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DECISION



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

FILE: B-189567

DATE: November 21, 1977

MATTER OF: Robert P. Duffy - Backpay,
highest previous rate

DIGEST: Navy employee returned to former position and grade, with time credit for within grade increases after 1 year temporary promotion, may not have salary adjusted based on highest previous rate earned during temporary promotion. There is no agency regulation requiring use of highest previous rate earned during temporary promotion of more than 90 days, and employee's Notification of Personnel Action promoting him states he is to be returned to former grade and position with time credit for within grade increases.

This is in response to a letter dated June 15, 1977, from Admiral D. M. Altwegg, Commander, Pacific Missile Test Center. Admiral Altwegg has requested an advance decision concerning the claim of Mr. Robert Duffy, an employee of the Pacific Missile Test Center, who was temporarily promoted on December 22, 1974, from the position of Supervisory Management Analyst, GS-13, step 5, to the position of Management Analysis Officer, GS-14, step 2. The temporary promotion expired on December 22, 1975. In accordance with what Admiral Altwegg states was the normal procedure at the Test Center, Mr. Duffy was returned to his former position and grade with credit for within grade increases. At that time he requested that his salary be established at a higher step of that former grade based on the rate he received while temporarily promoted, his highest previous rate. Although his supervisors were supportive of that request, personnel officials determined that it was not permissible to grant it. The Civilian Personnel Officer has now determined that it would have been proper to base Mr. Duffy's salary on that rate. Mr. Duffy, therefore, seeks to have his salary established on the basis of the highest previous rate earned during his promotion and to be compensated on that basis retroactive to December 22, 1975.

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The regulations pertaining to the application of the so-called "highest previous rate" are found in 5 CFR 531.203. Paragraph c of that section provides in part that "when an employee is reemployed, transferred, reassigned, promoted or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate." Paragraph d(1) provides that "the highest previous rate is based on a regular tour of duty at that rate under an appointment not limited to 90 days or less, or for a continuous period of not less than 90 days under one or more appointments without a break in service."

Agency authority under the highest previous rate rule is permissive, and the Navy has set forth its policy with regard to the use of the highest previous rate in paragraph 4a(2)(a), section 531.S2 of the Civilian Manpower Management Instructions (CMMI) as follows:

"(a) The Navy's policy. It will be the policy of the Navy to not use a step above the minimum step required by law or regulation unless it is in the interest of the Government. Wherever a higher rate is permissible, activity management will review the rate to be set in light of the needs of the activity, assessment of the quality of the employee, equity among employees, and availability of funds. In no case will there be an 'automatic' placement in the highest rate permissible. Activities will develop in writing local policies on the use of the highest previous rate based on this policy and the provisions that follow."

Although Admiral Altwegg states that it was the normal practice at the Pacific Missile Test Center to return employees to their former grade and salary upon expiration of temporary promotions, we are aware of no Navy regulation mandating this action. Paragraph 4.b(1), CMMI section 531.S2, merely provides that "in computing an employee's highest previous rate, the rate will not

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be based on a rate received under a temporary promotion of 90 days or less." The use of a rate received under a temporary promotion of more than 90 days duration in determining the employee's highest previous rate is neither required nor precluded. Compare B-178794, August 6, 1973, and B-175349, April 27, 1972. In Mr. Duffy's case the Notification of Personnel Action promoting him states that "on or before the expiration of this appointment you may be returned to your former grade and salary. Any necessary within grade salary adjustments will be made at that time." Thus, the employee was on notice of the determination to set his compensation on that basis upon his return to his former position. Such action was taken, and, as stated above, was consistent with the normal practice at the Test Center.

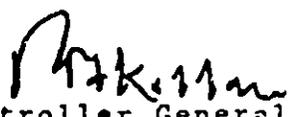
Admiral Altwegg also has requested our opinion on whether it would be permissible to adjust Mr. Duffy's salary retroactively. In effect, Admiral Altwegg has asked whether Mr. Duffy is entitled to backpay. Backpay is awarded under the authority of 5 U.S.C. 5596 as a remedy for wrongful reductions in grade, removals and suspensions, and other unjustified or unwarranted actions affecting pay or allowances. A prerequisite for the award of backpay is a determination by appropriate authority that an employee has undergone an unjustified or unwarranted personnel action. We have recognized as unjustified and unwarranted actions, clerical or administrative errors that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. See 54 Comp. Gen. 888 (1975).

The facts of Mr. Duffy's case do not fall within any of the above situations. We have held that the misinterpretation of instructions not involving a right

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granted by statute or regulation or a mandatory agency policy, is not an administrative error of the type that will support an award of backpay, 53 Comp. Gen. 926 (1974). Mr. Duffy has not been deprived of a right granted by statute or regulation. Neither does the failure to establish Mr. Duffy's rate of pay on the basis claimed violate a nondiscretionary agency policy, given the fact that it is Navy policy not to grant a step above the minimum step required unless specifically determined to be in the interest of the Government in accordance with specific criteria. Compare 55 Comp. Gen. 42 (1975) and 51 Comp. Gen. 656 (1972), both involving violations of nondiscretionary agency policies.

For the above stated reasons, the requested adjustments to Mr. Duffy's salary may not be made.


Deputy Comptroller General
of the United States