

**DECISION**



118562  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-204299

DATE: June 2, 1982

MATTER OF: Edward C. Biewald - Retroactive promotion

- DIGEST:
1. A developmental air traffic controller, GS-9, step 1, transferred through the Federal Aviation Administration (FAA) Merit Promotion Program to another duty station which had a full performance level of GS-12. The FAA required that the employee complete the training and facility qualification requirements at the new station, in addition to meeting the time-in-grade requirement, before he could be promoted to the developmental grade of GS-11. The employee claims that the FAA committed an administrative error since an FAA regulation required the agency to promote him to the GS-11 position when he met the time-in-grade requirements even though he had not fulfilled the training and facility qualification requirements. The cited regulation does not require the FAA to promote the employee in this situation, and, therefore, his claim is denied.
  2. A developmental air traffic controller, GS-9, step 2, who had been transferred pursuant to FAA's Merit Promotion Program to another duty station, but failed to complete the training and facility requirements at the new station, requested and received a transfer back to his original duty station at the same grade, GS-9, step 2. The employee contends that the FAA committed an administrative error by failing to promote him upon his transfer back since an FAA regulation required such a promotion. However, regulation cited only covers employees who upon transfer have been demoted, and since the employee was not demoted, FAA did not commit an administrative error and the claim for a retroactive promotion is denied.

Mr. Edward C. Biewald, through his authorized representative, the Professional Air Traffic Controllers Organization (PATCO), has presented a claim for two separate retroactive promotions. Pursuant to 4 C.F.R. Part 22 (1981) (originally published as 4 C.F.R. Part 21 at 45 Fed. Reg. 55689-92, August 21, 1980), the Federal Aviation Administration (FAA) was served with a copy of PATCO's submission, but has filed no comments or response.

The first issue in this case is whether FAA committed an administrative error by failing to promote Mr. Biewald after a transfer when he had met the time-in-grade requirements, but had not completed the training and facility qualification requirements at his new duty station. The second issue is whether the agency committed an administrative error by failing to promote him when he transferred back to his original position until after he had again completed the training and facility requirements for that duty station. Based on the following discussion and the record before us, we hold that the FAA did not commit an administrative error in either instance and, therefore, the claims for retroactive promotions are denied.

The record shows that Mr. Biewald was originally assigned to the Dubuque, Iowa, Air Traffic Control Tower, as a developmental air traffic control specialist with a full performance level for that facility of grade GS-10. Mr. Biewald received a promotion to grade GS-9, step 1, on July 29, 1979, and, since he had satisfactorily completed the training and facility qualification requirements on July 17, 1979, he would have been eligible for promotion to GS-10 on July 29, 1980. However, Mr. Biewald submitted a bid through the FAA Merit Promotion Program (FAA Order 3330.1A) and was selected for an air traffic control specialist position at the Des Moines, Iowa, Air Traffic Control Tower, effective March 9, 1980. The full performance level for the Des Moines facility is grade GS-12.

The FAA required that Mr. Biewald complete the training and facility qualification requirements at the Des Moines facility, in addition to meeting the time-in-grade requirement, before he could be promoted to the developmental grade of GS-11. PATCO contends that FAA Order 3330.1A only requires that Mr. Biewald meet the time-in-grade requirement before receiving a promotion to the developmental grade of GS-11. Therefore, the first issue in this case is whether the FAA committed an administrative error by not promoting Mr. Biewald to the GS-11 position on July 29, 1980, the date in which he satisfied the time-in-grade requirement.

It is a well-settled rule that the granting of promotions from grade-to-grade is a discretionary matter primarily within the province of the administrative agency involved. Tierney v. United States, 168 Ct. Cl. 77 (1964); Wienberg v. United States, 192 Ct. Cl. 24 (1970).

Moreover, an administration change in salary may not be made retroactively effective in the absence of specific authority. This Office has permitted retroactive promotions in cases where through an administrative or clerical error a personnel action was not effected as originally intended, where an agency has failed to carry out nondiscretionary regulations or policies, where an administrative error has deprived an employee of a right granted by statute or regulation, or where the agency has through a collective bargaining agreement vested in an employee the right to be promoted after a specified period of time. Ruth Wilson, 55 Comp. Gen. 836 (1976); William Scott, B-182565, May 29, 1975.

