

CHAPTER 11

WITHIN-GRADE INCREASES

Within-grade adjustments are periodic increases in salary based on an employee's length of service in a particular salary grade. 5 U.S.C. 5335(c). These increases are commonly referred to as step increases. The determination to grant or deny an increase is made based on an employee's performance during the applicable waiting period. It is incumbent on the employee's supervisor to determine if the employee is performing at an acceptable level of competence. If so, the employee should be granted the increase.

Although the denial of a within-grade increase is not a routine occurrence, it is extremely important that a chapter representative be able fully to represent an employee should an increase be denied. Not only is the employee denied an increase in salary, but further step increases will also be delayed stifling the employee's career advancement. Further, the denial of a within-grade increase may be a symptom of the agency's dissatisfaction with the employee's overall performance. It is not uncommon that the next step taken by the agency will be a removal action for unacceptable performance. It is therefore critical that you become familiar with the statutory, regulatory and contractual rights and obligations of the employee and the agency in these actions.

In this chapter we will explore the contractual and regulatory requirements for obtaining a within-grade increase, what constitutes an acceptable level of competence and the actions to take should a denial of an increase occur. We will also explore how these types of actions can be used in an overall effort to build an effective chapter and to increase involvement and membership.

I. Regulatory Requirements

To be eligible for a within-grade increase the employee must meet the following three requirements:

- A. The employee's performance is deemed by the employer to be at an acceptable level of competence.
- B. The employee must have completed the required waiting period necessary for advancement to the next step.
- C. The employee may not have received an equivalent increase during the waiting period.

5 C.F.R. 531.404

To be rated at an acceptable level of competence the employee must have received at least fully successful (level 3) on his or her last rating of record. However, a fully successful

annual rating does not guarantee the employee a within-grade increase, nor does a minimally successful rating guarantee the denial of an increase. The supervisor can prepare a current rating of record that is consistent with the acceptable level of competence determination. This is particularly applicable where an employee may have had problems in the previous rating cycle but has since resolved the problems and is performing at a fully successful level. Informing the supervisor of the right to give a new rating of record may informally solve any problem.

The length of the waiting period for an increase varies depending on the employee's step within the grade. The waiting periods are as follows:

- A. Steps 2, 3, and 4 - 52 calendar weeks of creditable service;
- B. Steps 5, 6, and 7 - 104 calendar weeks of creditable service; and
- C. Steps 8, 9, and 10 - 156 calendar weeks of creditable service.

5 C.F.R. 531.405

What constitutes creditable service may at times become an issue. 5 C.F.R. 531.406 defines creditable service. In general, any civilian employment in any branch of the Federal Government or within a government corporation (as defined by 5 U.S.C. 103) is creditable service. This includes periods of annual, sick or other leaves with pay. Some time in a non-pay status may also be creditable if it does not exceed an aggregate of two (2) work weeks for steps 2, 3 and 4; four (4) work weeks for step 5, 6 and 7; and six (6) work weeks for steps 8, 9 and 10. Time in a leave of absence status may also be creditable service (e.g., time in military service or while receiving injury compensation). Consult the regulations with respect to the specific facts of your case.

II. Performance Constituting an Acceptable Level of Competence

As stated previously, an acceptable level of competence determination is based on a rating of record made in accordance with the performance elements and standards created pursuant to 5 C.F.R. Part 430. For those agencies not covered by 5 C.F.R. Part 430, the acceptable level of competence determination shall be based on minimal performance appraisal requirements issued by OPM (See 5 C.F.R. 531.408). A within-grade increase may not be denied based on any alleged misconduct by the employee. Management is required to communicate the specific performance requirements constituting an acceptable level of competence. This is usually done at the beginning of the rating period when the employees receive their elements and standards. Failure to receive notice of the specific performance requirements constituting an acceptable level of competence is a defense should a within-grade increase be denied.

