

DECISION

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

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FILE: B-215311**DATE:** December 4, 1984**MATTER OF:** Mary Anna Cole - Employment Discrimination
Complaint Settlement**DIGEST:**

Federal Communications Commission (FCC) employee temporarily detailed to higher grade position filed complaint alleging race, sex, and age discrimination because she was not temporarily promoted to the higher grade level. The FCC made a proposed finding of no discrimination and reached settlement agreement with employee. Because proposed settlement award exceeds amount the employee would be entitled to receive under Title VII of the Civil Rights Act of 1964, as amended, if discrimination had been found, it must be reduced. Backpay for the period employee was ineligible for promotion to higher grade because of insufficient time in grade, may not be included in settlement. Additionally, backpay for period employee was performing duties of position to which she was officially appointed, during which period no discrimination is alleged may not be included in settlement.

This responds to a request from the Chief Authorized Certifying Officer of the Federal Communications Commission (FCC) regarding the propriety of paying the amount of a proposed employment discrimination claim settlement offered pursuant to Title VII of the Civil Rights Act of 1964, as amended. We find that the proposed settlement exceeds the amount to which the employee would be entitled if discrimination had been found. Therefore, the settlement must be reduced as described below.

Ms. Mary Anna Cole, a grade GM-13, Deputy Chief of the Financial Services Branch, FCC, filed an equal employment opportunity complaint with the agency on November 3, 1980, alleging race, sex, and age discrimination during her

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temporary tenure as Chief of the Branch, a grade GM-14 position. She claimed that she was not promoted to the GM-14 level during her temporary assignment, from November 11, 1978, to the date of her complaint, because of discrimination on the part of her supervisors. In fact, she was not promoted at any time during the temporary assignment which ended June 14, 1981.

On September 22, 1984, FCC Mass Media Bureau Chief James McKinney, acting as an administrative reviewer in this case, made a proposed finding of no discrimination, but proposed a settlement of approximately \$9,133.60. After further negotiation between the FCC and counsel for Ms. Cole, a settlement of \$12,160.32, to which Ms. Cole subsequently agreed, was reached. The amount represents the difference between Ms. Cole's GM-13 salary and the GM-14 salary of the position to which she was detailed for the 31-month period extending from March 11, 1979, to October 3, 1981. Because the 31-month period exceeds the 25-month period during which Ms. Cole appeared eligible for backpay, the certifying officer submitted the payment request to this Office for decision. The letter to Ms. Cole proposing this settlement noted that it would be submitted to the Comptroller General for approval.

Pursuant to Title VII of the Civil Rights Act of 1964 and relevant Equal Employment Opportunity Commission regulations, Federal agencies may offer compromise settlements to employees pursuing employment discrimination claims, even without findings of discrimination. 42 U.S.C. § 2000e-16 (1982); 29 C.F.R. § 1613.221(c) (1983); 62 Comp. Gen. 239 (1983).

"* * * it is beyond question that an agency has the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination."
62 Comp. Gen. at 242.

Additionally, we have held a lump-sum settlement may be made without a concomitant personnel action, but the amount of such a lump-sum settlement must be related to backpay and is limited to the amount of backpay which could be awarded to the employee if a finding of discrimination had been made. 62 Comp. Gen. at 244 (1983).

In the present case, the proposed settlement consists of the difference between the salary Ms. Cole received as a grade GM-13 and that which she would have received at the GM-14 level from March 11, 1979, to October 3, 1981. Because Ms. Cole is not eligible for backpay for two periods within the overall time span of March 11, 1979, to October 3, 1981, two concomitant reductions must be made in the proposed settlement.

First, backpay for the period from March 11 to June 30, 1979, may not be included in the settlement due to regulations established by the Office of Personnel Management requiring employees at grade GS or GM-11 or above to serve at least 1 year in a grade before being promoted to the next higher grade. 5 C.F.R. § 300.602(a) (1984). Because Ms. Cole apparently was promoted to grade GM-13 on July 1, 1978, she was ineligible for promotion to GM-14 until July 1, 1979. Therefore, she could not have recovered backpay for the period March 11, 1979, to July 1, 1979, even if a finding of discrimination had been made. As a result, the settlement may not include backpay for the period before July 1, 1979.

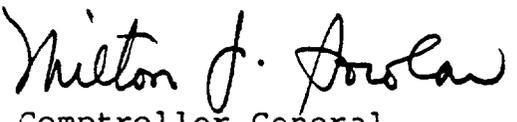
Secondly, the portion of the settlement representing backpay for the period from June 14, 1981, to October 3, 1981 must also be excluded, because Ms. Cole resumed her GM-13 position on June 14, 1981, and because she did not allege discrimination in that position as Deputy Chief, in her complaint. When Ms. Cole left the GM-14 position as of June 14, 1981, the duties of that position were resumed by the individual who was officially appointed to that position. The holder of the GM-14 position was detailed to other duties during the period Ms. Cole performed his duties in the GM-14 position. Under any circumstances, the maximum relief Ms. Cole could have obtained would have been a temporary promotion to GM-14, which would have ended when her performance of the GM-14 duties ended on June 14, 1981.

Since Ms. Cole only alleged that she was discriminated against because she was not temporarily promoted to GM-14, no finding of discrimination could have been made for the June 14 - October 3 period when she was working in the GM-13 position to which she was officially appointed. Thus, backpay covering that period would exceed the amount that could be paid if discrimination had been found and may not be included in Ms. Cole's settlement.

Conclusion

The FCC is clearly authorized to settle Ms. Cole's employment discrimination claim, even absent a finding of discrimination. 62 Comp. Gen. at 242. However, the proposed settlement to Ms. Cole must be reduced to exclude amounts relating to backpay which she could not have been awarded if a finding of discrimination had been made. 62 Comp. Gen. at 244.

Therefore, amounts relating to backpay for the above discussed two periods may not be included in the settlement.

for 
Comptroller General
of the United States