

DECISION



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

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FILE: B-197394

DATE: October 9, 1980

MATTER OF: Alyse Rebel, et al. ^(REQUEST FOR) Retroactive Promotions and Backpay]

DIGEST: Twelve Social Security Administration employees claim retroactive promotions and backpay where career-ladder promotions were delayed by agency because Civil Service Commission questioned classification of higher-graded positions. Claims are denied since agency acted properly in view of Commission's final authority over position classification and delay did not violate any nondiscretionary policy to promote. Evidence of disparity in treatment of employees does not, by itself, entitle employees to retroactive promotions.

This decision is in response to appeals by 12 employees of the Bureau of Hearings and Appeals (BHA), Social Security Administration (SSA), Dallas Field Office, Region VI, Department of Health, Education, and Welfare (HEW), of our Claims Division settlements denying their substantially similar claims for retroactive promotions and backpay. The employees have designated the American Federation of Government Employees (AFGE) as their representative in this matter.

Two of these employees occupied grade GS-4 clerical positions and 10 were grade GS-7 Hearing Assistants. During the period from late 1975 until early 1977 their promotions to grades GS-5 or GS-8 were delayed pending completion of a review of classification of their positions. It appears that in early 1975, 79 BHA employees in Region VI, including 4 of the 12 claimants in this case, filed classification appeals with the Civil Service Commission (CSC) challenging the classification of Hearing Assistant and clerical positions in the Bureau of Hearings and Appeals.

The CSC Dallas regional office conducted a study of the involved positions in various field offices in the region and in early August 1975 advised the HEW regional

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B-197394

personnel office that tentative findings indicated that the grade GS-5 clerical positions and the grade GS-8 Hearing Assistant positions were overgraded and should be classified in grades GS-4 and GS-7 respectively. As a consequence, the HEW regional personnel office advised BHA by telephone that promotions to the grades GS-5 and GS-8 positions should be halted pending CSC's final decision, and thereafter approval was withheld on most recommendations for promotions, including those of these claimants. However, at least one promotion to grade GS-8 - that of a white female - was approved to be effective November 9, 1975. The file contains no explanation for this but it resulted in the award of a retroactive promotion to grade GS-8 and backpay to another employee - Danny W. Hill, an Indian male - after a finding of discrimination because of race and sex.

In the meantime the matter was referred to the central office of CSC because of its possible nationwide impact and, after some discussion between the two agencies, CSC by letter dated December 12, 1975, formally presented its findings to the central office of HEW and requested a report by March 5, 1976, on what action HEW proposed to take to deal with the situation. The suspension of promotions of the grade GS-5 and GS-8 positions was formally reaffirmed by memorandums from the HEW regional personnel office on January 9, 1976, and from HEW central personnel office on January 22, 1976. On January 26, 1976, the CSC Regional Director informed the HEW Regional Director of the Commission's formal decision that the grade GS-5 clerical positions were properly classified at grade GS-4 and the grade GS-8 Hearing Assistant positions at grade GS-7. However, the Commission did not at that time certify the classification (order it to be put into effect within a prescribed time limit) because it had not audited all BHA positions and because it wished to give HEW an opportunity to attempt to resolve the problem through job restructuring or other means to lessen the impact on employees. The appellants were also notified of the Commission's decision.

Subsequently, CSC agreed to the retention of the grade GS-8 position provided the description was revised

B-197394

to (1) make it eminently clear that it is intended for application only to work situations which are clearly above normal and (2) bring about sharper distinctions between work associated with the grade GS-8 level and that characteristic of the GS-7 (normal performance) level. A revised grade GS-8 position description was approved September 9, 1976. Apparently, similar action was taken with regard to the grade GS-5 clerical positions. By letter of April 6, 1976, CSC approved HEW's plan for the continued use of the grade GS-5 and grade GS-8 positions which included requirements that all such positions be desk audited to insure that they were properly classified and that promotions to them be carefully monitored. These desk audits were conducted from June to October 1976 and they apparently revealed a substantial number of improper classifications. The file does not show what action was taken in this regard but apparently promotions to the grade GS-5 and GS-8 positions were resumed in late 1976 or early 1977.

