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M. Volpe



DECISION

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

GAO 00 411

FILE: B-192556

DATE: December 4, 1978

MATTER OF: William Wilder- [Arbitration Award of
Retroactive Promotion and Backpay]

DIGEST: *O* Employee, who had been employed in a grade GS-5 position for 8 months, did not receive promotion in career-ladder position until 13 other trainees were promoted after 1 year in ^{the} career-ladder position. Arbitrator awarded promotion with backpay retroactive to date employee received within-grade increase in grade GS-5. Award, which is based upon violation of provision requiring "equal opportunity" in promotion program, may not be implemented since absence of nondiscretionary agency policy requiring promotion will not support award of retroactive promotion with backpay.

This action is in response to a request from the Federal Labor Relations Council, dated July 26, 1978, for an advance decision concerning the legality of implementing the backpay award of an arbitrator in the matter of American Federation of Government Employees, Local 1760 and Northeastern Program Service Center (Wolff, Arbitrator), FLRC No. 77A-31. The arbitrator found that the agency, the Social Security Administration (SSA), was not justified in delaying the career-ladder promotion of an employee, Mr. William Wilder, and the arbitrator awarded him a retroactive promotion with backpay.

The FLRC had initially, on August 26, 1977, denied the agency's petition for review of the award because it failed to meet the FLRC's requirements for review set forth in 5 C.F.R. § 2411.32. Subsequent to the FLRC's denial of review, we issued a decision in Janice Levy, B-190408, December 21, 1977, in which we invalidated an arbitrator's award of a retroactive promotion made under similar circumstances. Based on that decision, the SSA asked the FLRC to reconsider its denial of review in the present case. The FLRC granted the agency's request for reconsideration and accepted its petition for review of the arbitrator's

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award. The FLRC requests our decision as to whether, in light of the decision in Janice Levy, supra, the arbitrator's award in this case violates applicable law or appropriate regulation.

The facts in this case are that the grievant, Mr. Wilder, was hired by SSA in September 1974, under a temporary appointment as a Claims Representative Trainee, grade GS-5. Because Mr. Wilder was a temporary employee, he received only 3 weeks of training instead of the normal 12 weeks of training, and he was then assigned to a SSA branch office. On May 27, 1975, the grievant was transferred to SSA's Northeastern Program Service Center where he was given a term appointment as a Benefit Authorizer Trainee, grade GS-5. Mr. Wilder, along with 13 other Trainees who were hired in May 1975, then received 7 weeks of specialized training in lieu of the 16-week formalized training program since the agency wanted to reduce the backlog of cases in a certain area.

In September 1975, Mr. Wilder received a within-grade increase in grade GS-5 but his subsequent request for a promotion to grade GS-7 was denied by the agency in December 1975 on the ground that he had not completed the full range of formal training necessary for a career-ladder promotion. The grievant and the other trainees were later promoted to grade GS-7 in June 1976, but Mr. Wilder filed a grievance contending that he was entitled under the negotiated agreement to a career-ladder promotion on October 12, 1975, the pay period following a within-grade increase.

The arbitrator found that the grievant and the other trainees had been promoted in June 1976, without receiving further training, and that the grievant was performing the same work in September and October 1975, as he was when he was promoted in June 1976. Based upon the evidence before him, the arbitrator concluded that the grievant was eligible and qualified for promotion to grade GS-7 in October 1975. Furthermore, the arbitrator held that the agency was not justified in delaying the grievant's promotion until the other trainees were eligible for promotion since the agency's failure to provide "the full range of training" violated Article 16 of the negotiated agreement which provides, in pertinent part, as follows:

"Section b. The Bureau shall continue to provide equal opportunity in its promotion program for all qualified employees and will make promotions without discrimination for any nonmerit reason.* * *."

Therefore, the arbitrator awarded the grievant a promotion retroactive to October 12, 1975, with backpay.

