

**DECISION**



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

**FILE:** B-208406

**DATE:** July 15, 1983

**MATTER OF:** Mitchell J. Albert, et al. - Revocation of Promotions Due to Budget Cuts

**DIGEST:**

1. Ten employees of Merit Systems Protection Board were selected for promotion effective December 13, 1981. Due to budget cuts, the Managing Director announced on December 16 that all promotions would be suspended. These 10 promotions were not properly revoked before they became effective and are retroactively effective on December 13, 1981.
2. Eight employees of the Merit Systems Protection Board were selected for promotion effective December 27, 1981, or later. Due to budget cuts, the Managing Director announced on December 16 that all promotions would be suspended. These promotions were effectively revoked, even though written notification was not issued until December 29. There is no basis to allow retroactive promotions for these eight employees.

The issue in this decision is the entitlement of 18 employees of the Merit Systems Protection Board (MSPB or Board) to retroactive promotions where the promotions were suspended due to a cut in the MSPB's Fiscal Year 1982 appropriations. We hold that the 10 promotions which became effective prior to the promotion freeze are retroactively effective, but that the remaining eight promotions scheduled to be effective after the announcement of the promotion freeze were properly revoked and may not be implemented retroactively.

This decision is in response to a request from Mr. Richard Redenius, Managing Director of the MSPB. Comments supporting the MSPB position were submitted by the MSPB Professional Association.

Of the 18 MSPB employees in question, 10 were scheduled for promotion effective December 13, 1981; 6 were scheduled for promotion effective December 27, 1981; and 2 were to be promoted in January and February 1982. The MSPB's Managing Director had signed a Standard Form 52, "Request for Personnel Action" (SF-52), for each promotion in the Washington, D.C., office. In the case of promotions in the MSPB's regional offices, the appropriate regional director had signed the SF-52's. The SF-52's stated no conditions on the promotions. However, no Standard Form 50, "Notification of Personnel Action" (SF-50), was ever transmitted to any of the employees due to the subsequent suspension of the promotions.

On December 15, 1981, the continuing resolution passed by Congress made a 16 percent cut in MSPB's Fiscal Year 1982 appropriation. As a result of this budgetary cut, on December 16, 1981, MSPB's Managing Director orally notified the agency's Office of Personnel to suspend the processing of the 18 promotions. Then, on December 29, 1981, MSPB's Director of Personnel notified office heads and regional directors in writing that all previously authorized promotions for the named employees were suspended at that time, until funding permitted their further processing. The promotions were reprocessed in July 1982.

The General Counsel of the MSPB argues that for the 16 employees whose promotions were to be effective before December 29, an SF-52 was executed for each employee by a duly authorized official and there were no conditions or discretionary acts to be completed before the promotions would become effective. Since the December 29 notice was the first written notice to the affected employees, the General Counsel concludes that these employees, "entered into duty on the effective dates of promotion," and that the attempted revocation of their promotions by the December 29 memorandum cannot be supported. As to the two employees scheduled for promotion in January and February 1982, the General Counsel concedes that the December 29 memorandum effectively revoked these promotions.

The MSPB Professional Association represents four of the 18 employees (two scheduled for promotion on December 13 and two scheduled for promotion on December 27, 1981). The Association concurs with the position of the MSPB General Counsel that promotions authorized to be effective prior to December 29, 1981, were effective on those dates and, therefore, the employees are entitled to retroactive promotions.

As the General Counsel of the MSPB notes, it is settled that to be entitled to the rights and salary associated with a given position in the Federal service, the person claiming entitlement (1) must have been appointed to the position by one with the authority to make such an appointment, and (2) must have entered on duty in that position. National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981).

An appointment to a position takes place when the last act to be done by the appointing official is performed. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156 (1803). Completion of the SF-50 is not the "last act" required of the appointing authorities within the meaning of Marbury v. Madison. NTEU v. Reagan, at 246. Rather, completion of the SF-52 by an authorized official may serve as such a "last act." See B-179323, May 16, 1974.

