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DECISION

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

FILE: B-188343

DATE: November 17, 1977

MATTER OF: Allen L. Walker--Application of Highest Previous Rate Rule

DIGEST: Employee hired by NASA was not accorded benefit of highest previous rate rule, but such denial was not stated in writing as required under NASA regulations. Since denial of highest previous rate was within agency's discretion and was agency's intention, the mere failure to document the determination does not constitute unwarranted or unjustified personnel action under 5 U.S.C. 5596.

This action is in response to a request from the Administrator of the National Aeronautics and Space Administration (NASA) for an advance decision concerning the application of the highest previous rate rule in the case of Mr. Allen L. Walker, an employee of the NASA Goddard Space Flight Center.

The record indicates that on August 27, 1972, Mr. Walker transferred from a position as an Administrative Aid, grade GS-6, step 1, (\$8,153 per annum), with the Public Health Service to a position as an accountant at the Goddard Space Flight Center. Mr. Walker's letter of appointment advised him of his grade (GS-5) and salary (\$7,319 per annum) but made no specific mention that he was not being accorded the benefit of his highest previous rate or the reason for that denial. The record indicates further that the reason for denying highest previous rate, that there was little or no relationship between the experience he gained in the position with the Public Health Service and the Goddard Space Flight Center accountant position, was not documented in his personnel file until January 8, 1975.

By virtue of 5 U.S.C. 5334(a) (1970), the Civil Service Commission is given the authority to promulgate regulations establishing an employee's rate of basic pay upon a change of position or type of appointment. The relevant regulation is found at 5 C.F.R. 531.203(c) (1977), which provides in pertinent part as follows:

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"* * * 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* * * ." (Emphasis added.)

We have held that the application of the highest previous rate rule pursuant to this regulation is discretionary. Each agency is permitted to formulate its own policy regarding application of the rule. Clifton A. Russell, B-186554, December 28, 1976.

The policy established by NASA is as follows:

"4. POLICY

- "a. NASA employees generally shall be given the benefit of the highest previous rate rule in determining basic rates of compensation.
- "b. Any exceptions to this policy must be based on meaningful factors and shall be justified in writing. Examples of the reasons which may justify exceptions are outlined in Attachment A." NPD 3531.2, May 6, 1966.

An example given as a reason for not applying the highest previous rate rule is that there exists "Little or no relationship between the experience gained in position(s) at higher rate(s) and the qualifications required for the present position." (NPD 3531.2, May 6, 1966) (Attachment A).

The administrative report states that the enclosure to the appointment letter "* * * clearly shows that it was Goddard's intention not to give Mr. Walker the benefit of his highest previous rate, and thus, the personnel action was effected as intended." The referred-to enclosure sets forth general information and shows the salary as GS-5, \$7,319. That figure represents step 1 of GS-5 at the time of appointment. Further, while the policy, quoted above, requires exceptions to be justified in writing, it does not require that the written documentation be processed in advance of the appointment.

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Based upon the record before us, it appears that NASA exercised its discretion in not according Mr. Walker the benefit of the highest previous rate rule at the time of appointment but then merely failed to document its determination at that time. When the documentation was later included in the official records the reason stated for denying the higher previous rate at time of appointment was the specific example set forth in the policy statement. We have held that where agency action is committed to agency discretion as in this case, the standard to be applied by the reviewing authority in reviewing the action of the agency is whether the action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. See Harold E. Levine, 54 Comp. Gen. 310 (1974) and court decisions cited therein.

We believe NASA's mere failure to document a determination which was apparently made at the time of appointment would not, in view of the standard set forth above, constitute an unwarranted or unjustified personnel action under the Back Pay Act, 5 U.S.C. 5596 (Supp. V, 1975).

Accordingly, Mr. Walker's claim for retroactive application of the highest previous rate rule may not be allowed.

R. F. K. 114
Deputy Comptroller General
of the United States