

December 7, 1977

**78-89 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**General Services Administration—Disciplinary
Matter—Authority of the General Services
Administration (5 U.S.C. § 5596)**

This is in response to a request for our views concerning sanctions imposed on three employees of the General Services Administration (GSA). The three employees were charged with the theft of several packages of cigarettes from a blind-operated snack bar. Each of them was suspended without pay for 30 days and was demoted two grades. Each person pursued the matter within the GSA grievance system and then appealed to the Civil Service Commission's Federal Employee Appeals Authority, which upheld GSA's action. Petitions to reopen and reconsider the cases were filed with the Commission's Appeals Review Board and were denied.

Specifically you asked us whether GSA has authority to restore the employees to their prior grades. In our opinion, there are possible legal bases for GSA to take such action.

Retroactive restoration of employees to prior grades or to intermediate grades is authorized if GSA determines that its action in demoting them was "unjustified or unwarranted." This authority is set forth in the Civil Service Commission's regulation concerning adverse actions, 5 CFR § 752.402 (1977). Also, a foundation for such action is provided by the back-pay statute, 5 U.S.C. 5596 (1976), and the Civil Service Commission's implementing regulations, 5 CFR §§ 550.801-.804 (1977). The back-pay regulations make clear that an agency may make such a determination on its own initiative. *See* 5 CFR § 550.803(a) (1977).

Another possibility would be to increase, on a prospective basis, the grade of the employees. Of course, the ordinary requirements for a promotion would have to be satisfied.*

*If there is to be an increase of two grades in one year, waiver of the Whitten amendment may be necessary. *See* § 1310(c) of the Act of Nov. 1, 1951, as amended, 5 U.S.C. 3101 note (1976). The general rule under that provision is that employees in the competitive service may not be promoted to a higher grade without having served at least one year in the next lower grade. There are certain

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In our opinion, the fact that GSA's sanctions were upheld in the Civil Service Commission proceedings does not bar GSA from reconsidering the matter. Accordingly, it would seem appropriate for you to refer this matter to GSA for further consideration. The question whether any remedial action should be taken is for GSA, and we express no opinion regarding that matter.

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exceptions; and, in special cases, an agency head may obtain a waiver from the Civil Service Commission.