

**DECISION**



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

60890

MAY 18 1976

FILE: B-185805

DATE:

MATTER OF:

Dr. Kenneth J. Friedman - Retroactive  
appointment

98932

DIGEST:

Where NIH Manual provided that "candidates for the Senior Staff Fellowship must have three to seven years professional level research experience," individual appointed to a regular Staff Fellowship may not recover the compensation payable to Senior Staff Fellows merely because he has 3 years research experience. The manual provision does not set forth a mandatory administrative policy requiring appointment of all individuals with 3 years research experience to the Senior Staff Fellowship Program without regard to other factors, including the quality of that research experience.

By letter of December 8, 1975, Dr. Kenneth J. Friedman requests this Office's review of Claims Division Settlement Certificate No. Z-2608851 dated December 3, 1975, denying his claim for additional salary.

Dr. Friedman's claim is based on his belief that the National Institutes of Arthritis, Metabolism and Digestive Diseases was required to appoint him to its Senior Staff Fellowship Program in view of his prior 3 years of research experience. Instead he was appointed on July 9, 1972, to the Staff Fellowship Program. As a Staff Fellowship employee he was entitled to receive a lesser stipend than Senior Staff Fellowship employees. It is Dr. Friedman's contention that his appointment as other than a Senior Staff Fellowship employee violated the following provision of National Institutes of Health (NIH) Manual 2300-320-1:

- "3. Both the Staff Fellowship Program and the Senior Staff Fellowship Program are used to employ investigators whose prior research experience--whether outside or within NIH--does not provide an adequate basis for a conclusive evaluation of their research capabilities. Within this criterion:

sp of ad. 5-14-76  
L. ... 5-5-76  
Dr. ... 5-10-76

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- "3. Both the Staff Fellowship Program and the Senior Staff Fellowship Program are used to employ investigators whose prior research experience--whether outside or within NIH--does not provide an adequate basis for a conclusive evaluation of their research capabilities. Within this criterion:

- "a. Candidates with less than three years of professional level research experience enter the Staff Fellowship Program.
- "b. Candidates for the Senior Staff Fellowship Program must have three to seven years of professional level research experience or be physicians with three or more years of specialty training in fields related to NIH research."

On August 20, 1975, Dr. Friedman initiated an informal grievance proceeding which, in part, concerned the failure of NIH to appoint him to the Senior Staff Fellowship Program. In response to that portion of his grievance presentation, Dr. Friedman was advised by the individual responsible for his appointment that it was his understanding that while 3 years postdoctoral research is necessary for appointment as a Senior Staff Fellow, such experience does not make appointment to that program mandatory and that the program director had the option of appointing individuals with 3 years or more research experience to either the Senior Staff Fellowship or the Staff Fellowship Program. In his particular case, the program director had some reservations about the grievant's research record, particularly as to whether he had demonstrated sufficient independence to qualify for a Senior Staff Fellowship.

In response to the subsequent submission of a Stage 2 grievance proceeding, Dr. Friedman was advised as follows:

"1) There is no requirement in any of the regulations pertaining to the Staff Fellowship Program that someone with three years post-doctoral experience must be made a Senior Staff Fellow. The exact phraseology is 'Candidates for the Senior Staff Fellowship Program must have three to seven years of professional level research experience.' The number of years of postdoctoral experience is not the determining

factor; the quality of experience must clearly be professional. It was Dr. Buck's judgement that you had not demonstrated the abilities required of a Senior Staff Fellow. If you had later demonstrated the necessary skills and independence, your appointment would have been converted."

Dissatisfied with the above determination, Dr. Friedman submitted a claim to our Claims Division for the additional salary he would have received if he had been appointed as a Senior Staff Fellowship employee. By Settlement Certificate No. Z-2608851, dated December 3, 1975, that claim was denied. This action is an appeal from that denial.

Essentially what Dr. Friedman seeks is a retroactive change in his appointment. As a general rule, a personnel action may not be made retroactive so as to increase the rights of an employee to compensation. 40 Comp. Gen. 207 (1960), B-175372, April 13, 1972. We have made exceptions to this rule where, through administrative or clerical error, a personnel action was not effected as originally intended. In this context we have construed administrative error as the failure of an agency to carry out written administrative policy of a nondiscretionary nature. B-173815, April 18, 1973.

Having reviewed the language of NIH Manual 2300-320-1 pertaining to appointment to the Senior Staff Fellowship Program, we are unable to conclude that it sets forth a mandatory requirement that candidates with 3 or more years professional level research experience be appointed to that program rather than to the Staff Fellowship Program. In response to his Stage 2 grievance presentation, Dr. Friedman was correctly advised that the 3-year requirement contained in the manual language quoted above is no more than a minimum requirement for qualification for the Senior Staff Fellowship Program and that its only concrete effect is to eliminate individuals with less than 3 years experience from consideration for appointment to that program.

Because the authority to appoint individuals to Government positions and to establish and classify those positions is

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vested in the administrative agency involved and the Civil Service Commission, consideration of whether, by virtue of his research experience, Dr. Friedman otherwise qualified for appointment as a Senior Staff Fellowship employee is a matter primarily for consideration by NIH. B-181223, July 29, 1974; Tierney v. United States, 168 Ct. Cl. 77 (1964); Nordstrom v. United States, 177 Ct. Cl. 818 (1966); and Dianish v. United States, 183 Ct. Cl. 702 (1968).

For the foregoing reasons, our Claims Division's denial of Dr. Friedman's claim for additional compensation is hereby sustained.

R.F.KELLER

Deputy Comptroller General  
of the United States