

Comptroller General
of the United States

Washington, D.C. 20548

Decision

CP

Matter of: Michael Kostishak

File: B-248460.2

Date: November 10, 1992

DIGEST

A court clerk's appointing official did not approve his authorized promotion in grade until about four months after he was first eligible for the increase. The employee claims a retroactive pay increase for the four months. The authority under which the increase was granted made it contingent upon the request of the appointing official, and the general rule is that such an increase is not effective before the official exercises his discretion to grant it. Since the record shows no clerical or administrative error, there is no basis on which the increase may be made effective retroactively.

DECISION

Mr. Michael Kostishak, Clerk of the U.S. Bankruptcy Court at Baltimore, Maryland, requests our review of a Claims Group settlement¹ denying his claim for a retroactive salary increase. We affirm the settlement.

BACKGROUND

At its September 12, 1990 meeting, the Judicial Conference of the United States² authorized a salary increase for certain Judicial branch executives, in relevant part as follows:

¹2-2867831-347, June 22, 1992.

²The Judicial Conference of the United States is composed of the Chief Justice of the United States, the Chief Judge of each judicial circuit, the Chief Judge of the Court of International Trade and a district court judge from each judicial circuit. The Conference prescribes rules and regulations related to the administration of the Judicial Branch. 28 U.S.C. § 331 (1988).

EXECUTIVE PAY IN THE JUDICIARY

In order to remain competitive with the executive branch, which anticipates an increase in pay for senior executives in January, 1991, the Judicial Conference approved a one-grade pay increase, if requested by the appointing official, for clerks of the courts of appeals, district court clerks, bankruptcy court clerks. . . . The Conference authorized exceptions to normal promotion and time-in-grade requirements to be made to allow incumbents to be promoted to the next higher grade at the step held at the time of the promotion, and required that no position other than the court unit executives cited be increased in grade by virtue of this change. These increases are to take effect no earlier than January 1, 1991.³

Subsequently, on December 10, 1990, the Administrative Office of the United States Courts⁴ issued a memorandum to the Chief Judges of Bankruptcy Courts explaining that the Judicial Conference had authorized promotions of specified executives to the next grade and had approved exceptions to the normal pay setting rules to ensure that the executives would receive pay increases. It went on to state:

The effective date of the increases will be January 14, 1991, the beginning of the first full pay period after the first of the year. We must receive your request by that date in order to ensure that the increase is reflected in the salary payment for the January 14 pay period. To keep payroll processing and changes manageable, we will be able to make requests received after January 14 retroactive to that date only if they are received within two pay periods after January 14, i.e., by February 11. Requests received after February 11 will become effective the first pay period following receipt of the request.

In Mr. Kostishak's case, his appointing official, Chief Judge Paul Mannes, requested the one-grade pay increase authorized by the Judicial Conference in a letter to the

³Report of the Proceedings of the Judicial Conference of the United States, Washington, D.C., September 12, 1990, p.91.

⁴The Director of the Administrative Office of the United States Courts is the administrative officer of the courts and acts under the supervision and direction of the Judicial Conference. 28 U.S.C. § 604 (1988).

Administrative Office dated April 25, 1991. In accord with the guidance stated above and the policy set out in the Judicial Salary Plan³ (JSP) that all personnel actions other than appointments and separations will "take effect on the first day of the first pay period on or following the day on which all requirements for the action were met and the requesting letter was signed," Mr. Kostishak's increase was made effective May 6, 1991, the beginning of the first pay period after the date of the Chief Judge's request.

Mr. Kostishak, however, disagreed with the May 6, 1991 effective date, and claimed that the increase should be made retroactive to January 14, 1991. Mr. Kostishak asserted his claim on the basis the action authorized by the Judicial Conference was a pay "adjustment" (not a promotion) to become effective on or after January 1, 1991, and that other than setting the January 14, effective date, the Administrative Office did not have the authority to set the timeliness guidelines contained in its December 10, 1990 memorandum. However, both the Administrative Office and our Claims Group characterized the personnel actions authorized by the Judicial Conference as promotions and denied Mr. Kostishak's claim based on the rule that promotions cannot be made retroactive unless one of three exceptions applies. (This rule and the exceptions are discussed below.)

In his appeal of our Claims Group's settlement, Mr. Kostishak alleges that the settlement did not address his contentions that the Administrative Office acted in excess of its authority or that the personnel action at issue is a salary adjustment rather than a promotion, and therefore, not subject to the rule against retroactivity. Specifically, in his submission to the Claims Group, Mr. Kostishak argued that the personnel action was a salary adjustment rather than a promotion for the following reasons:

1. Normal time in grade (one year requirement) was suspended.
2. In the case of a true promotion, the official having the next grade below the promoted party--in my case the chief deputy clerk--would have been allowed to move up one grade. This did not occur.

³See page 32 of the JSP. The JSP is established by the Director of the Administrative Office under the supervision and direction of the Judicial Conference, and it establishes the entire compensation system for the judicial branch. JSP, June 1, 1992, at 1.