Our Office has held that as a general rule personnel actions may not 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 granted by statute or regulation, or (3) would result in the failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. 55 Comp. Gen. 42 (1975); and 54 *id.* 888 (1975). We have also recognized that these 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, and may be remedied through an award of backpay.

In considering the legality of implementing arbitration awards relating to Federal employees who are covered under negotiated labor-management agreements, we have held that the provisions of such agreements may constitute non-discretionary agency policies if consistent with applicable laws and regulations. 55 Comp. Gen. 42, *supra*. Therefore, where an arbitrator finds that an employee has been denied or has lost pay or allowances which is the result of and would not have occurred but for the violation of the negotiated agreement, the Back Pay Act and the implementing Civil Service Commission regulations contained in 5 C.F.R. Part 550, Subpart H (1978), are the appropriate authorities for compensating the employee.

In the present case, the question presented is whether this provision of the negotiated agreement constitutes a nondiscretionary agency policy so as to support an award of a retroactive promotion with backpay. The arbitrator held that the agency, by delaying the grievant's promotion until the other Trainee employees were eligible for promotion,

violated "the contractual 'equal opportunity' in the promotion program". However, there appears to be no agency regulation nor provision in the negotiated agreement which mandates that employees receive career-ladder promotions within a certain time frame. In fact, the agency regulations clearly leave promotions to the next highest level within the discretion of the agency as evidenced by the following excerpts from the SSA regulations on career ladder promotions:

"Timing and Intent

"Advancement to the journeyman level is the intent and expectation in the career ladder system. However, promotions within career ladders are neither automatic nor mandatory. There is no guarantee that an employee in a career ladder will be promoted, nor a commitment that a promotion will be made at any set time. Promotions will be effected as the employee's performance demonstrates readiness to assume more difficult duties at the next higher level and as other legal requirements (e.g., time-in-grade) are met.

* * *

"Basis for Promotion

"Time-in-grade requirements establish the minimum time within which career promotions may be made. They do not, however, constitute a basis for promotion. Promotions within career ladders are to be made only when (1) the employee has performed successfully at this current grade level and (2) his performance indicates that he is ready for assignments at a higher level and ultimately can be expected to perform at the journeyman level.

"Minimum Time

"Employees in career ladders will be considered for promotion when they meet time-in-grade requirements; they will be promoted only as they meet established promotion criteria."

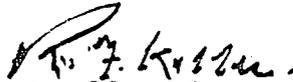
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The provision in the negotiated agreement which the arbitrator relied upon requires "equal opportunity" in the promotion program, but that provision does not require the agency to make promotions within any specified time frame under any stated conditions. Therefore, we are unable to conclude that there has been a violation of a nondiscretionary agency policy or regulation which constitutes an unjustified or unwarranted personnel action under the Back Pay Act and thus entitles the grievant to a retroactive promotion with backpay.

This case is clearly distinguishable from prior cases which have been considered by our Office where the agency and the union had agreed upon a specific time frame for promotions under stated conditions. See, for example 55 Comp. Gen. 427 (1975); 55 id. 42, supra; 54 id. 888, supra; and 54 id. 403 (1974). On the other hand, this case is quite similar to our recent decisions in Janice Levy, supra, and John Cahill, B-192455, November 1, 1978, where we held that negotiated agreement provisions requiring consistent and equitable application of merit promotion principles or equal pay for substantially equal work do not constitute nondiscretionary agency policies which require an agency to make promotions at any specified time or under specified criteria.

Accordingly, since we conclude that there has been no violation of a nondiscretionary agency policy or regulation, we hold that the award of a retroactive promotion and backpay was improper and may not be implemented.

We have been informally advised that payment of backpay has been made to Mr. Wilder in satisfaction of the arbitration award. Under the circumstances of this case, we believe that the overpayments of backpay would be subject to waiver under the provisions of 5 U.S.C. § 5584 (1976) and 4 C.F.R. Part 91 (1978).


Deputy Comptroller General
of the United States