It is typically the employee's immediate supervisor who completes the performance evaluation and documentation necessary to grant or deny the within-grade increase. If the supervisor has made a determination to deny the increase it is common for the supervisor to issue the employee a warning letter specifying that his or her performance is below an acceptable level of competence. In many NTEU agreements it is required that management issue a warning letter and provide the employee with an opportunity to improve performance prior to denying the within-grade increase. Check your agreement on what must be included in the notice to the employee. The notice should provide the critical element(s) and performance standard(s) deemed to be below fully successful. Further, some agreements require that the employee be provided with specific examples of performance below the fully successful level. The notice should also clearly state that the employee's failure to improve performance to the fully successful level will result in a denial of the within-grade increase. It may also be required that the notice provide advice on how to achieve an acceptable rating and how the supervisor will assist the employee.

Although this notice should be given to the employee prior to the end of the rating period (most agreements specify 60 days) management often fails to provide the notice in a timely manner. Failure to provide timely notice does not entitle the employee to the increase. However, if the employee's performance improves sufficiently during the notice period the employee should receive the increase retroactive to the original due date.

At the notice stage we can do much to ensure that the employee receives the within-grade timely. It is necessary for the representative to investigate the allegations made by the supervisor. It is very helpful to find one or two employees who can serve as technical advisors. Ask these individuals to review the warning letter in an attempt to determine if the supervisor has appropriately rated the employee. These experts should then make an effort to assist the employee in correcting any perceived deficiencies. If possible, ask the technical advisors to review the employee's work prior to submission to the supervisor.

If the employee meets with the supervisor during this opportunity period to get advice and guidance it is advisable to document these meetings. The Union probably does not have a right to be present during these meetings, but you may be able to convince the supervisor that it is in everyone's best interest to have a steward present. Have the employee immediately sit down and document what occurred in the meeting. Next, the steward or employee should draft a memorandum to the supervisor setting forth the substance of the discussions. If possible, try to get the supervisor to provide an assessment of the employee's performance during this opportunity period. Send the memo to the supervisor and request that the supervisor note any disagreements and return the document with his or her signature. You may not compel the supervisor to sign and return the document. This procedure provides a record of the discussions during the opportunity period and may prevent inconsistent testimony on the part of the supervisor at a later date.

If the employee improves performance to the fully successful level the within-grade increase should be granted. It is improper for the increase to be denied as a "lesson" to the employee. Time and energy put in at this stage may prevent the need to

represent the employee in an unacceptable performance action later.

III. Notice of Determination

The regulations provide that a level of competence determination shall be communicated to the employee as soon as possible after the end of the waiting period. 5 C.F.R. 531.409(e). The notice must be in writing. If the determination is positive the notice should so state and the employee should receive the increase on the first day of the pay period following the end of the waiting period. 5 C.F.R. 531.412(a). If the supervisor's decision is to withhold the increase the notice should state:

- A. the reason(s) for the denial;**
- B. the respects in which the employee must improve his or her performance in order to be granted a within-grade increase; and**
- C. the employee's right to secure a reconsideration of the denial.**

5 C.F.R. 531.409

An example of a denial of within-grade notice is attached to the back of this chapter of the manual (Attachment No. 1). Review the reasons for the denial. The reasons should be stated in terms of the failure to meet the fully successful level of the critical elements related to the employee's position. The notice should also provide specific instances of performance that failed to meet the fully successful rating. Once the employee receives a negative determination we are under a tight time frame to appeal to the next step. It is at this next stage that your formal representational role begins.

IV. Reconsideration of a Negative Determination

Should an employee be denied a within-grade increase the employee must be granted the right to appeal that decision. To appeal the employer's negative determination the employee must file a written request for reconsideration with the official designated in the notice letter within **15 calendar days** of the receipt by the employee of the determination letter (Attachment No. 2). The time limit to file for reconsideration may be extended if the employee shows that he or she was not notified of the time limit and was otherwise not aware of it or that the employee was prevented from filing timely by circumstances beyond his/her control. 5 C.F.R. 531.410(b).

When a request for reconsideration is filed by an employee the agency is required by regulation to establish an employee reconsideration file.

