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DECISION

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

FILE: B-200005 DATE: June 18, 1982

MATTER OF: Albert W. Lurz - Extended detail to higher grade position--Agency regulation and provision of negotiated agreement

DIGEST:

1. In Wilson v. United States, the Court of Claims ruled that no statute or provision of the Federal Personnel Manual requires a temporary promotion for an overlong detail. We followed Wilson in Turner-Caldwell III, B-203564, May 25, 1982, and overruled our prior Turner-Caldwell decisions. Nevertheless, we hold that an agency, by regulation or collective bargaining agreement, may establish a policy under which it becomes mandatory to promote employees detailed to higher grade positions. The violation of such a mandatory provision in a regulation or agreement may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596.

2. Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, that regulation may provide the basis for backpay under the Back Pay Act, 5 U.S.C. § 5596. While other interpretations of the regulation could be made, under the circumstances of this case the agency's interpretation is a reasonable one.

3. Where the parties to a collective bargaining agreement agree that the provisions in the negotiated agreement were intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, those provisions may provide the basis for backpay under the Back Pay Act 5 U.S.C. § 5596. While other interpretations of the negotiated agreement could be made,

the interpretation of the parties is a reasonable one under the circumstances of this case.

4. Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for GAO to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, the parties are in agreement as to the intent of the negotiated provisions, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office.

The issues in this case are whether we will accept the agency's interpretation of its own regulation concerning temporary promotions for overlong details and whether we will accept the interpretation of the parties of a similar provision in the collective bargaining agreement concerning temporary promotions for overlong details. These issues arise in connection with our reconsideration of the claim of Mr. Albert W. Lurz for retroactive temporary promotion and backpay in connection with an alleged overlong detail to a higher grade position as an employee of the Social Security Administration, Department of Health, Education, and Welfare (now Department of Health and Human Services).

We decide that since the above interpretations are reasonable, the claim may be paid as recommended by the agency.

BACKGROUND

The record in Mr. Lurz's case shows that he was detailed from his official position as a GS-12 Computer Specialist to a higher grade position as a GS-13 Computer Systems Analyst from November 26, 1972, through April 28, 1973. Mr. Lurz filed a claim for backpay based on an overlong detail, and the agency determined that since his detail exceeded 60 days it was in fact violative of

paragraph D3, Chapter III of the Social Security Administration Headquarters Promotion Plan Guide 1-1, which states that if an individual's assignment to higher level work is expected to exceed 60 days in a 12-month period, the assignment should normally be made by temporary promotion rather than by detail. As this authority was consistent with and deemed to be required by Articles 15 and 17 of the collective bargaining agreement between the Social Security Administration and Local 1923 of the American Federation of Government Employees, the agency considered Mr. Lurz as being on a detail for the first 60 days; but, due to the presidential freeze on promotions during the period from December 11, 1972, to January 30, 1973, his temporary promotion could not be effective until January 30, 1973. As a result the agency granted Mr. Lurz a temporary promotion and backpay for the period from January 30, 1973, through April 28, 1973. Mr. Lurz felt he was entitled to retroactive temporary promotion with accompanying backpay for the entire period of his detail and therefore presented his case to our Claims Group.

ACTION OF OUR CLAIMS GROUP

Our Claims Group not only denied the claim of Mr. Lurz for the first 60 days of his detail, but also held that the agency's action in granting backpay from the 61st day of the detail was improper. The claims settlement stated, in pertinent part, as follows:

> "Since your agency's promotion plan and your union's collective bargaining agreement merely state that temporary promotions should normally be given instead of details to higher grade positions which would exceed 60 days, they cannot be considered nondiscretionary, so as to require that you be promoted prior to the 121st day of your detail. Therefore, your agency's settlement of your claim was incorrect in that it temporarily promoted you 60 days too soon. * * *."

THE AGENCY'S POSITION

The Social Security Administration argues that its interpretation of its own regulation and the interpretation

of the collective bargaining agreement by both management and union should be given effect. It submitted copies of guidelines for processing backpay cases signed by five of its division directors in which it is implicit that management and union have consistently viewed the contract provisions as establishing a nondiscretionary agency policy. The agency also points out that the issue is of great importance since it not only involves decisions it has already made on over 220 claims, but also bears on the larger issue of the interpretation of the negotiated agreement. See Beachley and Davis, B-200000, May 25, 1982.

ANALYSIS

Before discussing the issues involved in this particular claim, we believe it will be helpful to discuss our recent decision in Turner-Caldwell III, B-203564, May 25, 1982, which, in effect, overruled our prior Turner-Caldwell decisions. Our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975), sustained in 56 Comp. Gen. 427 (1977), represented a departure from prior decisions of our Office regarding the entitlement of employees to temporary promotions where they have been detailed to higher level positions for more than 120 days without the prior approval of the Civil Service Commission (now Office of Personnel Management). See 52 Comp. Gen. 920 (1973). Our Turner-Caldwell decisions allowed temporary promotions under such circumstances, following a decision of the Board of Appeals and Review, Civil Service Commission, dated April 19, 1974, which held that the remedy expressed in the Federal Personnel Manual for an agency's failure to obtain prior Civil Service Commission approval to extend a detail was a temporary promotion for the employee.

