



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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OFFICE OF GENERAL COUNSEL

B-200620

October 1, 1980

Mr. Craig B. Pettibone
Director, Office of Pay and
Benefits Policy, Compensation Group,
Office of Personnel Management
P.O. Box 57
Washington, D.C. 20044

Dear Mr. Pettibone:

We desire to provide you with our comments regarding your proposed regulations regarding within-grade increases which appear at 45 F.R. 50336-41, July 29, 1980.

[We are concerned about that part of the proposed regulations, subsection 531.410(c) of title 5, Code of Federal Regulations, (which would provide that where, through administrative oversight, error, or delay, an employee has not been notified of a determination that his or her work has not been of an acceptable level of competence within 60 days after the completion of a waiting period, the agency shall give the employee notice of the negative determination and grant the employee a within-grade increase effective on the first day of the first pay period beginning 60 days after completion of the waiting period.

As you are aware, the statutory authority for within-grade increases, 5 U.S.C. § 5335, provides, in part, that the granting of a within-grade increase is subject to the condition that the work of the employee is of an acceptable level of competence as determined by the head of the agency. Subsection 5335(c) of title 5, United States Code, provides that an employee is entitled to prompt written notice of a determination that his work is not of an acceptable level of competence and the opportunity for the reconsideration and appeal of such determination. Subsection 5335(c) further provides that if a reconsideration or appeal results in a reversal of the earlier determination the new determination is deemed to have been made as of the date of the earlier determination.

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The express language of subsection 5335(c) does not authorize a within-grade increase where an employee has not been promptly advised of a negative determination. In addition, the legislative history of subsection 5335(c) does not appear to contain any support for the view that Congress intended to authorize the granting of a within-grade increase under such circumstances.

While it is not entirely clear why your Office is proposing that a within-grade increase be granted in instances where an employee is not timely advised of a negative determination, it would appear that the proposed regulation results from concern that agencies may not act to promptly notify employees of a negative determination and thus may adversely effect the employee's right to reconsideration and appeal of that determination.

However, it appears that the proposed regulation would be in conflict with the statutory requirement that an employee's performance must be at an acceptable level of competence for entitlement to a within-grade increase.

We agree that it is highly desirable that an agency promptly advise an employee of a negative determination and the accompanying right to reconsideration and appeal. However, a delay in notification in no way diminishes an employee's rights. Subsection 531.410(b) of the proposed regulations provides that an employee may request reconsideration of a negative determination within a reasonable period of time after receiving notice of the determination. As stated above, subsection 5335(c) of title 5, United States Code, provides that if reconsideration or appeal of a negative determination results in a decision favorable to the employee, the decision will be effective retroactively. This provision will be implemented by the proposed regulation 5 C.F.R. 531.411 which provides, in part, that a within-grade increase shall be effective retroactively to the first day of the first pay period beginning after completion of the required waiting period when a negative determination is changed by an agency or as a result of appeal, to the Merit Systems Protection Board or review under negotiated grievance and arbitration procedures.

We note that while proposed regulation 5 C.F.R. 531.410(c) provides that where an employee is not timely

notified of a negative determination, the within-grade increase is to be effective on the first day of the first pay period beginning 60 days after the completion of the waiting period, a change of a negative determination resulting from reconsideration or appeal would entitle the employee to a within-grade increase effective retroactively to the first day of the first pay period after completion of the required waiting period. See proposed regulation 5 C.F.R. 531.411, supra. Thus, it reasonably can be expected that some employees who are entitled to a within-grade increase as a result of administrative oversight, error, or delay under proposed regulation 5 C.F.R. 531.410(c) would elect to request reconsideration or appeal of the negative determination on their performance in the hope of obtaining an earlier effective date for their within-grade increase. Thus, the proposed regulation at 5 C.F.R. 531.410(c) would raise the prospect of an employee being entitled to a within-grade increase not only where the agency has made a negative determination on his or her level of performance, but also where such determination has been affirmed by the Merit Systems Protection Board or other appropriate review authority.

In view of the above, we recommend that your Office consider either the deletion or amendment of subsection 531.410(c) of the proposed regulations to insure the regulation, as promulgated, will be consistent with the statutory requirement that a within-grade increase be conditioned upon a finding that the employees' work is of an acceptable level of competence. If you have any questions regarding these comments please contact David Agazarian of my staff at 275-6404.

Sincerely yours,

F. H. BARCLAY, JR.

F. Henry Barclay,
Associate General Counsel