



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ella M. Richardson and Sharon G. Dover - Claims
for Retroactive Promotion and Backpay

File: B-227331

Date: February 29, 1988

DIGEST

Two employees claim retroactive promotions and accompanying backpay for the 5-month period that their career-ladder promotions were delayed due to a reclassification review. Generally, a career-ladder promotion is discretionary with the agency unless there is a mandatory agency regulation or policy which states otherwise. In this case, the claims are denied since the job announcement indicating a promotion potential to a particular grade for the employees' positions did not constitute a nondiscretionary administrative regulation or policy which if not carried out would constitute an "unjustified or unwarranted personnel action" by the agency under the Back Pay Act, 5 U.S.C. § 5596 (1982).

DECISION

ISSUE

Two employees of the Defense Logistics Agency (DLA) claim retroactive promotions and backpay at the grade GS-9 level for the period of time their promotions were delayed due to a classification review. In the absence of a nondiscretionary agency policy or regulation requiring that the employees be promoted, we conclude that there is no basis to permit a retroactive promotion with accompanying backpay.

BACKGROUND

This is in response to a request from Mr. Peter H. Tovar, Chief, Accounting and Finance Division, DLA, for an advance decision regarding the claims for retroactive promotions and backpay filed by two DLA employees, Ms. Ella M. Richardson and Ms. Sharon G. Dover. Ms. Richardson seeks backpay at the grade GS-9 level for the period from March 23 through August 9, 1986. Ms. Dover seeks backpay at the grade GS-9 level for the period from March 23 through August 23, 1986. The events and actions in these claims are essentially the

same for both Ms. Richardson and Ms. Dover, except for the period of time each claim covers.

Effective February 26, 1984, Ms. Richardson and Ms. Dover were promoted to trainee positions classified as GS-1712-05, Training Specialist (Supply), at the Defense Depot, Memphis, Tennessee (DDMT). Both employees were selected on the basis of the Job Opportunity Announcement No. DDMT-154-83, November 29, 1983, which indicated that the entry-level grade GS-5 trainee position had promotion potential to grade GS-9. The job announcement stated:

"Selectees will enter a training program leading eventually to non-competitive promotion to GS-9. . . . The trainee must successfully complete all formal courses and meet prescribed objectives for on-the-job training. . . .

"When the trainee successfully completes the first year of training, he or she will be promoted to GS-7. After successfully completing one year of training at GS-7, the trainee will be promoted to GS-9."

After satisfactorily completing the first year requirements for the position, both employees were promoted to grade GS-7 on March 10, 1985.

During the latter half of January 1986, both employees were considered to be meeting the requirements for promotion to the grade GS-9 level in March 1986, and DDMT submitted the paperwork requesting their promotions. As a result of these promotion requests, the Classification and Pay Office, DLA, notified DDMT that, due to a classification standard change, the positions occupied by the employees could be rated no higher than the grade GS-7 level. This classification standard change was the result of a temporary issuance by the Office of Personnel Management (OPM) of a new classification guide for the GS-1700 series, which threw the classification of the target jobs into question.

On June 9, 1986, OPM issued Federal Personnel Manual Bulletin No. 511-30, which rescinded the use of the new 1700 guides and permitted agencies to return to the previous standards and guides. As a result, on August 6, 1986, a

desk audit of Ms. Richardson's position was performed, and she was promoted to grade GS-9 effective August 10, 1986. Likewise, on August 19, 1986, a desk audit of Ms. Dover's position was performed, and she was promoted to grade GS-9 effective August 24, 1986.

Both employees then filed claims for backpay and credit for time within grade at the grade GS-9 level for the period of time their promotions were delayed due to the classification review, i.e., the end of their year at grade GS-7 and the date that their promotion actions to grade GS-9 were made effective. The employees contend that this delay was contrary to the language of the job announcement which they believe "guaranteed" them promotions to grade GS-9 after successfully completing 1 year at grade GS-7. They believe this delay constitutes an "unjustified or unwarranted personnel action" under the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1982).

In forwarding the employees' claims for retroactive promotion and backpay to this Office, the agency states that the Comptroller General has decided a number of cases involving the reclassification of a position and has consistently found that there is no entitlement to backpay for the period prior to the reclassification of a position. The agency also notes that our Office has decided cases in favor of the employee and has granted retroactive backpay only under very specific circumstances when the head of the agency has, by virtue of a negotiated agreement or by the establishment of an agency policy, limited his or her discretionary promotion authority and vested employees with a right to be promoted on an ascertainable date. The agency goes on to state:

"In this case, the vacancy announcement does not constitute Agency policy and there is no provision in the negotiated agreement which would guarantee an employee a promotion at any specific time or within any specific time limit."

OPINION

Generally, the granting of promotions from grade to grade is a discretionary matter primarily within the province of the

administrative agency involved. See John W. Godwin, B-202688, Oct. 23, 1981, and cases cited therein. This discretion includes the granting of noncompetitive promotions to individuals in career-ladder positions. John W. Godwin, B-202688, supra.