5 C.F.R. 531.410(a)(2). The regulations also require that the file contain all pertinent documents relating to the negative determination and the request for reconsideration, including copies of the following:

- A. the written negative determination and the basis therefore;
- B. the employee's written request for reconsideration;
- C. the report of investigation, if an investigation is made;
- D. the written summary or transcript of any personal presentation made; and
- E. the agency's final decision regarding the request for reconsideration.

The regulations specifically state that the reconsideration file may not contain any document that has not been made available to the employee or his or her representative. 5 C.F.R. 531.410(a)(2). The agency's failure to provide all documents relied upon could result in reversal of the action.

The employee is also entitled to respond to the negative acceptable level of competence determination. This response can be oral and/or written. The opportunity to present a reply is required before the agency can proceed with the denial of the within-grade increase. The employee must be granted a reasonable amount of official time to review the reconsideration file and to prepare an adequate response. 5 C.F.R. 531.410(a)(3). The employee's representative should be granted reasonable bank time to prepare the response and official time for the presentation of the response. It is important to remember that the failure of the employee to pursue the reconsideration process may be a bar to arbitrating the denial of the within-grade at a later date. The MSPB has reasoned that the reconsideration process is an administrative review, and the failure to exhaust all administrative reviews precludes an appeal.

Like the oral and written replies presented in adverse and disciplinary actions, it is imperative that you thoroughly prepare the presentation of both the oral and written reply to the denial. The agency will either prepare a transcript or a summary of your presentation. This becomes a part of the reconsideration file and will be submitted into evidence in the arbitration hearing over the denial. Any statement made at this stage will be used for, and possibly against, the employee at the hearing. Carefully review the transcript or summary to ensure that it accurately reflects the parties' statements made at the reply.

V. Preparing For the Oral and/Or Written Presentation

The steps necessary to prepare for and present both the oral and written presentation follow. Remember that the first step is to file a written request for reconsideration within 15 calendar days of the employee's receipt of the notice of denial.

A. Request a Copy of the Reconsideration File

When the employee or representative submits the written request for reconsideration he/she should also request a copy of the reconsideration file. As a reminder, the reconsideration file should contain all of the pertinent documents relied upon by the agency in making its determination. Failure of the agency to maintain the reconsideration file or failure to provide all documents could result in the reversal of the denial. As with actions based on unacceptable performance, NTEU takes the position that the reconsideration file should contain specific information to allow the employee an adequate opportunity to respond to the allegations. Failure to provide specific information (e.g., work files or specific documents) could result in a reversal of the negative determination.

B. Inventory the Reconsideration File

The purpose of the inventory is to ensure that the agency may not subsequently add documents to the file.

1. Upon receipt of the file examine each document and arrange them in chronological order, with the oldest document on the bottom of the file.
2. Inventory the chronologically arranged documents by assigning each document a sequential number. For example, if the reconsideration file contains twenty documents, assign the most recent document the number twenty and the oldest document the number one. Next, create an inventory list with the number twenty (most recent) at the top and the number one (oldest) at the bottom. Record on that list the identity (date, subject, author and recipient) of the document in its respective sequence. Adopting such a practice will guard against additional documents being added to the file after your inventory.
3. Ask the management official presenting you the reconsideration file to sign the final inventory. However, you should be aware that management is not obligated to comply with this request. If the management official declines to sign the inventory, note on the inventory list the day and time you made the request and that the management official refused to sign. Finally, give a copy of the inventory list to the management official involved.
4. Photocopy every document given to you as part of the reconsideration file so that you have more than one copy.
5. Take the documents originally provided to you and seal and store them in a safe place.

These precautions are necessary to preserve the evidence and to document exactly what was contained in the reconsideration file at the time it was provided to the

employee or the representative. An improperly compiled reconsideration file may deprive the employee of his/her right to due process. This denial of due process could be considered harmful procedural error and may result in the reversal of the negative acceptable level of competence determination.

C. Create Working Files

As with any performance based action, you can anticipate that there will be a large number of documents for you to review. These will not only include the reconsideration file, but also documents provided by the employee or other employees to show that the employee's work was at an acceptable level of competence. It will be very helpful to you and to the field representative to arrange the files so that information can be retrieved as quickly as possible.

