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Per. L. I.  
H. DUNN

**DECISION**



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

FILE: B-192372

DATE: January 2, 1979

MATTER OF: *[Authority to Grant]*  
Robert Baldwin - Retroactive Quality Step Increase]

**DIGEST:** Failure of the approving officer to act for almost a year upon a quality step increase (QSI) recommendation for reasons unrelated to performance was improper and tantamount to an unjustified personnel action. The QSI may be made effective retroactively under the Back Pay Act of 1966 and the implementing regulations.

The Honorable Donald Kennedy, Commissioner of Food and Drugs, Department of Health, Education, and Welfare, has requested an advance decision on whether the Food and Drug Administration (FDA) has the authority to grant a retroactive quality step increase (QSI), with backpay, to Dr. Robert Baldwin, an employee in the FDA's Division of New Animal Drugs, Bureau of Veterinary Medicine. *726 00001*

The Commissioner's letter recognizes the general principle that salary changes cannot be made effective before the date when action is taken by the proper administrative official. However, he also refers to our rulings allowing retroactive promotions for unjustified or unwarranted personnel actions, and he believes that the delay and circumstances involved in the approval of Dr. Baldwin's QSI are sufficient to be considered as an unjustified personnel action.

The circumstances referred to by Commissioner Kennedy are summarized as follows in his letter:

"In January 1975, Dr. Robert Baldwin testified at joint hearings before Senator Edward M. Kennedy's Subcommittee on Health and Scientific Research regarding possible problems and questionable administrative procedures within the Bureau of Veterinary Medicine. On July 24, 1975, he was recommended for a QSI by his immediate supervisor. The following day, in conformity with routine procedures, the recommendation was forwarded to the approving official. However, the approving official did not approve the recommendation until July 8, 1976, almost a year later. Standard procedures of

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the Agency require approval or disapproval of a QSI within thirty days after receipt by the approving official.

"The Quality Step Increase Certificate was prepared on July 18, 1976, just one day prior to the resumption of the Kennedy hearings, and on July 20, 1976 Dr. Baldwin testified for the second time."

The 30-day requirement referred to is found in FDA Personnel Regulation 531-5-70E, as follows:

"E. The approving official will review and approve or disapprove recommended quality increases as promptly as possible--normally within 30 calendar days of their receipt. He will immediately inform the recommending official of his approval or disapproval and promptly forward any approved quality increase recommendations to the personnel office that performs personnel services for him."

The circumstances surrounding the violation of the agency procedures that the QSI recommendation be acted upon within thirty days were the subject of a Special Counsel's investigation for the Secretary's Review Panel on New Drug Regulation. The Special Counsel concluded that, although the evidence did not support a finding that the delay in approving Dr. Baldwin's QSI was in specific retaliation for his testimony, the delay was based on inappropriate considerations rather than on his performance of his duties. The Special Counsel recommended that Dr. Baldwin's QSI be made effective as of July 1975, and that he be awarded backpay for the difference between the salary at the increased step and the salary which he actually received, with interest.

In December 1977, a special FDA Task Force was appointed to prepare a response to the Secretary, HEW, on specific recommendations concerning redress to several employees. The Task Force endorsed the recommendation pertaining to Dr. Baldwin, and stated that the FDA should make an attempt to secure backpay for the employee. In addition, Dr. Baldwin has received a formal apology for not receiving his QSI in a timely manner.

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Commissioner Kennedy concludes his letter by stating that he believes that the lack of action by the approving official in not approving or disapproving the QSI within thirty days after receipt should be considered an unjustified personnel action. Therefore, he believes that justice would dictate that the QSI be made retroactive to July 1975, in addition to the formal apology made by the agency, and he asks for our favorable consideration of this request.

The awards statute and implementing regulations vest discretion in agencies to make awards and their determinations will not be upset except for a clear showing of abuse of discretion. Shaller v. U.S., 202 Ct. Cl. 571 (1973), cert. denied 414 U.S. 1092. We believe the same principle applies to the awarding of quality step increases under 5 U.S.C. 5536. Thus, an agency has discretion to approve or disapprove a quality step increase. See John H. Brown, 56 Comp. Gen. 57 (1976).

But the exercise of discretion by an agency must be done in good faith and not constitute an abuse of discretion. 46 Comp. Gen. 730, 735 (1967). In Ruth Wilson, 55 Comp. Gen. 836 (1976), we held that, although the granting of temporary promotions is discretionary, it was improper for an agency in exercising its discretion to force an employee to choose between a temporary promotion and per diem. We, therefore, held that an unjustified personnel action had occurred that entitled the employee to a retroactive temporary promotion under the Back Pay Act. 55 Comp. Gen. 836, at 839.

In the case before us, the Food and Drug Administration itself investigated the matter and both the Special Counsel and the FDA Task Force found that the delay had been improper and that the QSI should be made retroactive. The Commissioner of Food and Drugs concurs and states that "the lack of action by the approving official is not approving or disapproving the QSI within thirty days after receipt should also be considered as unjustified personnel action."

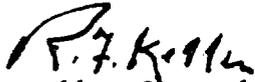
It is clear that a failure to act may constitute an unjustified personnel action. 54 Comp. Gen. 1071 (1975). The administrative record shows that the long delay in approving the QSI was unrelated to the consideration of the merits of the QSI recommendation and in our opinion sufficiently establishes an abuse of discretion by the approving official so far as the issue of back pay is concerned. Therefore, we hold that the failure

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to act for almost a year on the QSI recommendation under the circumstances of this case constituted an unjustified personnel action and as such permits an exception to the rule prohibiting a retroactive salary increase.

With regard to the payment of interest on backpay awards, it is a general rule of law that, in the absence of a contract or a statute expressing a contrary intention, interest does not run upon claims against the Government. Seaboard Air Line Railway v. United States 261 U.S. 299, 304 (1923); Smyth v. United States 302 U.S. 329, 353 (1937); 45 Comp. Gen. 169 (1964). No applicable statute specifically provides for the payment of interest on retroactive awards of backpay. Therefore, interest may not be awarded under the circumstances of this case.

In conclusion, we believe the FDA, in light of the findings made by its investigating officials and the determination made by the Commissioner, has authority to grant a retroactive quality step increase to Dr. Robert Baldwin.

  
Deputy Comptroller General  
of the United States