Similarly, the authority to classify general schedule positions is vested by law in the agencies where the positions are located and the OPM. See 5 U.S.C. §§ 5107, 5110, 5112, and 5115; 5 C.F.R. Part 511 (1986). Under these laws and regulations, OPM has the authority and responsibility for the preparation and publication of standards for classification of positions subject to the general schedule. Each agency is required to initially classify positions within the agency and to change the classification when circumstances warrant. These actions by an agency are the basis for pay and personnel transactions until changed by OPM. 5 U.S.C. § 5107. Under the provisions of 5 U.S.C. § 5110, OPM is required to review agency classification actions and correct such actions which are not in accordance with published standards.

Ordinarily, an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. See Susan E. Murphy, 63 Comp. Gen. 417 (1984), and cases cited therein. Similarly, there is no entitlement to backpay for the period prior to reclassification of a position. We have found that alleged delays by an agency in processing job descriptions used to support a higher grade position do not provide a basis for backpay. Gordon L. Wedemeyer, B-200638, Oct. 9, 1981, and cases cited therein. The U. S. Supreme Court has held that a reclassification action upgrading a position may not be made retroactively effective for purposes of effecting the Back Pay Act, 5 U.S.C. § 5596. United States v. Testan, 424 U.S. 392 (1976). Thus, the fact that a position is reclassified to a higher level and the employee is promoted does not entitle him to retroactive pay at the rate of the higher level position, even though he may have performed the duties of that position prior to its reclassification. See Connie V. Marcum, B-204521, Apr. 26, 1982; Gerald V. Mann, B-195132, Aug. 6, 1981; David A. Webb, B-190695, July 7, 1978.

However, we have permitted a retroactive personnel action where clerical or administrative errors occurred that

(1) deprived an employee of a right granted by statute or regulation, or (2) would result in a failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. Susan E. Murphy, 63 Comp. Gen. 417, supra, and cases cited therein. We have recognized that the above-stated exceptions to the general rule prohibiting retroactively effective personnel actions may constitute "unjustified or unwarranted personnel actions" under the Back Pay Act, 5 U.S.C. § 5596. 55 Comp. Gen. 42 (1975).

In a career ladder, the classification of a position depends on the grade the incumbent has reached through promotion. Thus, unless an administrative regulation, instruction, policy, or provision in a negotiated agreement states otherwise, a career-ladder promotion is not mandatory and withholding it is within the discretionary authority of the official authorized to approve such promotion. George Twohy, B-204019, Feb. 8, 1982; Ivey N. Brown, B-195229, Sept. 14, 1979.

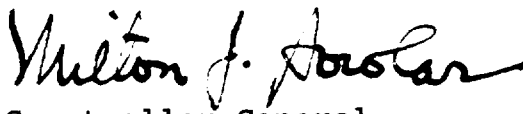
In this case, although the job announcement indicated a potential career ladder from grades GS-5 to GS-9 for the trainee positions accepted by the employees, this career ladder was delayed by the temporary issuance of the new classification guide. Issuance of this guide and the review and eventual desk audits of the positions involved was certainly within the discretion of OPM and the agency under the classification provisions of title 5, United States Code, cited above. See also Dolly Green Marshal, et al., B-196216 et al., May 16, 1980.

Moreover, we have generally held that informal understandings between the employee and the agency or job offers (such as the announcement in this case) which indicate a promotion potential for a position do not constitute an agency regulation, policy, or agreement which limits or qualifies the discretion of the agency to approve or disapprove promotions or vests employees with the right to be promoted at any specific time. See, George Twohy, B-204019, supra; John W. Godwin, B-202688, supra; Dolly Green Marshal et al., B-196216 et al., supra; Ivey N. Brown, B-195229, supra; Katherine M. Kline, B-185482, Sept. 16, 1976. For example, in Marshal, the Social Security Administration froze promotions to the position of hearings and appeals analyst, grade GS-13, because of a question as to the validity of the

grade GS-13 position classification, which had been advertised in a vacancy announcement. We held in Marshal that, in the absence of a nondiscretionary policy to promote, the employees could not receive retroactive promotion and backpay based on the mere existence of career-ladder positions.

In this case, the employees have not submitted any additional evidence to establish that this case falls within one of the exceptions described above, and there is nothing in the file which indicates the existence of any nondiscretionary agency policy or regulation which would have required that they be promoted prior to the effective dates of their promotions in August 1986. Thus, while the employees may have been misled with regard to the certainty of the promotion potential as stated in the job announcement of the trainee position, this does not afford a basis for a retroactive promotion in view of the prospective only nature of classification actions.

Accordingly, we conclude that the agency may not grant the employees retroactive promotions with backpay under the provisions of 5 U.S.C. § 5596.

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