Position

**DIGEST:**

Law clerk to Federal judge was appointed to a grade 11 position although she was eligible for grade 12 position. She seeks a retroactive appointment to the higher grade with appropriate backpay. The appointment may not be changed retroactively since there is no evidence of administrative error or a nondiscretionary administrative policy requiring that the employee be appointed to the highest grade for which she was eligible. There is no authority to allow the backpay claim on equitable grounds.

ISSUE

The issue in this decision is whether an employee who was appointed to a grade lower than that for which she was eligible is entitled to have her appointment retroactively changed to the higher grade with appropriate backpay. We hold that the appointment may not be changed retroactively since there is no evidence that a nondiscretionary administrative policy required that the employee be appointed to the highest grade for which she was eligible.

BACKGROUND

Mr. William R. Nichols, General Counsel, Administrative Office of the United States Courts, requests our decision whether Ms. Debra L. Raskin may be retroactively appointed to grade JSP-12, effective August 30, 1982, and awarded backpay from that date to May 30, 1983. <sup>1/</sup>

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<sup>1/</sup> The designation "JSP" refers to the Judicial Salary Plan, a classification system for employees of the Federal courts. See 28 U.S.C. § 604(a)(5) (1982). The grades and steps correspond with those of the General Schedule.

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On August 30, 1982, Ms. Raskin was appointed as a law clerk for the United States District Court for the Southern District of New York. At the request of the U.S. District Court judge responsible for her appointment, Ms. Raskin was placed in grade JSP-11. Apparently, the judge believed that, based on Ms. Raskin's experience, grade JSP-11 was the highest grade for which she was eligible.

Later, the judge learned that Ms. Raskin had been eligible for grade JSP-12 at the time of her appointment since she was a member of a state bar and had more than 2 years of prior legal experience. Consequently, by letter of May 19, 1983, he requested that the Administrative Office's Division of Personnel retroactively appoint Ms. Raskin to the higher grade effective August 30, 1982. The Division of Personnel agreed to promote Ms. Raskin to grade JSP-12 effective May 30, 1983, but disallowed a retroactive appointment change.

Ms. Raskin contends that she is entitled to a retroactive salary adjustment under the authority of the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982), and in accordance with the rules applicable to retroactive promotions, expressed in our decision 54 Comp. Gen. 888 (1975). In that decision, we stated that a personnel action may not be made retroactively effective unless a clerical or administrative error (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.

Ms. Raskin alleges that several factors contributed to an administrative error which frustrated the judge's original intention of appointing her to the highest grade for which she was eligible. In this regard, she has furnished evidence indicating that neither the judge nor his secretary was aware at the time of her appointment that she was qualified for placement in grade JSP-12. She states that this situation resulted from the Administrative Office's failure to adequately inform Federal judges of the criteria for appointing and promoting law clerks to positions in grades

JSP-9 through 13. Additionally, Ms. Raskin states that the Administrative Office's Division of Personnel was aware of her qualifications and experience when it processed the judge's request for her appointment to grade JSP-11, and, therefore, should have alerted him to her eligibility for grade JSP-12.

Ms. Raskin further states that, "it is not at all clear that the Judge had discretion not to appoint me to JSP-12-1, given my prior experience." In support of this contention, she has submitted administrative instructions describing the eligibility requirements for law clerk positions in grades JSP-9 through 13. The pertinent instructions read as follows:

"LAW CLERK TO A FEDERAL JUDGE

"Qualifications

To qualify for the position of law clerk to a Federal Judge, a person must be a law school graduate \* \* \*, and must have the following experience:

<u>JSP Grade Level</u>	<u>Years of General Experience</u>	<u>Years of Specialized Experience</u>	<u>Total Years of Experience</u>
9	NA	0	0
11	NA	1	1
12*	NA	2	2
13*	NA	5**	5

\*Must be a member of the bar of a state, territorial or Federal Court of general jurisdiction.

\*\*A minimum of 5 years service in this position. \*\*\*"

Ms. Raskin interprets the above-quoted instructions as requiring Federal judges to appoint an attorney with more than 2 years of prior legal experience to a position at the grade JSP-12 level. On this basis, she maintains that she

is entitled to a retroactive salary adjustment under our decision in Richard Siriani, B-181223, February 19, 1975. As will be more fully discussed below, we held in Siriani that an individual who initially was appointed to the position of Attorney-Adviser, grade GS-9, was entitled to a retroactive appointment to grade GS-11 where it appeared that the agency had an established practice of hiring entry-level attorneys at grade GS-11 when they met certain eligibility requirements.

The Administrative Office denies that Ms. Raskin's appointment to grade JSP-11 constituted an administrative error which may be corrected retroactively. Specifically, the Administrative Office states that there is no nondiscretionary administrative policy or practice which requires that law clerks eligible for grade JSP-12 be appointed at that level. Rather, the agency indicates that the determination to assign law clerks to a particular grade level is discretionary:

"Pursuant to standards promulgated by the Judicial Conference of the United States, federal judges have the discretion to appoint law clerks at JSP-9, 11, 12, or 13, depending on the individual's experience and qualifications. While we do not contest the fact that Ms. Raskin was eligible for a grade 12, we must point out that \* \* \* [the judge] was not required to appoint her at that level. Federal judges have the discretion to appoint law clerks at any level to which they are eligible, and our Division of Personnel advises that many judges do in fact employ clerks at less than their maximum potential grade. A judge could, for example, elect to start a clerk at a lower rate as an informal probationary period, promoting the clerk if subsequent performance warranted. Alternatively, some judges pay less than the maximum amount so as to match the prevailing salary paid to lawyers of similar experience in the geographical area. Clearly, this agency does not and should not 'second guess' a judge's decision in this regard."

