

Date: March 29, 2006  
Claimant: [name]  
File Number: 05-0049  
OPM Contact: Robert D. Hendler

The claimant was offered a position with the Office of Personnel Management (OPM) in June 2004 as an [GS-301-11], step 1, with a salary of \$50, 593.00 per annum. Approximately three weeks after his July 12, 2004, appointment he was informed that his appointment under the Presidential Management Fellows (PMF) Program (see 5 CFR 362.202(d)) should have been made at the GS-9, step 1, level of the General Schedule. To minimize the loss of pay, OPM authorized that his pay be set at GS-9, step 7, (\$50,178 per annum) based on the provisions for superior qualification appointments (see 5 CFR 531.203(b)), and his appointment was thus changed retroactively. The claimant described the impact this has had on his career with regard to promotion eligibility, and asks that:

**my SF-50 be changed to reflect that I was in fact a GS-301-11 from July 12, 2004, to July 12, 2005. My team leader...has indicated that over the past year that I did in fact perform at the GS-301-11 level. Upon receiving an SF-50 that states that I was a GS-301-11 for one year, I also request that I be promoted to the full performance level of the position to a GS-12.**

For the reasons discussed herein, the claim is denied.

The claimant stresses he was provided erroneous and incomplete information, stating:

If I had known what avenues I had at my disposal or the repercussions it would have on promotions, I would have never agreed to accept the GS-301-09 Step 7 that was given to me to compensate for the \$12,000.00 pay difference.

In support of his claim, he states:

OPM will not owe me any back pay, retribution [sic], etc., since OPM has already paid me the equivalent of a GS-301-11 Step 1 salary for the past year. I worked as a GS-301-11 Step 1 for one year as stated by my superiors, so why not make up for the OPM Human Resources office initial mistake and

change my SF-50 to show that I was in fact a GS-301-11?...I feel that I have taken the high road ....I have not once threatened to remedy this situation through litigation. I have not once asked for monetary restitution and have not once asked that someone be held accountable for the enormous mistake made....Why OPM would not want to deal with this quietly instead of promoting "bad publicity" that an OPM Fellow from OPM's [sic] own run Fellowship program was severely mistreated is beyond me.

The issue before us is whether the claimant should have been hired at the GS-11 grade level or, at a minimum, be treated as having occupied a GS-11 position from July 12, 2004, to July 12, 2005, for promotion purposes. In so doing, the claimant would ask us to act as if his appointing agency was not bound by the regulations in force at the time of appointment limiting appointments under the PMF program to the GS-9 grade level, or the waiting period for promotion stipulated in 5 CFR 362.202(d). He would also ask us to act on his request and provide him relief because of the incorrect advice given by the appointing agency.

The claimant seeks to prevent the Federal Government from denying him benefits because he expected to be hired at the GS-11 grade level and receive GS-11, Step 1, compensation. The claims jurisdiction of this office is limited to consideration of legal liability. OPM has no authority to authorize payment based solely on equitable considerations. 63 Comp. Gen. 50 (1983). Detrimental reliance is not a legal basis for the payment of appropriated funds. 56 Comp. Gen. 943 (1977). It is well established that the Government cannot be estopped from denying benefits that are not permitted by law, even where the claimant relied on mistaken advice from a Government official or agency. A claim for payment of money from the U.S. Treasury contrary to a statutory appropriation is prohibited by the Appropriations Clause of the Constitution, Art. I, 9, cl. 7. Recognition of equitable estoppel could nullify the clause if agents of the Executive agency were able by their unauthorized oral or written statements, to obligate the U.S. Treasury contrary to the wishes of Congress. See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), *Falso v. Office of Personnel Management*, 116 F.3<sup>rd</sup> 459 (Fed Cir. 1997), and *Melvin Ackley, Jr.*, B-200817, April 21, 1981. Therefore, the claimant's request for equitable estoppel must be denied.

We note that even though 5 U.S.C. §§ 5112 and 5346(c) authorize OPM to decide position classification and job grading appeals, respectively, OPM's authority to adjudicate compensation and leave claims flows from a different law - 31 U.S.C. § 3702. The authority in § 3702 is narrow and limited to adjudication of compensation and leave claims. Section 3702 does not include any authority to decide position classification or job grading appeals. Therefore, OPM may not rely on 31 U.S.C. § 3702 as a jurisdictional basis for deciding position classification or job grading appeals, and does not consider such appeals within the context of the claims adjudication function that it performs under § 3702. Cf. *Eldon D. Praiswater*, B-198758, December 1, 1980, (Comptroller General, formerly authorized to adjudicate compensation and leave claims under § 3702, did not have

jurisdiction to consider alleged improper job grading); *Conon R. Odom*, B-196824, May 12, 1980. Therefore, we may not address the claimant's assertion under the provisions of 31 U.S.C. § 3702 that he should be treated as if he has occupied a GS-11 position because he has performed work at the GS-11 grade level since his initial appointment because of the failure of his organization to assign him work within the scope of his GS-9 official position of record.

We also note the Supreme Court in *United States v. Testan*, 424 U.S. 372 (1976), specifically held that neither the Classification Act, 5 U.S.C. §§ 5101 - 5115, nor the Back Pay Act, 5 U.S.C. § 5596, creates a substantive right to back pay for periods of wrongful classification. B-190695, July 7, 1978 and B-191360, May 10, 1978. Employees of the Federal Government are entitled only to the salaries of the positions to which they are actually appointed regardless of the duties they perform. When an employee performs duties at a grade level higher than that in which his position is classified and is successful in obtaining reclassification of his position and promotion, no entitlement exists for compensation at the higher grade level prior to the date the necessary administrative actions are taken to effect the promotion. 52 Comp. Gen. 631 (1973) and 39 Comp. Gen. 583 (1960). *See also* B-204769, April 13, 1982; and B-207889, August 31, 1982. When an employee performs duties normally performed by one in a grade level higher than the one he holds, no entitlement to the salary of the higher level position exists until such time as the individual is actually promoted to that level. *See also* B-192560, December 14, 1978. Therefore, assuming the claimant performed work above the GS-9 grade level, he is precluded from being compensated for the work at a higher salary than the official position he occupied.

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