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ms. Diamond

GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-201227

[Entitlement to Within-Grade Increase]

February 4, 1981

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Ms. Ethel Nunn
4524 Fair Street
St. Louis, Missouri 63115

Dear Ms. Nunn:

Your letter of November 3, 1980, requests our views on whether the General Services Administration (GSA) was correct in denying you a within-grade increase when you have not been able to perform the duties of your position description. While a decision will not be rendered on your request, the following information should be helpful to you in resolving the questions presented.

Under the provisions of section 5335 of title 5, United States Code, an agency is vested with authority to determine whether an employee's work is of an acceptable level of competence for the purpose of granting within-grade increases. The head of an agency is responsible for determining what constitutes an acceptable level of competence and for determining which employees are performing at that level. 5 C.F.R. 531.407(a)(1). The Office of Personnel Management has stated that:

"The head of the agency, or his designee, in determining whether an employee's work is of an acceptable level of competence shall base his determination on the essential requirements of the employee's position, and shall award a within-grade increase when his work performance clearly meets those standards, recognizing that for an increase work performance must be of sufficient level to merit a pay increase and not just adequate for retention on the job. * * * Federal Personnel Manual Chapter 53I, subchapter 4, section 4-9(c)(1).



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In other words, a rating of satisfactory does not guarantee that an employee's performance will be considered "at an acceptable level of competence" for within-grade salary increase purposes. In order to receive a within-grade increase, the employee must be performing at "an acceptable level of competence" rather than barely satisfactory. See Federal Personnel Manual Chapter 430, subchapter 4, section 4-2.

Although we do not have any facts other than the ones presented in your letter, you state that you have been in a light duty status and did not perform any duties under your present position description. Given this circumstance, it would not appear improper for your agency to have determined that your level of competence was less than acceptable when considered in light of the essential requirements of your position description.

If you do not agree with GSA's determination that your performance was not of an acceptable level of competence, 5 U.S.C. 5335(c) provides, in part, that:

"(c) When a determination is made * * * that the work of an employee is not of an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of the determination within his agency under uniform procedures prescribed by the Office of Personnel Management. If the determination is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board. If the reconsideration or appeal results in a reversal of the earlier determination, the new determination supersedes the earlier determination and is deemed to have been made as of the date of the earlier determination. * * *"

The general procedure for an agency to follow in considering an appeal of a negative determination is set

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out in 5 C.F.R. 531.407(d). This Office does not have the authority to set aside the factual finding of your agency.

The Federal Personnel Manual, at Chapter 339, states that when an employee can no longer perform the duties of his or her position efficiently and safely because of a physical or mental condition, the agency may separate the employee on the basis of disability. It goes on to say, however, that in view of the executive branch policy on use of employees who are handicapped or who develop handicaps, every reasonable effort should be made to reassign the employee to duties he or she can perform efficiently and safely, or to take steps to protect the employee's rights under subchapter III of chapter 83, title 5, United States Code, before taking action to separate him or her for disability. Subchapter III deals with civil service retirement and may be found at title 5, United States Code, sections §331 et seq.

Various alternatives to separating a physically or mentally incapacitated employee are listed in the Federal Personnel Manual at Chapter 339, subchapter 1-3b. These include reassignment to a position with less rigid physical requirements. You may wish to discuss these alternatives with the appropriate person within your agency.

Copies of the authorities cited are enclosed. We trust the information supplied will serve the purpose of your inquiry.

Sincerely yours



Edwin J. Monsma
Assistant General Counsel

Enclosures