Here PATCO contends that the agency failed to carry out a nondiscretionary regulation, FAA Order 3330.1A, Paragraph 43, entitled "PROMOTION OR REASSIGNMENT OF AIR TRAFFIC CONTROL SPECIALISTS SELECTED UNDER THE MERIT PROMOTION PROGRAM FOR MOVES BETWEEN FACILITIES." The regulation provides in part:

"(2) Developmental Level Controllers:

"(a) Prohibition - Promotion to FPL Position. A developmental controller SHALL NOT be promoted to a FPL position at the new facility. The employee shall be reassigned in-grade to a developmental position.

"(b) Promotion to Developmental Positions. If the employee MEETS the one year time-in-grade requirement, he or she shall be promoted to a higher graded DEVELOPMENTAL position coincident with entering on duty at the new facility.

"NOTE: Satisfactory completion of the training and facility qualification requirements (in addition to time-in-grade) is required before subsequent promotion(s) of developmental level controllers at the new facility."

The FAA apparently has interpreted this regulation to require a developmental controller who is transferred under the merit promotion program, but upon transfer, has not met the time-in-grade requirement, to fulfill the training and facility qualification requirements before promotion. PATCO contends that the regulation should mean that a developmental controller is only required to meet the time-in-grade requirements for his first promotion after transfer to a new facility in accordance with the merit promotion program. PATCO also contends that the FAA interpretation discourages employees from participating in the program.

A careful reading of the regulation reveals that Mr. Biewald's specific situation is not addressed. This regulation requires promotion to a higher-graded

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developmental position if the employee meets the one year time-in-grade requirement at the time he enters on duty at the new facility. Mr. Biewald did not meet the one year time-in-grade requirement when he began duty at the Des Moines facility. Also, the note in the regulation is ambiguous since it could refer to a promotion subsequent to a first promotion or simply subsequent to arrival, if the employee is not promoted on arrival.

Since the regulation does not clearly cover Mr. Biewald's situation, we hold that such a regulation does not establish a nondiscretionary right to promotion. Therefore, Mr. Biewald's first claim for a retroactive promotion to GS-11 beginning July 29, 1980, is denied.

Mr. Biewald failed to meet the requirements of the facility training program at the Des Moines Air Traffic Control Tower. He then requested and received a transfer back to the Dubuque Air Traffic Control Tower, effective December 14, 1980. Mr. Biewald had received a within grade step increase to GS-9, step 2, on July 27, 1980. Upon his return to Dubuque, he was again required to complete the training and facility qualifications requirements of the Dubuque facility before he received his promotion to the full performance grade of GS-10. He fulfilled this obligation and was promoted to GS-10 on January 23, 1981. Mr. Biewald and PATCO contend that he did not have to requalify in order to get promoted to this position and this dispute is the second issue in this case.

PATCO contends that the FAA failed to carry out a nondiscretionary policy as established by FAA Order PTP 3550.1A, Chapter 2, Paragraph 12e(2)(a) and (b), which pertains to voluntary demotions from a trainee position. PATCO also cites Douglas Ruger, B-201037, February 2, 1981, in support of Mr. Biewald's claim.

However, the record shows that Mr. Biewald was not demoted as a result of his transfer. Instead he was transferred at the same grade and step level. Mr. Biewald is in fact requesting a promotion to GS-10,

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and the cited regulation and the Ruger case, are not applicable since they only pertain to demotions as a result of a voluntary transfer. There is nothing in the record that pertains to a developmental controller transferred back to a former duty station. Thus, the claimant has not met his burden of establishing every element of his claim. 4 C.F.R. § 31.7 (1981).

Therefore, Mr. Biewald's claim for retroactive promotion to GS-10 on December 14, 1980, is denied since he has not shown that the FAA committed an administrative error by failing to follow a nondiscretionary regulation.

*for Milton J. Fowler*  
Comptroller General  
of the United States