

DECISION



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

FILE: B-214671

DATE: June 12, 1984

MATTER OF: Susan E. Murphy - Retroactive Salary Increase

DIGEST:

Employee of EEOC was hired with the understanding she would be appointed at step 3 of grade GS-14. After actual appointment at minimum step of that grade, it was discovered that prior approval of the higher rate was not obtained from the Office of Personnel Management (OPM), due to administrative oversight. Upon subsequent, but prospective approval of higher step placement by OPM, a claim for retroactive increase in that pay is made here. Claim is denied. Under 5 U.S.C. § 5333, 5 C.F.R. § 531.203(b), and GAO decisions appointments to grades GS-11 and above may be made at a rate above the minimum rate of the grade, but only with prior OPM approval. Since such an appointment is discretionary and not a right, employee may not receive a retroactive increase.

This decision is in response to a request from the Director, Financial Management Services, Equal Employment Opportunity Commission, concerning the entitlement of Ms. Susan E. Murphy to receive a retroactive adjustment in her step-placement and backpay. We conclude that she is not so entitled for the following reasons.

FACTS

In March 1983, an employment offer was made by the Commission's Office of General Counsel to Ms. Murphy to become a Special Assistant to the General Counsel. On the basis of a finding that she had superior qualifications for the position, her entry salary was established at the rate of step 3 of grade GS-14. However, due to an administrative error, the Commission failed to request that the Office of Personnel Management (OPM), approve the higher step of grade GS-14. Thus, when Ms. Murphy entered onto duty on April 11, 1983, her rate of pay was established at step 1 of that grade.

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Following discovery of the error, the necessary approval from OPM was sought. In their notice approving the higher rate, OPM advised that the earliest date that the action could be made effective was August 18, 1983.

Because OPM admitted that they would have approved the request had it been submitted earlier, but could not make it retroactive because they have no authority to grant backpay, the matter has been submitted here for resolution.

DECISION

Section 5333 of Title 5, United States Code (1982), provides in part that new appointments shall be made at the minimum rate of the grade to which appointed. Notwithstanding that limitation, it also authorizes OPM to prescribe regulations which would permit the head of an agency to appoint an individual to a position in grade GS-11 or above at a rate above the minimum rate for that grade, based on such considerations as existing salary, unusually high or unique qualifications of an appointee, or a special need of the Government. It goes on to provide that an agency's authority to so appoint requires the approval of OPM in each case.

The applicable civil service regulation governing this matter is found in 5 C.F.R. § 531.203(b) (1983). That section states that an appointment to a step above the minimum rate for a grade requires the prior approval of OPM.

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 Comp. Gen. 583 (1960); and 40 Comp. Gen. 207 (1960). However, 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 Comp. Gen. 300 (1957); 37 Comp. Gen. 774 (1958); and 55 Comp. Gen. 42 (1975). We have also permitted retroactive adjustments of salary rates where administrative errors occur as a result of failures to carry out nondiscretionary administrative regulations or policies. See 34 Comp. Gen. 380 (1955); 39 Comp. Gen. 550 (1960); and 54 Comp. Gen. 263 (1974).

In contrast to the foregoing, we have held that the failure of an agency to request approvals in a timely manner under 5 U.S.C. § 5333 and 5 C.F.R. § 531.203(b) is neither a deprivation of a right granted by statute or regulation, nor a violation of a nondiscretionary administrative regulation or policy. Harriet B. Marple, B-188195, January 3, 1978, and John P. Corrigan, B-191817, February 5, 1979.

Accordingly, since the action to appoint Ms. Murphy to a position at a rate above the minimum rate was discretionary and approval was not secured at the time of her appointment, there is no proper basis to allow her a retroactive increase in pay for the period prior to August 18, 1983.

for 
Comptroller General
of the United States