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

**DECISION**

FILE: B-202403

DATE: December 30, 1981

MATTER OF: Alice L. Kirkman--Retroactive Promotion -  
Establishment and Classification of Position

DIGEST: To settle court action charging sex discrimination, the agency established higher-level positions for the plaintiffs. When one of the plaintiffs who occupied a GS-14 position under the court settlement resigned, the agency's personnel office believed the GS-14 position automatically terminated, and it therefore refused to process a management proposal to promote another employee to that position until it was specifically classified and established for the employee. There is no evidence of a clear mistake by the personnel office or of a mandatory policy to retain the higher-level position and promote the employee before the personnel office declined to process the promotion request; nor was there a finding of discrimination against the employee. Therefore, the employee's promotion can be prospective only, and backpay cannot be justified.

The issue in this case is whether Alice L. Kirkman, an employee of the Community Services Administration, is entitled to grade GS-14 with backpay for a period when her official grade was GS-13. The Administration's certifying officer requested our decision because he is concerned that backpay would be contrary to the general rule that employees are entitled only to the salary of the position to which they are actually appointed regardless of the duties they perform. 39 Comp. Gen. 583 (1960) and 52 *id.* 631 (1973). We decide in this case that the general rule is applicable and that a retroactive promotion is not warranted based upon the facts provided us.

Background Information

The Community Services Administration's General Counsel's Office prepared a memorandum setting forth the pertinent facts. It states that on August 18, 1980, a stipulation in behalf of the Administration and three of its female employees settled a

court action brought under the Equal Pay Act by the three employees, who alleged discrimination because of sex. The three employees were Ms. Kirkman's supervisor, who was the Assistant General Counsel for the Division of Labor Management in the Office of the General Counsel, and two of the Assistant General Counsel's subordinates, one of whom was the Division's senior attorney. The stipulation, entered into the court proceedings, provided for the retroactive promotion of the Assistant General Counsel to grade GS-15 and the senior attorney to Grade GS-14. The promotions raised the grades of these employees in the Division of Labor Management to the levels of the Assistant General Counsel and senior attorney positions held by males in each of the other two divisions of the Office of the General Counsel. The Acting Director of the Administration agreed to the settlement.

After the senior attorney who had been promoted resigned in the fall of 1980, the Assistant General Counsel, Labor Management, requested that Ms. Kirkman be promoted to the GS-14 senior attorney position. The Administration's Office of Personnel refused to process the promotion request because it believed that the GS-14 level for the senior attorney position had been limited to the incumbent of the position with whom the settlement had been made and that the position no longer existed after she resigned. The matter was referred to the Administration's Acting Director who concurred in promoting Ms. Kirkman. To effectuate the promotion a Standard Form 8 was prepared, certifying that the position was classified for Ms. Kirkman at grade level GS-14. The reason for its submission was shown as the court settlement, which became effective August 18, 1980, and it was signed by the General Counsel on January 16, 1981, and the Deputy Director of the Administration on February 20, 1981. The personnel action (Standard Form 50) promoting Ms. Kirkman was also signed by the Deputy Director on February 20, 1981; however, it purported to be retroactively effective to December 14, 1980. It is for the retroactive period, December 14, 1980, through February 19, 1981, that the certifying officer questions whether Ms. Kirkman is entitled to pay at the GS-14 level.

Legal Discussion and Conclusions

With one exception, we have recognized classification actions may not be made retroactive under civil service regulations. The exception is an unlawful classification of a position when the misclassification is the result of prohibited discrimination such as because of race or sex, 50 Comp. Gen. 581 (1971); 55 id. 1062 (1976). Also, the Supreme Court held in United States v. Testan, 424 U.S. 392 (1976), that neither the Classification Act, 5 U.S.C. §§ 5101-5115, nor the Back Pay Act of 1966, 5 U.S.C. § 5596 (1976), creates a substantive right to backpay for a period of wrongful position classification. George A. Jackson, B-188617, September 20, 1977.

We have held that where an established position is abolished by mistake, the termination is ineffective and the position may be retroactively restored to correct the error. Orin T. Hanson, B-196405, April 4, 1980.

Promotions are ordinarily discretionary and, unless delayed because of error after the exercise of final discretionary authority to promote, may not be made retroactive. Barbara W. Scheaffer, B-200717, January 28, 1981. However, promotions may be mandatory under the employing agency's regulations, collective bargaining agreement with a labor organization, or agency policy. Under our more recent decisions, failure to promote when the agency is required to do so is an unjustified or unwarranted personnel action under the Back Pay Act of 1966, 5 U.S.C. 5596, entitling the employee to a retroactive promotion with backpay. 54 Comp. Gen. 312 (1974); 54 id. 403 (1974); 55 id. 836 (1976).

In the present case, classification action was taken to promote Ms. Kirkman's predecessor to the position of GS-14 senior attorney in order to settle the court action for discrimination because of sex. The Office of Personnel believed that the position automatically terminated when the predecessor resigned. We have no evidence that the Office of Personnel's belief was clearly mistaken or that there was a definite policy to retain the GS-14 senior

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attorney position and promote Ms. Kirkman to the position when the Office of Personnel considered the position abolished and refused to process Ms. Kirkman's promotion. The record before us is more consistent with the view that the decision to retain the position, classify it at the GS-14 level, and complete the discretionary actions required to promote did not become final until February 20, 1981, after the Office of Personnel rejected the proposed promotion. Further, there was no finding of discrimination in Ms. Kirkman's case to warrant retroactive classification and promotion.

Consequently, as set forth in United States v. Testan, and Barbara W. Scheaffer, supra, the classification and promotion actions, under the facts reported to us, could be prospective only, and backpay is not justified.

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For the Comptroller General  
of the United States