

Date: February 8, 2006

Claimant: [name]

File Number: 04-0028

OPM Contact: Robert D. Hendler

The claimant retired from his [AD-03 position], Department of the Navy, in [city & State] on November 12, 2003. He believes he is entitled to back pay for a promotion effective July 6, 1999, until his retirement. The claim was received by the U.S. Office of Personnel Management (OPM) on July 8, 2004. The administrative report with attachments was received from the agency on November 1, 2004, and the claimant's comments on the report on November 8, 2004. Additional information was provided by the agency on August 11, 2005, and September 1, 2005. For the reasons discussed herein, the claim is granted.

The claimant provided a copy of a letter he received in April 2003, dated April 1, 1999, from the Office of the Provost, notifying him of a promotion from Research Assistant Professor to Research Associate Professor, effective July 6, 1999. The claimant stated that he was not aware of the promotion until he received the letter and then made a verbal request for a one-step increase from the date of his promotion to the date of his retirement based on the agency:

Policy Regarding Promotion, Salary and Tenure of the Civilian Members of the Faculty, (att2) Para 6b states that "With every promotion, a civilian member of the faculty shall receive a salary increase of at least one step."

The claimant stated that he received a two-step increase on April 1, 1999, as the result of the normal merit and performance review process. He provided a copy of a letter of that date signed by the Chairman, Systems Management Department, and the Dean of Operational and Policy Science, informing the claimant that he would receive a salary increase to step 45, effective July 4, 1999, as a "merit step increase."

In a letter dated June 18, 2003, the Director, Academic Planning, denied the verbal claim. He stated that:

- a) There has never been any guarantee of receiving a step for promotion. Such steps are granted at the discretion of the Provost, they are not entitlements nor guaranteed steps.

- b) I have read your pay increase letter dated 1 April 1999. It is true that it does not tie the steps to your promotion, but it does not imply that there is no relationship. The letter cites certain accomplishments that were no doubt part of the decision process when considering your promotion.
- c) Traditionally, a two-step increase was unusual on the basis of good performance alone. Your two-step increase at that time is indicative of the fact that thorough consideration was given to your situation.

In its administrative report, the agency stated that the claimant's promotion letter is a standard letter that does not make reference to the award of a pay step, and provided copies of similar letters issued to other faculty members. The agency report, signed for the Provost/Academic Dean, also said that:

The Department Chairman and Dean are part of the Promotion and Tenure Process, and both were well aware that the claimant was promoted and would thereby receive a one pay step increase. In fact, the 1 April 1999 letter issued by the Department Chairman...and cognizant Dean...was drafted to reflect the award of a "merit step increase" in addition to an increase resulting from promotion. This letter, also submitted by the claimant, specifically states "This merit step increase is granted in recognition of your high quality scholarly and applied research outputs produced this past year." The use of "merit step increase" is singular. They knew that the claimant would receive one step in recognition of claimant's promotion. Therefore, the letter begins by stating that "We are pleased to inform you that you will receive a salary increase to step 45, effective 4 July 1999.

In review, at the time of the Promotion and Tenure Process, the claimant was at step 43. The intent of the Provost's letter dated 1 April was that the claimant would receive one pay step, taking him to step 44, in conjunction with his promotion to Research Associate Professor. Concurrently, his Department Chair and Dean awarded a merit step increase to pay step 45.

Further documenting this process is the Standard Form (SF)-50 effective 7/4/99 which clearly shows the claimant going from step 43 to step 45.

The report reviewed the claimant's inconsistent record of step increases, and stated that "Perhaps the coincidental timing could be contributing to the claimant's misunderstanding that he did not receive the pay step awarded for his promotion."

In his response to the agency administrative report, the claimant reiterated his original rationale, adding:

2. NPS enclosed the form 50 awarding the two steps in 1999. Please note that the same form 50 refers to me twice as a Visiting Assistant Professor. It seems that the personnel system had not recognized my promotion to Associate professor at that time, so it couldn't have been justification for either of the two steps cited in the form 50.

3. As I reviewed some of my past form 50's (attached) it seems that an administrative oversight occurred, as I was referred to as an Assistant (vs Associate) professor in a form 50 dated three months after my promotion, in a form 50 one year after my promotion, and on my final 50 in 11/03. Perhaps the fact that my promotion was never entered in the system caused the failure to award a step increase for the promotion.