1. The first file should contain the documents provided in the reconsideration file. Organize the file with the documents in chronological order as outlined earlier. Place the documents on the right side of the folder and the inventory sheet on the left side. If possible use fasteners to secure the documents.
2. Establish a correspondence file containing documents related to the denial. The first document placed in the file would be the notice denying the within-grade increase. On top of that document you would place the request for reconsideration. As other correspondence comes in place them in the file. This should leave you with a file in chronological order with the latest document on top and the oldest document on the bottom. Once the case has been invoked for appeal a written inventory should be completed listing the documents. Again, secure this inventory on the left side of the file folder.
3. The third file should consist of all material related to the appeal of the determination. This would include the documents from the MSPB appeal or from the grievance arbitration. As will be discussed later, most appeals will be through grievance arbitration.
4. The final file you should create is an evidence file. This should contain all of the information you have gathered to support the employee's reconsideration and subsequent appeal. It would be helpful to separate this file into separate sections corresponding to each specification. Include in this file the employee's statements as well as statements of other employees.

D. Review the Specifications with the Employee

A vital step in this process is to interview the employee to get his/her side of the story. It is your job to get the facts necessary to determine the chances for success in the reconsideration. The employee is often emotional, and it is difficult to separate the facts from the employee's opinions. Further, the employee will often harbor ill-will toward the supervisor and will not objectively evaluate the situation.

The first thing you should do is ask the employee to sit down and write a response to each of the specifications. The response should include all reasons why the employee feels the decision was unjust. You can weed through these reasons and make a determination as to which reasons give you an avenue of appeal. Next, sit down with the employee after reviewing the employee's response and discuss the situation. Start at the beginning of the waiting period and work your way through to the end. Details that might seem insignificant to the employee give potential defenses. Do not be afraid to ask clarifying questions that may seem somewhat personal. More than one employee has been denied a benefit based on personal animus.

After completing the review restate the case to the employee to ensure that each of you knows the direction the reconsideration will take. Ask the employee to provide any documents or witnesses that support his/her claims. Ask the steward in the employee's work area to review the situation and to provide input. Have other employees in the unit experienced similar problems? Have the employees complained that the standards do not accurately evaluate their work? Have employees complained that they can not meet the standards? If you have access to an employee in the employee's work group it may be helpful to ask general questions on the supervisor's attitude toward the employees. In general you should try to explore any potential defenses that the employee may have left out while at the same time determining if the action against the employee was warranted.

At the end of this process you should know if the facts as alleged in the specifications are correct. If they are incorrect you should note the employee's version for inclusion in the presentation. If the specifications as alleged are correct, you should note if the employee has a valid explanation for the failure to meet the specifications. Finally, you should know, after talking to other employees in the unit, whether the elements and standards are valid.

E. Identify the Appropriate Defenses

It is now time to put the information you obtained during your investigation to work. In attacking the negative determination you should look at a number of areas. Some defenses go to the accuracy of the specifications and some to the failure to meet the elements and standards.

1. Attacking the Elements and Standards

Because the regulations clearly tie the denial of a within-grade into the

performance appraisal process, attacking the elements and standards is appropriate. Chapter 10 of this manual provides details on how to attack the elements and standards. In general, you should look to the following:

- a. Were the elements and standards provided and adequately explained;
- b. Unclear standards. Use this when the standards are unclear and could mean more than one thing;
- c. Subjective standards. Standards should be written as objectively as possible to eliminate biased evaluating. Although numerical standards are often objective, numerical standards in the face of a fluctuating workload may not be objective; and
- d. Unrealistic, unattainable or absolute standards. This argument can be made when the standard requires perfection or near perfection for a fully satisfactory rating.

2. The Specifications Are Not Factual

Attack any specification that does not have a factual basis. For example, the supervisor may allege that he/she counseled the employee on numerous occasions on the correct procedure for accomplishing a particular task. The employee tells you that no counseling has been performed, and a check of the employee's performance file reveals no documented counseling. It is important for this discrepancy to be attacked and noted in the employee's response.