The 12 employees in this case filed claims with our Office seeking retroactive promotions and backpay alleging that denial of the career-ladder promotions violated provisions of the negotiated collective bargaining agreement between SSA and AFGE and citing our decision B-187452, December 21, 1977 (Lorraine N. Bain, et al.). As examples of abuse of authority and disparity of treatment of employees, the union cites the discrimination grievance filed by Mr. Danny W. Hill, a fellow BHA employee, which resulted in his retroactive promotion, and findings from a GAO report concerning hearing procedures for SSA disability claimants.

The agency argues that the circumstances in this case are substantially different from that in Bain, that there has been no violation of the collective bargaining agreement, and that the decision to retroactively promote Mr. Hill was based on a finding of discrimination which is not relevant to these claims. Our Claims Division denied these 12 claims on the ground that there was no violation of the collective bargaining agreement which would support an award of a retroactive promotion and backpay.

B-197394

Generally, promotions may not be made retroactively effective unless clerical or administrative errors occurred 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. 55 Comp. Gen. 42 (1975); and Barry S. Vestal, B-192434, November 21, 1978. We have recognized that the above-stated exceptions to the general rule prohibiting retroactively effective personnel actions may constitute an "unwarranted and unjustified personnel action" under the Back Pay Act, 5 U.S.C. § 5596, and be remediable through the payment of backpay. 55 Comp. Gen. 42, supra.

An agency, by negotiation of a collective bargaining agreement or by promulgation of a regulation, may limit its discretion so that under specified conditions it becomes mandatory to make a promotion on an ascertainable date. See John Cahill, 58 Comp. Gen. 59 (1978), and decisions cited therein. In the present case, however, there is no evidence of a nondiscretionary policy with regard to making career-ladder promotions under specified conditions. Those provisions of the agreement cited by the union in support of its position (Articles IV and X) require that personnel policies and practices shall be free from prejudice and discrimination and shall be "consonant with the spirit and intent of the merit system." As we held in Cahill, supra, not every violation of a collective bargaining agreement will support a retroactive promotion and backpay, only violations of nondiscretionary policies. When an agency has violated the language of a negotiated agreement calling for equitable treatment of all employees, we have held that such a violation does not provide a basis for an award of backpay. Cahill, supra.

Our decision in Bain, supra, is not applicable to the present case since the collective bargaining agreement in that case required career-ladder promotions under specified conditions. The facts in the present case are instead analogous to those in a recent case

B-197394

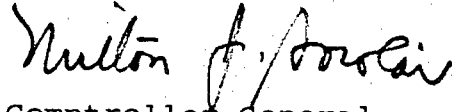
where SSA froze promotions to the position of Hearings and Appeals Analyst, grade GS-13, because of a question as to the validity of the grade GS-13 position classification. Dolly Green Marshal, et al., B-196216, et al., May 16, 1980. We held in Marshal that in the absence of a nondiscretionary policy to promote, these employees could not receive retroactive promotions and backpay due to the mere existence of career-ladder positions.

As to the union's reliance upon the discrimination case of Mr. Danny W. Hill, we note that Mr. Hill was found to have been discriminated against on the basis of race and sex in not receiving a career-ladder promotion to grade GS-8 in late 1975, and he was awarded a retroactive promotion and backpay to November 9, 1975. This award of a retroactive promotion and backpay was not made under the Back Pay Act but under the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (1976) and 5 C.F.R. §§ 713.211 et seq. (1977). The claimants in this case were not part of any class action alleging discrimination by the agency, and, therefore would not be covered by the determination in Mr. Hill's case. Although the examiner's report in Mr. Hill's case does indicate disparate treatment of employees similarly situated, that alone does not provide a basis for a retroactive promotion for the claimants in this case. See Cahill, supra.

Moreover, it must be pointed out that final authority to classify General Schedule (GS) positions is vested by law in the Civil Service Commission (now Office of Personnel Management) and its decisions must be complied with. 5 U.S.C. § 5112. Here the CSC found that the grade GS-5 clerical positions were not being performed at that level; that the full performance or journeyman level for the Hearing Assistants was grade GS-7, not GS-8; that the career progression for these positions was grade GS-6 to GS-7, not GS-6 to GS-7 to GS-8; and that the grade GS-8 position could be justified only if its duties and responsibilities could be demonstrated to be clearly above the full performance or journeyman level. In view thereof HEW properly suspended promotions to the grade GS-5 and GS-8 position until the conditions prescribed by the CSC for their use had been met.

B-197394

Accordingly, we sustain our Claims Division's determination denying these claims for retroactive promotions and backpay.



For the Comptroller General
of the United States