The Administrative Office believes that, absent a nondiscretionary administrative regulation or established practice requiring that law clerks be assigned to the highest grade for which they are eligible, there is no legal basis for retroactively changing Ms. Raskin's appointment. In this regard, the agency cites our decision in B-173815.12, April 18, 1973, discussed below, and attempts to distinguish our decisions in 54 Comp. Gen. 888 and Richard Siriani, cited by Ms. Raskin. Nevertheless, the Administrative Office requests that we allow Ms. Raskin's claim based on the equitable considerations involved. Specifically, the agency states that disallowance of Ms. Raskin's claim would impose a hardship upon her, and that she should not be penalized for the Administrative Office's failure to appoint her to the highest grade for which she was eligible.

#### OPINION

Backpay may be awarded under the authority of 5 U.S.C. § 5596 as a remedy for wrongful reductions in grade, removals and suspensions, and other unjustified or unwarranted personnel 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. As Ms. Raskin points out, we have recognized as an unjustified or unwarranted personnel action an administrative error which prevented a personnel action from taking effect as originally intended. However, our decisions in this area have involved errors which occurred after the authorized official approved the personnel action. For example, where the official approved a promotion but the necessary papers were lost and the promotion was delayed, we have permitted a retroactive promotion and backpay. See the discussion in Melissa T. LeSeur, B-200669, May 6, 1981. In the present case, no administrative error occurred after the judge appointed Ms. Raskin to the grade JSP-11 position even though he might have intended, had he known of the appropriate criteria, to appoint her to a grade JSP-12 position. An example of a personnel action not effected as intended would be if the judge had appointed Ms. Raskin to the grade JSP-12 position, but, through administrative error, the action was processed as an appointment to a grade JSP-11 position.

With regard to the other two types of administrative errors recognized in our decisions, we have narrowly construed administrative error in appointments as an action which deprives an employee of a right granted by statute or regulation or results in the failure to carry out a non-discretionary administrative regulation or policy. See, for example, Dr. Kenneth J. Friedman, B-185805, May 18, 1976; and B-173815.12, April 18, 1973. See generally Robert A. Remes, 54 Comp. Gen. 69 (1974), and cases cited therein.

Ms. Raskin does not contend that the Administrative Office's failure to appoint her to grade JSP-12 deprived her of a right granted by statute or regulation, and there is nothing in the record to show that her appointment to the higher grade was nondiscretionary. No labor-management agreement, agency regulation, or internal policy requires the Administrative Office to employ law clerks at the highest grade for which they are eligible. While the administrative instructions submitted by Ms. Raskin outline the minimum requirements for law clerk positions in grades JSP-9 through 13, an administrative policy which merely makes an employee eligible for a particular grade cannot, in itself, be construed as requiring the employee's assignment to that grade. See Friedman and Remes, cited above.

As the Administrative Office points out, the facts surrounding Ms. Raskin's claim are similar to those involved in B-173815.12, April 18, 1973. In that case, a U.S. District Court judge requested that a new appointee who had formerly been employed in grade JSP-7, step 10, be placed in grade JSP-8, step 7, so that she would not suffer a reduction in pay. Later, the judge learned that the employee had been eligible for appointment to step 9 of grade JSP-8. We held that the employee's salary could not be increased retroactively since there was no administrative regulation or policy which required that she be appointed to the highest step for which she was eligible.

To be contrasted are our decisions in 54 Comp. Gen. 888 and Richard Siriani, cited by Ms. Raskin. In 54 Comp. Gen. 888, a processing error caused the career-ladder promotions of two Internal Revenue Service employees to be delayed for one pay period beyond the date that they should

have become effective pursuant to provisions of a collective bargaining agreement. We found that both employees were entitled to retroactive promotions since the agreement constituted a nondiscretionary administrative policy requiring that the employees be promoted at specified times. As indicated previously, there is no labor-management agreement or other binding agency directive which requires the Administrative Office to hire law clerks at the highest grade for which they are eligible.

In Siriani, an employee was erroneously found to be ineligible for appointment to the position of Attorney-Adviser, grade GS-11, and was placed in grade GS-9. We held that the employee was entitled to a retroactive salary adjustment since the agency had an established practice of hiring entry-level attorneys at grade GS-11 if they met the requirements for that grade. In Ms. Raskin's case, there is no evidence that it is the practice of Federal judges to appoint eligible law clerks at the grade JSP-12 level. In fact, the Administrative Office states that many Federal judges choose to hire law clerks at a grade lower than that for which they are eligible, in order to provide an informal probationary period or to match salary levels prevailing in the locality.

Absent an administrative regulation, policy or procedure requiring that Ms. Raskin be appointed to grade JSP-12, her assignment to a lower grade did not constitute an administrative error which may be corrected retroactively. However, as indicated previously, the Administrative Office questions whether Ms. Raskin's claim may be allowed on equitable grounds.

The claims settlement jurisdiction of this Office is limited to considerations of legal liability, and we have no authority to pay claims based solely on equitable considerations. Our Office grants relief on the basis of equity only where such jurisdiction is specifically granted by statute. See Ervin A. Keith, B-204443, April 5, 1982. See also 5 U.S.C. § 5584 (1982), permitting waiver of collection of erroneous overpayments where collection would be against equity and good conscience. Since there has been no overpayment in this case, we know of no basis to allow Ms. Raskin's claim on equitable grounds.

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Accordingly, we hold that Ms. Raskin may not be retroactively appointed to the grade JSP-12 position.

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