As evidenced by a copy of the Standard Form 50 (SF-50), dated July 4, 1999, the claimant received a pay adjustment from [AD-03], step 43, to [AD-03], step 45. Since pay for the position encumbered by the claimant was administratively determined, we requested and reviewed the agency's policy "Regarding Appointment, Promotion, Salary, and Tenure of Office of the Civilian Members of the Faculty" of the NPS for its procedures and guidance on merit pay increases and promotions.

The Policy Regarding Appointment, Promotion, Salary, and Tenure of Office of the Civilian Members of the Faculty, states "With every promotion, a civilian member of the faculty shall receive a salary increase of at least one pay step." In the April 1, 1999 letter, the claimant was promoted to Research Associate Professor, effective 6 July 1999. However, an SF 50 dated 1 October 1999, changed the "to" title as Research Assistant Professor. This action did not include a change in salary. There were no remarks to explain why the change in position title, and the agency indicated there was no additional documentation that would resolve the apparent discrepancy.

In a letter dated, April 1, 1999, the claimant was informed that he would receive a salary increase to step 45, effective July 4, 1999. The agency's June 18, 2003, letter to the claimant, stating that there has never been any guarantee of receiving a step for promotion, and such steps are granted at the discretion of the Provost and are not entitlements or guaranteed steps, is at variance with the agency's written policy as discussed previously and with the agency's rationale in the administrative report. The June 18 letter also makes reference that two-step increases were "unusual on the basis of good performance alone" and the two-step increase is indicative of the fact that thorough consideration was given to the claimant's situation. However, the Merit Pay Increases section of the policy states:

Civilian members of the faculty may receive none, one, or two steps at the discretion of the Superintendent. Faculty members whose performance has been rated outstanding by their Department Chairman and approved by the Academic Dean may, at the discretion of the Superintendent, be granted salary increases of three or four steps. The number of three or four step increases shall not exceed, in any one year, 5 % of the total of the civilian members of the faculty.

These merit increase flexibilities do not support the June 18, 2003, claim denial's assertion that "Traditionally, a two-step increase was unusual on the basis of good performance alone." We note that the claim denial does not include any documentation from the Chairman, Systems Management Department, or the Dean of Operational Policy Studies, as to whether the claimant's July 4, 1999, two-step increase was intended to cover both his promotion and a performance-based merit increase. Absent remarks on the SF 50 as to the reason for the pay

adjustment, there is no clear and convincing evidence that one of the steps was for the promotion of the claimant.

OPM does not conduct investigations or preside over adversary hearings in adjudicating claims, but relies on the written record submitted by the parties. *See Frank A. Barone*, B-229439, May 25, 1988. Where the record presents a factual dispute, the burden of proof is on the claimant to establish the liability of the United States, and where the agency's determination is reasonable, OPM will not substitute its judgment for that of the agency. *See, e.g., Jimmie D. Brewer*, B-205452, March 15, 1982, as cited in *Philip M. Brey*, B-261517, December 26, 1995. Where the written record presents an irreconcilable dispute of fact between a Government agency and an individual claimant, the factual dispute is settled in favor of the agency, absent clear and convincing evidence to the contrary. 5 CFR 178.105; *Matter of Staff Sergeant Eugene K. Krampotich*, B-249027, November 5, 1992; *Matter of Elias S. Frey*, B-208911, March 6, 1984; *Matter of Charles F. Callis*, B-205118, March 8, 1982.

In the instant case, the agency's rationale is not supported by its own policies or the documentation that it provided with regard to the claim or in response to the claimant's rationale. Therefore, we do not find the agency's determination reasonable, and the claim is granted.

The Back Pay Act, as 5 U.S.C. §5596(b), provides for back pay when the appropriate authority finds that an employee was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of all or part of the employee's pay. However, in specifying that subsection (b) does not apply to "any" reclassification action, section 5596(b)(3) excludes reclassification actions from coverage under the Back Pay Act. The Back Pay Act, as 5 U.S.C. §5596(a), applies to employees of agencies defined as:

- (1) an Executive agency;
- (2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;
- (3) the Library of Congress;
- (4) the Government Printing Office;
- (5) the government of the District of Columbia;
- (6) the Architect of the Capitol, including employees of the United States Senate Restaurants; and
- (7) the United States Botanic Garden.

Because the Back Pay Act does not exclude excepted service employees we find that the Act covers such employees.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.