

DECISION

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

FILE: B-183960

DATE: MAR 2 1976

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MATTER OF: Ruth Wilson - Retroactive Temporary Promotion

DIGEST: Employee was advised prior to a detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although a temporary promotion was discretionary, the agency had no right to require employee to make such a choice. Since the agency states that the employee would have been promoted but for the improper action, an unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for the period of the detail may be made.

The Department of the Treasury seeks authority to grant a temporary retroactive promotion for Ms. Ruth Wilson, an Employee Development Specialist, GS-12, in the Philadelphia Regional Office of the Internal Revenue Service (IRS), under the circumstances stated below.

According to the submission dated May 9, 1975, from Warren F. Brecht, Assistant Secretary for Administration, Ms. Wilson was detailed to the Newark District as District Training Officer, a GS-13 position, from December 10, 1973, to March 1, 1974. Prior to the detail Ms. Wilson was advised that she could be promoted on a temporary basis to the GS-13 position, but that, if she so elected, such action would constitute a change in her post of duty and she would not be entitled to a per diem allowance during the detail. Ms. Wilson elected to receive per diem instead of the temporary promotion.

Ms. Wilson later filed an internal grievance action stating that she was denied the promotion based on a misinterpretation of regulations. On review, the national office of IRS advised the regional office "that an employee assigned to a place other than his permanent duty station, at such a distance that it is not practicable for the employee to travel there daily, is entitled to per diem during the stay, even if a temporary promotion is given." Thereupon, the regional office requested authority to compensate Ms. Wilson for performing the duties of the GS-13 position during the period of the detail.

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55 Comp. Gen. 200,000,000

In summary, the submission to us states "[h]ere the agency had decided to temporarily promote Ms. Wilson, if she so elected. Her failure to so elect was based upon the misinformation furnished by the agency." The Department states its awareness of our decisions concerning the granting of retroactive promotions and requests our determination in light of the fact that Ms. Wilson would have been temporarily promoted if she had not relied on erroneous information furnished by the agency.

Authority under which an agency may retroactively adjust an employee's compensation is contained in the Back Pay Act of 1966, codified in 5 U. S. C. § 5596 (1970), which provides, in part, as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period * * *."

The criteria for determining when an unjustified or unwarranted personnel action has occurred are set forth by the Civil Service Commission in 5 C. F. R. § 550.803(d) and (e) (1975) which provide:

"(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

"(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay, allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter."

The Department of the Treasury states its doubts as to its authority to grant a retroactive temporary promotion to Ms. Wilson because of our decisions stating that "as a general rule an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947), 39 Comp. Gen. 583 (1960), 40 Comp. Gen. 207 (1960)." The Department also notes, however, that we have allowed retroactive salary adjustments where administrative errors have deprived an employee of a right granted by statute or regulation or have resulted in a failure to carry out nondiscretionary administrative regulations or policies as, for example, in 21 Comp. Gen. 369, 376 (1941), and 34 Comp. Gen. 980 (1955).

Those decisions predated the enactment of the Back Pay Act of 1966, 5 U. S. C. § 5596, and, although we have continued to follow the earlier decisions, we have recognized that the 1966 Act provided additional authority to make retroactive salary adjustments and have recognized that the erroneous actions involved in the earlier decisions would also constitute "unjustified or unwarranted personnel action[s]" under 5 U. S. C. § 5596 (1970), and consequently be remediable by the payment of backpay. 54 Comp. Gen. 312 (1974), 54 Comp. Gen. 435 (1974), 54 Comp. Gen. 888 (1975). Since 5 U. S. C. § 5596 provides broad statutory authority to rectify erroneous personnel actions by providing backpay to employees injured by such actions, it effectively covers those cases which previously could only be handled under our "administrative error" exceptions to the prohibition against retroactive salary payments. Also, we believe that instances involving unjustified or unwarranted personnel actions are taken outside of the rule against retroactivity by the Back Pay Act of 1966, *supra*. Hence, in the present case and in the future, we will apply the standards of 5 U. S. C. § 5596 to such cases.

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Here the regional office of IRS, in exercising its discretionary authority to promote Ms. Wilson on a temporary basis, gave her a choice between the promotion or per diem in lieu of subsistence in the mistaken conception that a temporary promotion effected a change of station. The record indicates that Ms. Wilson was to remain in the Newark District only during the period of the detail December 10, 1973, to March 1, 1974, not permanently. Since the detail away from Ms. Wilson's station was for a short period of time and she was to return to her old station, it is clear that a temporary promotion during the detail would not effect a change of station. Under 5 U. S. C. § 5702(a) (1970), an employee is entitled to a per diem allowance prescribed by the agency concerned for official travel away from his official station. Therefore, the choice offered her was improper. See generally Matter of Levine, 54 Comp. Gen. 310 (1974).

The IRS national office has found that the regional office erred in failing to properly advise Ms. Wilson. The Department of the Treasury, in submitting the matter to us, states that "Ms. Wilson would have been temporarily promoted if she had not relied on erroneous information supplied by the agency."

We, therefore, hold that an unjustified or unwarranted personnel action occurred that has resulted in the loss of pay for Ms. Wilson. As pointed out in B-175275, June 20, 1975, 54 Comp. Gen. 1071, an unjustified action may involve an act of omission including failure to promote. In the instant case Ms. Wilson was offered an improper choice between a temporary promotion and per diem, and, but for this improper choice, Ms. Wilson would have received a temporary promotion. In fact, as stated above, the agency had decided to process a temporary promotion prior to the commencement of the detail contingent upon her election to forego a per diem. Under these circumstances the general rule against retroactive promotions stated in 54 Comp. Gen. 263 (1974) and prior decisions does not apply.

Ms. Wilson is entitled to a retroactive temporary promotion to GS-13 and an adjustment of compensation for the period from December 10, 1973, to March 1, 1974, if otherwise proper.

Deputy

R. F. KELLER

Comptroller General
of the United States