3. The Employee Was Following Established Procedure

Regardless of the allegations, you should review national, regional and local operations manuals, policy statements and regulations to determine if the employee was following proper procedure in performing any assigned tasks. The agency is hard pressed to prove an allegation of less than satisfactory performance when the employee followed established procedure. Interviewing other employees in the unit may be helpful in proving the established procedure.

4. Failure of Management to Follow Proper Procedures

This can include errors in making the acceptable level of competence determination as well as errors during the appeals process. Check to see if the agency considered the entire waiting period in making its decision. It can be considered harmful error if management only considers performance during a portion of the waiting period. For example, if the

employee received fully successful rating during two of the three years of the waiting period and management only cites errors during the last few months of the waiting period, failure to consider the entire waiting period should be cited and harmful error alleged.

Failure to provide the reconsideration file or providing an incomplete file should be cited as harmful error. The reconsideration hearing is the employee's opportunity to respond to the charges. The agency's failure to provide information damages the employee's ability to present a defense.

Should the agency fail to meet any of the time limits contained in your agreement you should cite this failure as harmful error that compromises the employee's due process rights.

5. Defenses to the Employee's Inability to Meet the Performance Standards

The failure to meet the established elements and standards does not necessarily result in losing the reconsideration or any subsequent appeal. Several defenses may still be used. However, be aware that any admission on the employee's part that he/she failed to meet the requirements of the position will probably be used against the employee at some later time.

Check to see if the employee had any collateral assignments during the waiting period (e.g., EEO counselor, quality team member). If so, check to see the amount of time spent on these assignments. If the employee is a steward or officer of the Union check to see the amount of time the employee spent outside of the work unit. If the employee has spent considerable time away from the normal duties of the position and the agency is holding the employee to the standards set for a full time employee there may be grounds for reversing the negative acceptable level of competence determination. McCloskey v. Dept. of Treasury, 6 MSPB 570 (1981).

A within-grade denial may also be reversed if the employee can show a qualifying handicapping condition that caused the employee to be unable to meet the elements and standards. This area is dealt with in more detail in Chapter 15 of this manual. The cases in this area require that the employee must have a qualifying handicap and that the agency is aware of the handicap. Further, the agency must have failed to reasonably accommodate the handicap. Overton v. Dept of Treasury, 6 MSPB 373 (1981).

Lack of training should also be alleged if applicable. If it can be shown that the employee was not trained on how to perform the duties of his/her position a defense can be raised. Check to see the amount and quality of training other employees in the unit received. If the training appears to be inadequate or nonexistent raise this point at the presentation.

This is not a comprehensive list of the defenses that can be raised. If your investigation reveals any indications that the employee was treated differently from any other similarly situated employee you should raise disparate treatment as a defense.

VI. Presenting The Employee's Reconsideration Reply

The reconsideration reply is not substantially different from the oral and written reply you give in a disciplinary or adverse action case. It is the employee's opportunity to address the allegations contained in the determination letter. It should thus be handled like any oral reply. (See Chapters 10 and 12 of this manual for additional guidance on the presentation of an oral/written reply). It is advisable to contact your field representative prior to conducting the reply. In general, it is advisable to give both an oral and written presentation. A face-to-face presentation is often more persuasive than only presenting a written document. It provides you the opportunity to pursue points that seem to impress the hearing official and to address any questions that may arise. The written submission may be used to supplement the oral presentation and to provide additional clarification on points that may be in dispute. If you have an employee who is unable to maintain control due to a volatile emotional state it may be advisable to make only a written submission.

The preparation made before entering the presentation is critical to the success of the reconsideration. You should have your presentation outlined to ensure that you cover all points. Make sure that all parties know their role in the presentation. Go over your reply with the employee prior to meeting with management so the employee is aware of what you intend to say. It is common for the employee to want to respond to questions or to take over the reply. You, as the representative, should make the presentation. You can do so far more objectively than can the employee. The employee should speak only when you are certain of what she or he will say. Do not hesitate to take a break in order to decide if the employee should respond to questions and to prepare a response to any questions you should decide to answer.