Recently, the Court of Claims decided A. Leon Wilson v. United States, Ct. Cl. No. 324-81C, Order, October 23, 1981. The plaintiff had sought a retroactive temporary promotion and backpay for an alleged higher level detail based upon our Turner-Caldwell decisions. The court denied the plaintiff's claim by relying upon prior decisions where it had denied relief for overlong details. Salla v. United States, Ct. Cl. No. 623-80C (Order, July 2, 1981); Goutos v. United States, 212 Ct. Cl. 96, 98, 552 F.2d 922, 924 (1976) Peters v. United States, 208 Ct. Cl. 373, 376-380, 534 F.2d 232, 234-236 (1975). In addition, the court in Wilson addressed

our Turner-Caldwell decisions but declined to follow them, stating that neither the applicable statute (5 U.S.C. § 3341) nor the Federal Personnel Manual authorizes a retroactive temporary promotion and backpay in cases involving overlong details.

After the Wilson decision was issued, we reconsidered the Turner-Caldwell decisions in Turner-Caldwell III, above. For reasons stated at length in that decision, we have decided to adopt the Wilson decision and no longer follow our Turner-Caldwell decisions as they apply to all pending and future claims.

However, we have held that an agency, by its own regulation or by the terms of a collective bargaining agreement, has the discretion to establish a specified period under which it becomes mandatory to promote an employee who is detailed to a higher grade position. Thus, an agency may establish a specified period by regulation, or it may bargain away its discretion and agree to a specified period through a provision of a collective bargaining agreement. If the regulation or the agreement establish a nondiscretionary agency policy and if the provision in question is consistent with applicable Federal laws and regulations, then the violation of such a mandatory provision in a regulation or negotiated ageement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596. For a comprehensive analysis of our case law in this regard, see John Cahill, 58 Comp. Gen. 59 (1978). And see also, as a specific case example, Burrell Morris, 56 Comp. Gen. 786 (1977).

Since Wilson and Turner-Caldwell III are predicated upon the absence of a mandatory provision in a statute or in the Federal Personnel Manual requiring temporary promotions for overlong details, we do not believe those decisions are applicable to cases involving mandatory detail provisions contained in agency regulations or in collective bargaining agreements. Therefore, we will continue to follow the Cahill and Morris decisions, cited above, and allow backpay claims for violations of such mandatory provisions in agency regulations and collective bargaining agreements.

CONCLUSION

Turning back to the particular claim before us, the primary issue raised by the Social Security Administration in this appeal is whether the agency regulation and the comparable provision of the collective bargaining agreement, both of which use the word "normally", establish a non-discretionary agency policy.

In our decision Beachley and Davis, cited above, we reasoned as follows:

> "In considering the interpretation given an agency regulation by officials of that agency, we give great weight to their interpretation. This is especially the case where, as here, the agency has promulgated supplemental personnel regulations and policies for its employees within the general framework and consistent with Office of Personnel Management regulations. See 5 U.S.C. § 301 and Chapter 171 of the Federal Personnel Manual. Here, the Social Security Administration asserts that the wording of the detail provision was intended to make temporary promotion for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, the violation of which is compensable under the Back Pay Act, 5 U.S.C. § 5596. See Kenneth Fenner, B-183937, June 23, 1977. While other interpretations of the regulation could be made, the agency's interpretation is a reasonable one.
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> "Similarly, in considering the interpretation given a provision of a collective bargaining agreement by the parties to the agreement, we give great weight to the parties' own interpretation. We have stated that if such an interpretation is reasonable, we will accept it even if other interpretations could be made. Fish and Guy, B-197660, June 6, 1980. In Mr. Davis' case the joint position of the agency and the union that the 60-day detail provision is mandatory in the sense of being a nondiscretionary agency policy is a reasonable interpretation."

We are no less persuaded in Mr. Lurz's case that the agency's determination that the 60-day detail provision is mandatory in the sense of being a nondiscretionary agency policy is a reasonable interpretation. The agency's internal guidelines for processing backpay claims requires such an interpretation and the provision has been consistently applied in that manner to hundreds of claims. As a result, the agency had a mandatory duty to temporarily promote Mr. Lurz on the 61st day of his detail.

However, on the issue of the controlling significance of a presidential freeze to the circumstances of Mr. Lurz's claim, we find that the subject presidential freeze, as distinguished from an agency-imposed freeze, would serve to bar any promotions for the duration of such freeze. See Annette Smith, et. al., 56 Comp. Gen. 732, 737 (1977), and John J. Curry, B-191796, July 13, 1978. Therefore, since the presidential freeze covered a period from December 11, 1972, until January 29, 1973, a temporary promotion could not have been made in any event until January 30, 1973.

Accordingly, we sustain the agency's action in temporarily promoting Mr. Lurz retroactively to the first permissible day following the 61st day of his detail and continuing through the date the detail terminated on April 28, 1973. We note, however, that, under the provision of the 1972 agreement applicable to Mr. Lurz's claim, there is no entitlement in any event for promotion or backpay during that portion of a detail that is not prohibited as overlong by the ageeement, or in this case 60 days. Thus, Mr. Lurz's claim for backpay for the the initial 60 days of his detail is denied.

Finally, as more fully discussed in Beachley and Davis, although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for GAO to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, the parties are in agreement as to the intent of the negotiated provision, there is no arbitration award involved, no one has objected to submission of the matter

to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office.

for Harry R. Van Cleve
Comptroller General
of the United States