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**DECISION**



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

FILE: B-197728 *[Request For]* DATE: November 7, 1980

MATTER OF: Philip A. Lombardi - Retroactive Salary Adjustment]

DIGEST: An employee of Department of the Army was appointed at grade GS-15, step 1, where agency, through administrative oversight did not act timely to obtain the required approval of the Civil Service Commission to appoint him at step 7 of grade 15. The employee may not receive a retroactive increase in pay because, under 5 U.S.C. 5333 (1976) and implementing regulations, "prior approval" by the Commission was required for the appointment at a rate above the minimum rate of the appropriate grade.

By letter dated January 10, 1980, Dr. Philip A. Lombardi, an employee of the U.S. Patterson Army Hospital, Fort Monmouth, New Jersey, appealed the action of our Claims Division which by settlement dated July 31, 1979, disallowed his claim for a retroactive salary increase for the period September 1, 1978, to October 8, 1978. As is explained below, the retroactive salary increase may not be allowed.

The record shows that on July 10, 1978, the Civilian Personnel Office at Fort Monmouth, New Jersey, was notified by officials of the U.S. Patterson Army Hospital, Fort Monmouth, New Jersey, that Dr. Lombardi would be available to enter on duty on September 1, 1978, and it was requested that he be hired at step 7 of grade GS-15. It appears that the request to hire Dr. Lombardi at the special step 7 rate was due to the lack of applicants for the position involved and in order to attract physicians with the competency required for that position it was necessary to hire at a higher rate of salary.

Due to an oversight the Civilian Personnel Office failed to submit a timely request to the Civil Service Commission to have Dr. Lombardi certified for appointment at the GS-15 level and to obtain approval to hire him at

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step 7 of grade GS-15. Accordingly, Dr. Lombardi was given a temporary appointment effective September 1, 1978, to the position of medical officer (Radiology), grade GS-15 step 1. The Personnel Action Form, SF-50, issued incident to his appointment stated in the remarks section that the pay rate shown was subject to upward retroactive adjustment upon verification from the Commission.

Upon receipt of the Commission's certification Dr. Lombardi's appointment was converted to career-conditional effective September 22, 1978. The SF-50 issued incident to the conversion action contained the same statement as the prior SF-50 regarding an upward retroactive adjustment of pay rate upon verification by the Commission. By letter dated October 23, 1978, the Commission advised the U.S. Army that on October 5, 1978, the Commissioners had approved the request for a variance under civil service rule V to permit adjustment of Dr. Lombardi's salary from step 1 to step 7 of grade GS-15. The Commission further advised that this salary adjustment could not be made effective before the date of the Commission's action. The Army adjusted Dr. Lombardi's salary rate to the step 7 level on October 8, 1978.

On February 22, 1979, Dr. Lombardi filed a claim for a retroactive pay adjustment for the period from his initial appointment on September 1, 1978, to October 8, 1978, the date the Army effected his pay adjustment. This claim was forwarded to our Claims Division which denied it on the grounds that there was no administrative error, nondiscretionary regulation, or no statute which would provide a basis for a retroactive salary adjustment in his case.

Dr. Lombardi has appealed the disallowance of his claim on the basis that prior to his appointment officials of the Hospital had assured him that he would be paid at the higher rate commencing September 1, 1978. He further states that when he arrived for duty on September 1, 1978, he was assured that a retroactive pay adjustment would be made as soon as the necessary

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held that the failure of an agency to request such approval in a timely manner is neither a violation of a nondiscretionary administrative regulation or policy nor a deprivation of a right granted by statute or regulation. Therefore, we may not authorize the retroactive pay adjustment Dr. Lombardi claims. Matter of Harriet B. Marple, B-188195, January 3, 1978, and Matter of John P. Corrigan, B-191817, February 5, 1979.

While agency officials may have assured Dr. Lombardi that a salary adjustment would be retroactive to his initial appointment date, it is well settled that in the absence of specific statutory authority the United States is not responsible for erroneous advice or acts of its officers, agents, or employees, even though committed in the performance of their official duties. See John S. Treadwell, B-192659, February 14, 1979, and Clayton Jennings, B-194270, May 9, 1979.

Accordingly, the Claims Division's disallowance of Dr. Lombardi's claim is sustained.

*Harry R. Van Cleave*

For the Comptroller General  
of the United States

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paper work was completed. A letter dated December 29, 1978, from Headquarters, Fort Monmouth, confirmed that Dr. Lombardi had been advised that his salary would be adjusted retroactive to September 1, 1978.

As a general rule a retroactive administrative change in salary may not be made in the absence of a statute so providing. 26 Comp. Gen. 706 (1947); 39 id. 583 (1960); and 40 id. 207 (1960). However, we have permitted the adjustment, retroactively effective, of salary rates where errors occurred as a result of failures to carry out nondiscretionary administrative regulations or policies. See 34 Comp. Gen. 380 (1955); 39 id. 550 (1960) and 54 id. 263 (1974). Also, we have permitted retroactive adjustments in cases where an administrative error has deprived the employee of a right granted by statute or regulations. See 21 Comp. Gen. 369, 376 (1941); 37 id. 300 (1957); id. 774 (1958); and 55 id. 42 (1975).

Section 5333 of title 5, United States Code, provides in pertinent part that new appointments shall be made at the minimum rate of the grade. Section 5333 also provides that under regulations of the Civil Service Commission (now the Office of Personnel Management) which provide for such considerations as the existing salary or unusually high or unique qualifications of an appointee, or a special need of the Government, the head of an agency may appoint, with the approval of the Commission in each specific case, an individual to a position in grade GS-11 or above at a rate above the minimum rate of the grade. The applicable civil service regulation is found at 5 C.F.R. 531.203(b) which provides in pertinent part that a "superior qualifications appointment" means an appointment at a rate above the minimum rate of the appropriate grade under the authority of 5 U.S.C. 5333, and with the "prior approval" of the Commission.

An agency has no authority under 5 U.S.C. 5333 (1976) and implementing regulations to appoint an employee at a rate above the minimum rate of the grade prior to obtaining approval of the Commission. We have