After you receive the summary or transcript of the response, review it for accuracy. Agree upon a timeframe for your review of the transcript. If you have any corrections or concerns make them known to management within the agreed upon time. Remember, the transcript will most likely be presented as evidence in any hearing, and errors or admissions could hurt the employee's chances for successful appeal.

VII. Appeal of a Final Negative Determination Decision

OPM regulations state that if an employee is covered under a collective bargaining agreement the terms of the agreement govern the appeal of the case. 5 C.F.R. 531.410(d). It is therefore necessary for you to review the terms of your agreement. If the agreement calls for the appeal to be handled under the grievance arbitration procedure, that is the exclusive forum. Espenschied v. MSPB, 804 F. 2d 1233 (Fed.Cir. 1986). An appeal to the MSPB would be dismissed, and the employee could lose the right to appeal the

decision. You should also review your agreement to determine at what stage a grievance should be filed. Some agreements mandate the filing of a grievance at a certain step. Others call for filing of a grievance at the next higher level of management above the reconsideration official or directly to arbitration if the decision is made by the final step official.

The burden of proof is on the agency to show that the employee was not performing at an acceptable level of competence. It is now established that in cases without a discrimination element the agency meets its burden if it can show less than fully successful performance by substantial evidence. If the case contains a discrimination allegation (a mixed case) an appeal of the arbitrator's decision is made to the district court and a preponderance standard may be applied.

At this stage the field representative will be involved in the proceedings. Your preparation and planning prior to this stage will have a substantial impact on the outcome of the case. A well-organized investigation and presentation gives the employee every opportunity to prevail on appeal.

VIII. Evaluating The Employee After Withholding An Increase

Should the employee be denied an increase management continues to have a duty to evaluate the employee and to grant an increase when appropriate. The regulations state that management may, at any time after the denial, prepare a new rating of record and grant the increase when it determines the employee is performing at an acceptable level of competence. 5 C.F.R. 531.411. The agency is obligated to perform this review every 52 weeks. Some of our agreements call for reviews as early as 26 weeks after the denial. Check your agreement for the applicable review period.

You can continue to represent an employee denied an increase. Continue to work with the employee to improve performance. If possible ask other employees to assist the employee by providing additional training and reviewing the employee's work product. Steps you take at this stage may prevent your need to represent the employee in any future performance based action. You should also periodically check with the supervisor and remind him/her of the regulation allowing a review and subsequent increase at any time.

IX. Duty of Fair Representation

As a matter of law, the Union owes a duty of fair representation to each employee in the bargaining unit in matters such as denials of within-grade increases arising out of the contract. This duty exists regardless of whether the employee is a member of NTEU. If the Union is found to breach this duty it can be held liable for whatever damages are suffered by the employee. In the case of a removal action this can represent an enormous sum of money. Because denials of a within-grade increase are often the prelude to the agency's attempt to remove the employee for unacceptable performance it is very important that an employee be represented properly. For information regarding the Union's duty of fair representation consult Chapter 4 of this manual. It is always advisable to consult your Field Representative before deciding not to represent an employee.

X. Incorporating Within-grade Determinations Into Your Membership Recruitment Program

Employees evaluate the Union's ability and willingness to fight on behalf of its bargaining unit members. Management also looks at the willingness of the Union to fight before it moves forward on a questionable case. If supervisors know their own incompetence will be called to the attention of upper management, they will be less likely to deny a within-grade increase. Current case law provides management wide latitude in performance based cases. It is imperative that chapter representatives provide effective representation in these types of actions. The willingness and ability to represent employees directly affects NTEU's ability to improve the working conditions of employees.

Whenever the Union successfully defends an employee in a within-grade denial you should use flyers and newsletters to publicize this significant victory. Not only have you ensured the employee's receipt of a salary increase but you have also ensured that the employee will remain on a timely career track. Further, you have headed off a potential removal action based on unacceptable performance. Ask the employee to allow you to use his/her name in the publicity and ask them to be an active recruiter for NTEU. Use lunch and learns to educate employees about their rights in this area.

The more employees know about their rights, and of NTEU's actions in defending those rights, the easier your membership recruitment efforts will be.