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J. R. ...

DECISION



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

U4371

FILE: B-169678

DATE: December 20, 1977

MATTER OF: Maureen Barry - Compensation - Retroactive Promotion

DIGEST: Agency improperly evaluated employee's prior experience thereby causing delay in employee's promotion. Employee is not entitled to retroactive promotion. The error did not prevent a personnel action from taking effect as originally intended. Nor was the employee deprived of a right granted by statute or regulation and no nondiscretionary agency regulation or policy was violated.

This decision responds to a request from Mr. George C. Putnam, Assistant Regional Director, Administration and Management, Department of Health, Education, and Welfare (HEW) Region III, concerning the entitlement of Ms. Maureen Barry to retroactive promotion and backpay.

Ms. Barry is an employee in the Social Security Administration's District Office in Norfolk, Virginia. On May 14, 1976, the District Manager of the Norfolk office submitted a request for Ms. Barry's promotion from Claims Representative, GS-5 to GS-7, to be effective June 6, 1976. The Regional Personnel Office in Philadelphia disallowed the promotion on the basis that Ms. Barry did not have the one year of specialized experience at the GS-5 level which is a prerequisite for promotion to the GS-7 level of that position. The District Manager resubmitted the promotion request after a discussion with the Personnel Officer during which he pointed out that Ms. Barry had met the specialized work experience requirement through a job she had held in private industry from August, 1972 to October, 1974. The Personnel Officer rejected the second request, stating that, although she had overlooked that experience, "her wages at that time equated to wages at GS-3 level in Federal service and cannot be considered as qualifying at the GS-5 level for promotion to GS-7."

On July 23, 1976, the District Manager wrote to the Personnel Officer and included copies of Ms. Barry's application for employment which apparently described her prior job experience. He contested the basis of the Personnel Officer's decision and requested

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reconsideration of the promotion request. On October 19, 1976, the Personnel Office wrote to the District Manager, informing him that the matter had been sent to the Civil Service Commission for resolution.

On November 24, 1976, the Norfolk area office of the Civil Service Commission notified the Regional Personnel Office that, after consideration of information submitted by that office and additional information requested from Ms. Barry concerning her work experience, it had determined that Ms. Barry met both the generalized and specialized experience requirements for promotion to the GS-7 position. As a result of this determination, Ms. Barry was promoted to GS-7, effective December 5, 1976.

On December 3, 1976, Ms. Barry initiated an informal grievance, contending that her promotion should be made effective as of June 6, 1976, the date on which the initial request was to be effected. A Personnel Officer from the Philadelphia Regional Office rendered an unfavorable decision on December 29, 1976. He stated that no administrative error had occurred because the Civil Service Commission's determination had been made on the basis of information supplied by Ms. Barry--information which had not been made available to the Regional Office. Upon receipt of that decision, Ms. Barry initiated a formal grievance, stating that she had not submitted additional information to the Personnel Officer because she had been repeatedly told that it was not necessary. On April 15, 1977, the grievance examiner recommended denial of the retroactive promotion because the authorized official had properly withheld approval of the promotion in June 1976 pending submission of necessary information.

On June 28, 1977, Mr. George Putnam, the Assistant Regional Director, issued a formal grievance decision in which he rejected the examiner's recommendation because errors had occurred in Ms. Barry's promotion action. He enumerated those errors as follows:

"Specifically, I find that the Regional Personnel Office administratively erred by not giving you proper credit after your manager, Mr. Charles Teets, provided additional information on July 23, 1976 regarding your vocational background and its applicability to the position in question.

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"Additionally, I believe the Regional Personnel Office allowed an inordinate amount of time to elapse between the time Mr. Teets clarified the pertinent aspects of your vocational background and when the advice of the Civil Service Commission was sought in October, 1976. The rapidity with which the Civil Service Commission determined that you met the specialized experience requirement necessary for promotion to the GS-7 level, also causes me to conclude that the requisite information was available to the Regional Personnel Office at an earlier time; however, they improperly evaluated that information thereby delaying your promotion."

Mr. Putnam has asked us to determine, in light of these errors, whether Ms. Barry is entitled to retroactive promotion with backpay.

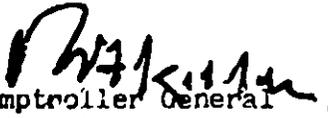
Backpay is awarded under the authority of 5 U.S.C. 5536 as a remedy for wrongful reductions in grade, removals and suspensions, and other unjustified or unwarranted actions affecting pay or allowances. A prerequisite for the award of backpay is a determination by appropriate authority that an employee has undergone an unjustified or unwarranted personnel action. We have recognized as unjustified and unwarranted actions, clerical or administrative errors 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 failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. See 55 Comp. Gen. 836 at 838 (1976) and 54 id. 888 (1975).

The facts of Ms. Barry's case do not fall within any of the above situations. It is clear that the decision not to promote Ms. Barry was intentional and no administrative or clerical error was made in this regard. Moreover, there is nothing in the record which would indicate that the promotion of Ms. Barry was non-discretionary. No statute, regulation, labor-management agreement,

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or other binding agency directive mandated the promotion of Ms. Barry after a given time had passed. Nor does there appear to be any agency regulation, policy or procedure regarding processing time for promotion requests. Therefore, since the decision to promote Ms. Barry was purely of a discretionary nature, she is not entitled to retroactive promotion and backpay.

Deputy


Comptroller General
of the United States



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

J. Rotford CP

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December 21, 1977

The Honorable G. William Whitehurst
Member, United States
House of Representatives
Room 601, Pembroke One
281 Independence Boulevard
Virginia Beach, Virginia 23462

Dear Mr. Whitehurst:

Reference is made to your letter of July 15, 1977, on behalf of Ms. Maureen Barry, an employee of the Social Security Administration in Norfolk, Virginia. By letter of September 27, 1977, we informed you that we were waiting for a request for a decision from the Assistant Regional Director. We have received that request in which Mr. Putnam asked for our decision on whether Ms. Barry was entitled to retroactive promotion and backpay.

By decision of today, copy enclosed, we hold that Ms. Barry is not entitled to retroactive promotion and backpay under the facts presented.

Sincerely yours,

Deputy

[Signature]
Comptroller General
of the United States

Enclosure