

DECISION

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

FILE: B-183125

DATE: NOV 14 1975

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MATTER OF: Harold A. Bruce - Retroactive promotion based
on administrative error in processing request

DIGEST: Regional office of Animal and Plant Health Inspection Service (APHIS) was confused over implementation of new classification standards and erroneously prepared promotion request for grade GS-7 employee to be promoted to interim grade GS-8 position instead of to grade GS-9 position that agency promotion criteria required. Upon discovery of error APHIS, with concurrence of Civil Service Commission, promoted employee to GS-9 position. Grievance examiner recommended employee's retroactive GS-9 promotion to date he received promotion to interim GS-8 position. Error was unjustified or unwarranted personnel action that deprived employee of pay and may be remedied under Back Pay Act, 5 U.S.C. § 5596.

This matter involves a request for an advance decision from the Department of Agriculture as to whether Mr. Harold A. Bruce, an employee of the Animal and Plant Health Inspection Service (APHIS), may be granted retroactive pay for the difference in salary between grades GS-8 and GS-9 for the period October 29, 1972, through June 10, 1973.

In October 1972 Mr. Bruce occupied the position of food inspector (slaughter), GS-1863-7, and was stationed in Cohoes, New York. At that time, the Northeast Regional Office, Meat and Poultry Inspection Program-Field Operations, APHIS, submitted a Standard Form 52, Request for Personnel Action, to the Personnel Operations Branch, Personnel Division, APHIS, Minneapolis, Minnesota, requesting that Mr. Bruce be promoted. Officials at the regional office were confused over the implementation of the then new Food Inspection Classification Standards and erroneously prepared the request for promotion by indicating the promotion was to an interim GS-8, food inspector (non-processing) position instead of to a GS-9, food inspector (non-processing) position. However, in the "Remarks" section of the request, the regional office noted that the promotion was for a GS-9 position when Mr. Bruce was eligible. The request was approved as prepared and the employee was promoted to grade GS-8 effective October 29, 1972.

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At the time of the action, the agency criteria for promotion from food inspector (slaughter), GS-7 position to a food inspector (non-processing), GS-9 position was whether: (1) a permanent food inspector (slaughter), GS-8 position existed in the circuit which was the minimum area of consideration; (2) the employee was recommended for selection for promotion; and (3) the employee was qualified and otherwise eligible for promotion. The agency states that there was neither a GS-8 (slaughter) position within the employee's circuit when he was promoted nor had such a position ever been established in the circuit. The interim GS-8 position to which Mr. Bruce was promoted was especially created for him.

Upon realizing it was the intent of the regional office to promote Mr. Bruce to grade GS-9 instead of to grade GS-8, the Personnel Division, APHIS, with concurrence of the Civil Service Commission (CSC), promoted the employee to GS-9 effective June 10, 1973, without regard to the year-in-grade requirement of the Whitten Amendment, 5 U.S.C. § 3101 note (1970).

Subsequently, the employee filed a grievance with his agency contending that his agency erred in failing to promote him to grade GS-9 on October 29, 1972. The grievance was referred to a Departmental Grievance Examiner who rendered a decision on November 25, 1974. Her analysis and findings were as follows:

"The appellant's contention of eligibility for retroactive pay is supported by the following uncontested facts: He was selected to fill a GS-9 Food Inspector (non-processing) position at Cohoes, Albany Circuit, between September and December of 1972. There was not then nor has there ever been a GS-8 Food Inspector (Slaughter) position in the Albany Circuit. Under the provisions of the Classification Standard issued in June of 1971, he was eligible for and should have been promoted to GS-9. The fact that he was not promoted to GS-9 effective October 29, 1972, was due entirely to improper application of the Classification Standard.

"I find that the improper application of the Classification Standard constituted an Administrative error which resulted in the appellant's not being promoted as intended.

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"The Comptroller General has ruled that generally, a personnel action may not be effected retroactively so as to increase the right of an employee to compensation. However, exceptions to this rule have been made when, through Administrative or clerical error, a personnel action was not effected as originally intended."

The Grievance Examiner made the following recommended decision:

"Based on my finding, it is recommended that the Agency present the circumstances of this grievance to the Comptroller General for a ruling as to whether or not the appellant may be granted retroactive pay for the difference in salary between GS-8 and GS-9 for the period October 29, 1972 and June 10, 1973."

The Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), is the appropriate authority under which an employee's pay may be retroactively adjusted. This statute provides, in part, as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

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"(2) for all purposes, is deemed to have performed service for the agency during that period * * *."

The above-quoted statute is the subject of implementing regulations promulgated by the CSC in subpart H, part 550, title 5, of the Code of Federal Regulations. These regulations provide in 5 C.F.R. § 550.803(c) that an agency is an appropriate authority under the statute to find that an employee has undergone an unjustified or unwarranted personnel action that has resulted in a loss or withdrawal of compensation. 54 Comp. Gen. 760 (B-180010, March 19, 1975).

On December 30, 1974, the Acting Administrator, APHIS, accepted the recommended decision of the Grievance Examiner and thereby adopted his findings that but for administrative errors in the handling of the promotion action, Mr. Bruce would have been promoted to grade GS-9 on October 29, 1972.

It is a general principle of law that Federal Government employees are entitled only to the salaries of the positions to which they are appointed, regardless of the duties they actually perform. Bielec v. United States, 197 Ct. Cl. 550 (1972); Ganse v. United States, 180 Ct. Cl. 183 (1967); Price v. United States, 112 Ct. Cl. 198 (1948). Equally important, the granting of promotions to employees is a discretionary matter within the scope of authority of the administrative agency involved. Tierney v. United States, 168 Ct. Cl. 77 (1964); Wienberg v. United States, 192 Ct. Cl. 24 (1970). Furthermore, salary increases may ordinarily not be made retroactively. However, we have held that when an employee has become entitled to a compensation increase under a nondiscretionary agency regulation or policy, administrative action retroactively correcting an error or oversight in processing the necessary documents to grant the increase required by such regulation or policy will not be regarded by us as a prohibited retroactive adjustment. See 21 Comp. Gen. 369, 376 (1941); 37 id. 300 (1957); 37 id. 774 (1958); 54 id. 263 (1974).

In the instant case there was a written agency policy that required that Mr. Bruce be promoted to grade GS-9 instead of to grade GS-8. Accordingly, since Mr. Bruce would have been promoted to GS-9 on October 29, 1972, but for the errors in processing his

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promotion, he suffered an unjustified or unwarranted personnel action which may be remedied under authority of 5 U.S.C. § 5596 (1970). The agency may therefore take corrective action in accordance with 5 C.F.R. § 550.804 (1975), to restore lost pay, allowances, and differentials to Mr. Bruce.

MILTON SOCOLAR

For the Comptroller General
of the United States