As to entry on duty, where a promotion involves no fundamental changes in duty, the employee enters on duty in the new position on the date the official having authority to make the promotion, approves the promotion, unless it is stipulated that the promotion shall be effective from some subsequent date. 3 Comp. Gen. 559 (1924). Further, the date of approval on the SF-52 or a subsequent date as may be administratively fixed on the SF-52 constitutes the effective date of promotion. B-179323, cited above.

Even if an appointment or promotion is made, it may be revoked by an authorized official before the employee enters onto duty in the new position. NTEU v. Reagan, at 247; see also Pratte v. National Labor Relations Board, 683 F.2d 1038, 1043 (7th Cir. 1982). To be effective, the revocation must serve to effectively prevent the employee from entering on duty in the position. See NTEU v. Reagan, at 248.

In the case of the 18 promotions in question, the authority of MSPB's Managing Director and the respective regional directors to approve the promotions is not at issue. The SF-52 in the case of each promotion was completed and signed by the above authorized officials, and no conditions were set on the promotions. Since all or a large majority of employees to be promoted did not change basic duties in their new positions, it is necessary to look at the date the appointing officials selected them for promotion to determine when they entered on duty in their new positions. These dates, as set forth in the SF-52's, constitute the effective dates of promotion. As the elements of an effective appointment were thus satisfied, the

only issue remaining concerns whether any of the promotions were revoked before the employees entered into their new positions.

With regard to the 10 employees whose promotions were to be effective December 13, these employees entered on duty in their new positions before the MSPB appropriation was cut and before any promotion freeze or suspension was announced. These promotions were not properly revoked and must be made retroactively effective in the absence of adverse action procedures demoting these employees. See Richard B. Pixton, B-187028, October 1, 1976. This situation is analogous to those individuals who were appointed and entered on duty prior to revocation of their appointments under President Reagan's hiring freeze. Those individuals were held to be employees, and the attempted subsequent revocation of their appointments was held to be invalid. NTEU v. Reagan, 663 F.2d 239, 248, cited above.

With regard to the eight MSPB employees with promotions to be effective December 27, 1981, or later, we believe these promotions were effectively revoked by the oral notification of suspension by the MSPB Managing Director to the Office of Personnel. It appears from the record before us that the announcement of the Managing Director was sufficient to suspend the processing of the eight promotions not yet completed, whether the employees were located in Washington, D.C., or in the regional offices. The December 29 memorandum by the Director of Personnel merely documented the prior action by the Managing Director, and we know of no requirement that revocation of a promotion be communicated to the employee before it takes effect. See also, Dalbey, et al. v. Navy, MSPB Docket No. SF075209091, November 25, 1981, where the Board upheld revocation of promotions announced on August 2, 1979, to be effective on August 20, but withdrawn by the appointing official on August 16 due to allegations of preselection. Federal Merit Systems Reporter, X-5163,5164 (1979-1981). See also 45 Comp. Gen. 99 (1965).

Our decisions allowing retroactive promotions are distinguishable since there is no evidence of administrative or clerical error in this case which (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) deprived the employee of a right granted by statute or regulation. See Douglas C. Butler, 58 Comp. Gen. 51 (1978). Although the

appropriate officials had approved these promotions and all that remained to effecuate them was a series of ministerial acts, we hold that these eight promotions were properly revoked prior to their effective dates. Thus, there was no delay or omission in processing the promotions that would constitute an administrative or clerical error which would support retroactive promotions. See Butler, cited above.

Accordingly, we hold that the 10 promotions scheduled for December 13 were effective on that date and must be implemented retroactively. However, we hold that the remaining eight promotions scheduled for December 27 or later were properly revoked by the MSPB Managing Director prior to their effective dates and may not be made retroactively effective.

for *Larry R. Dan Clave*  
Comptroller General  
of the United States