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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-190767(DAS)

November 21, 1979

Mr. David Eisenberg
Trial Attorney
Commercial Litigation Branch
U.S. Department of Justice *DLG 00801*

Dear Mr. Eisenberg:

Subject: Johnnie H. Winters v. United States
Court of Claims No. 286-79C

We refer to your letter of November 7, 1979, asking for our comments concerning Plaintiff's Motion for Summary Judgment in the above-mentioned case.

The remedy of backpay is available when the agency commits an unjustified or unwarranted personnel action. We have held that an act of omission may constitute an unjustified personnel action. 54 Comp. Gen. 1071 (1975). The definition of an unjustified or unwarranted personnel action is set forth in 5 C.F.R. § 550.802(c) (1978) which provides:

"(c) 'An unjustified or unwarranted personnel action' means an act of commission (i.e., an action taken under authority granted to an authorized official) or of omission (i.e., nonexercise of proper authority by an authorized official) which it is subsequently determined violated or improperly applied the requirements of a nondiscretionary provision, as defined herein, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay, allowances, or differential, as used here, otherwise due an employee. The words 'personnel action' include personnel actions and pay actions (alone or in combination)."

5 C.F.R. § 550.802(d) (1978) defines a nondiscretionary provision as:

"(d) * * * any provision of law, Executive order, regulation, personnel policy issued by an



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agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria."

In the present case, the plaintiff is claiming that the agency failed to promote him. Unless he can prove that he had a vested right to be promoted under statute, regulation, or collective bargaining agreement, the failure to promote him would not constitute an unwarranted personnel action under the Back Pay Act. See Adrienne Ahearn, B-186649, January 8, 1977 (copy enclosed).

The portion of the Civil Service Reform Act of 1978, which amends a section of the Back Pay Act, does not alter any of our decisions in this area. In fact, the Back Pay Act was amended to reflect a broader interpretation of the statute given by the Comptroller General and Civil Service Commission. See S. Rep. No. 969, 95th Cong., 2nd Sess. 114 (1978). Therefore, the discussion above is relevant concerning the question of backpay for unwarranted personnel actions.

Sincerely yours,

Daniel W. Martin

for

Robert L. Higgins
Assistant General Counsel

Enclosure