



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Edward M. Wirth - Retroactive Personnel Action
File: B-228711
Date: December 8, 1988

DIGEST

An individual in the IRS Student Trainee Program was delayed 4 months in his promotion to a grade GS-7 position. The delay occurred when he was discovered to be ineligible for noncompetitive conversion to the target position upon completion of his bachelors degree because he was appointed under temporary appointment authority rather than from a competitive civil service register. His appointment may not be made retroactive since he was not deprived of a right granted by statute or regulation nor was there a failure to carry out nondiscretionary administrative policies or regulations.

DECISION

This decision is in response to a joint request from Chapter 304 of the National Treasury Employees' Union (NTEU) and the Pittsburgh District Office of the Internal Revenue Service (IRS), for our determination as to whether Mr. Edward M. Wirth is entitled to retroactive advancement to a grade GS-7 revenue agent position. For the reasons stated below, we hold that he is not so entitled.

BACKGROUND

Mr. Wirth was hired by the IRS Pittsburgh District Office on June 6, 1983, to fill a career-conditional position in the Accounting Student Trainee Series, GS-599. The Pittsburgh office had requested a Student Trainee (Accounting) register from the Philadelphia Area Office of the Office of Personnel Management (OPM), but since such a register had not been established, the Philadelphia office issued Temporary Appointment Pending Establishment of Register (TAPER)

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authority, which permits an agency to fill a vacancy by a temporary appointment pending establishment of a register. 5 C.F.R. § 316.201 (1983).

The IRS incorrectly assumed that the TAPER authority permitted treatment of Mr. Wirth according to the guidelines of appendix G, chapter 332 of the Federal Personnel Manual (FPM), for student trainee positions. These guidelines provide that students may be promoted to higher level trainee grades after completion of certain educational and work experience and, in addition, may be reassigned or promoted in the appropriate target series at grades GS-5 or GS-7 when they complete their bachelor's degrees.

Mr. Wirth was promoted to the grade GS-5 student trainee position on May 27, 1984. After his graduation a year later, the IRS attempted to convert Mr. Wirth to the revenue agent position at the grade GS-7 level, based on his superior academic record. At that time, the IRS discovered that since Mr. Wirth had been hired under a temporary appointment he could not be appointed to the career conditional revenue agent position nor should he have been promoted to the grade GS-5 student trainee position.

The IRS applied to OPM requesting a variation under Civil Service Rule V to permit Mr. Wirth to be appointed as a revenue agent, grade GS-7, on June 9, 1985, the date he otherwise would have been eligible for such appointment. In the meantime, Mr. Wirth had been placed on the Philadelphia civil service register and was appointed at the grade GS-7 level on September 29, 1985.

On December 11, 1985, OPM denied the IRS request, and stated it had no authority to authorize retroactive personnel actions and backpay. The OPM stated that variations are authorized only to avoid unnecessary hardship or practical difficulty and that those conditions did not exist in Mr. Wirth's case since he did not face either separation from the grade GS-7 position or loss of any service credit. The OPM pointed out (1) that Mr. Wirth's original appointment under the TAPER authority was not invalid, (2) that according to decisions on de facto employees, Mr. Wirth was entitled to retain the pay he had received in the grade GS-5 position and to receive service credit for that period, and (3) that his appointment at the grade GS-7 level was valid.


The IRS and the NTEU have asked us to grant a variation on the grounds that Mr. Wirth relied on IRS' assurances that he would be eligible for noncompetitive appointment on or about June 9, 1985, and that he lost and will continue to lose pay since his appointment occurred in September rather than in June and his subsequent within-grade increases will be processed 4 months later.

OPINION

Only OPM has the authority to grant variations to civil service rules. See 5 C.F.R. § 5.1 (1988). Our decisions concerning retroactive personnel actions are as follows. Our general rule is that a personnel action may not be made retroactively effective to increase the rights of an employee to compensation in the absence of a statute so providing. 26 Comp. Gen. 706 (1947); 39 Comp. Gen. 583 (1960); 40 Comp. Gen. 207 (1960). However, we have permitted retroactive adjustments where an administrative error has deprived the employee of a right granted by statute or regulations. See 21 Comp. Gen. 369 (1941); 37 Comp. Gen. 300 (1957); 37 Comp. Gen. 774 (1958). We have also permitted retroactive adjustment 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); 54 Comp. Gen. 263 (1974).

The circumstances of Mr. Wirth's situation do not fall within the exceptions to our general rule against retroactive personnel actions. We are not aware of any non-discretionary IRS policy or regulation which was violated by Mr. Wirth's failure to achieve the position of revenue agent, grade GS-7, by a certain date. Furthermore, the OPM guidelines do not provide for automatic advancement in the student trainee program, but instead, provide that, "[u]pon completion of all the requirements for a bachelor's degree in an appropriate field, the student trainees may be reassigned or promoted in the appropriate target series at GS-5 or GS-7" (emphasis added). See FPM, chapter 332, appendix G, paragraph G-2a. While the use of the TAPER authority in effect prevented the consideration of Mr. Wirth for advancement to the grade GS-7 revenue agent position on June 9, 1985, that fact cannot be used as the basis for authorizing a retroactive personnel action. As OPM stated in its December 11 letter, there was no evidence that Mr. Wirth would have been within reach for a student trainee position had a register been established nor is there evidence that he was within reach for appointment at the grade GS-7 level before September 29, 1985.

Accordingly, we conclude that Mr. Wirth is not entitled to have his appointment to the grade GS-7 revenue agent position made retroactively effective.

for 
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