3. In the case of a true promotion, the step to which the party being promoted is entitled in the higher grade is to be no less than two steps in salary based on the lower grade. In the case of these salary adjustments, however, there is no such equivalent increase in salary.

4. In the case of these salary adjustments, the period of time previously accumulated in the lower grade toward the next step in grade was carried forward into the higher grade so that it was not necessary to start over again in building up this time necessary for the next step. Such a situation never occurs in the case of a promotion.

OPINION

We note first that the Director of the Administrative Office, "under the supervision and direction" of the Judicial Conference, among other things, supervises "all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the courts" and "fix[es] the compensation of clerks of the court." 28 U.S.C. § 604(a) (1) and (5) (1988). The Director also has the authority to promulgate, issue, rescind, and amend rules and regulations necessary to carry out his functions, powers, duties and authority. 28 U.S.C. § 604(f). Pursuant to these authorities, the Director established the Judicial Salary Plan which provides the compensation system for Judicial Branch employees, including a classification and pay grade system similar to the general schedule system established under 5 U.S.C. Chpts. 51 and 53. The JSP states that "the Judicial Conference has delegated to the Administrative Office and, by extension, the Division of Personnel, substantial latitude to interpret and administer the [Judicial Salary] Plan." JSP, at 2.

Accordingly, it is clear that the Director had the authority to prescribe the methods to be used to implement the one-grade pay increase authorized by the Judicial Conference in September 1990.

As to the guidance provided by the Judicial Conference, it approved a one-grade pay increase, "if requested by the appointing official." It authorized exceptions to the normal promotion and time-in-grade requirements to be made to allow incumbents to be "promoted" to the next higher grade at the step held at the time of "promotion," and it provided that the increases take effect no earlier than January 1, 1991.

In implementing the increases, the Administrative Office set January 14, 1991, as the effective date for requests

received by February 11, and the first pay period following receipt of the request for those received later.

In accordance with the method used by the Judicial Conference to effectuate the pay raise through a one-grade promotion, and the definition of promotion in the JSP as an increase in the grade of an individual without change in the classification of the position, clearly the pay increase was effectuated by granting a promotion, although under special rules providing deviation from the time-in-grade and step level requirements. The fact that similar special promotions were not authorized for the next lower level employees, does not change the fact that the Judicial Conference authorized these special promotions. Therefore, in our view the points raised by Mr. Kostishak do not change the character of these authorized increases in grade, and we agree with the Administrative Office and our Claims Group in characterizing them as promotions.

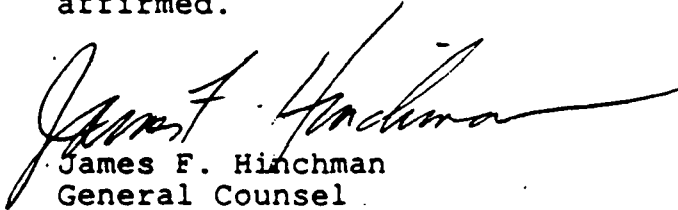
As noted above, the promotions under this plan were authorized only "if requested by the appointing official." Thus, they were not nondiscretionary actions that became automatically effective on January 14, 1991, but they required the discretionary act by the appointing official to request the promotion. In Mr. Kostishak's case, the appointing official's request was not made until April 25, 1991. The Administrative Office report on this case states that the appointing official, Judge Mannes, advised that he intentionally delayed authorizing the promotion until April 25, and he did not intend that it be granted retroactively to January 1991. Under the JSP provisions applicable to personnel actions, as indicated previously, the Administrative Office made the promotion effective the beginning of the next pay period, May 5, 1991. See JSP pp. 32-33.

As the Claims Group advised Mr. Kostishak in denying his claim, and as reflected in the JSP, we long have held that personnel actions cannot be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended; (2) deprived an employee of a right by statute or regulation or (3) would result in the failure to carry out a non-discretionary administrative regulation or policy if not adjusted retroactively. John R. MacDonald, 65 Comp. Gen. 485 (1986); Benedict C. Salamandra, B-212990, July 23, 1984. In this case, the record shows that the appointing official intended to wait until April 25 to request Mr. Kostishak's promotion, and the Administrative Office then followed its established policy in making the promotion effective the following pay period. Therefore, there was no administrative or clerical error. Moreover, the report adopted by the Conference merely authorized the

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increase, leaving to appointing officials the discretion to request increases for individual employees, and there was no statute, regulation or nondiscretionary policy requiring that Mr. Kostishak's promotion and pay increase be made earlier. Thus, none of the exceptions referred to above is present in Mr. Kostishak's case. Therefore, the general rule applies that a personnel action that depends on the exercise of a discretionary act by an official is not effective to increase an employee's pay prior to the official's action. Since Mr. Kostishak's increase in grade, whether characterized as a promotion or otherwise, depended on the discretionary action of Judge Mannes, the agency properly declined to make it retroactive.

Accordingly, the Claims Group settlement denying Mr. Kostishak's claim for a retroactive pay increase is affirmed.


James F. Hinchman
General Counsel

CIVILIAN PERSONNEL

Compensation

Retroactive compensation

Eligibility

Discretionary authority