



United States
**Office of
Personnel Management**

Washington, DC 20415

**Compensation Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name]

Organization: Employment Training Administration
U.S. Department of Labor
[city & State]

Claim: Request for Additional Compensation
for Delayed Appointments and
Promotions

Agency decisions: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 04-0007

/s/ Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability
Human Capital Leadership
and Merit System Accountability

5/9/2006

Date

The claimant is a former Federal civilian employee requesting “damages in the amount of \$68,789” from the Department of the Army (DA) for the period December 12, 2000, when he was notified he was eligible for a Contract Specialist, GS-1102-7, position until he transferred to the U.S. Department of Labor on May 3, 2003, (DOL). He also requests “damages in the amount of \$51,810” from the DOL for the period March 15, 1999, when he applied for employment with that agency, through June 28, 2003, when resigned from a [GS-11] position. The Office of Personnel Management (OPM) accepted his claim on December 18, 2003, but we did not receive the DOL administrative report until April 6, 2006. We obtained additional information from Department of the Army on May 4, 2006. For the reasons discussed herein, we do not have jurisdiction to consider his claim against Department of the Army, and we deny his claim against DOL.

The claimant stated in his September 30, 2003, claim request he was notified he was the second person on a certificate of eligibles referred by OPM to DA:

Not having heard from Picatinny Arsenal I visited there in March 2001. I was finally put on the payroll effective 12/2/01. I resigned 2/9/02 when I learned that an eligible who had a lower rank on the certificate had been hire [sic] in my spot by the agency and was about to be advanced to GS-9 while I had wait months to be advanced because of the illegal passover. Damage claim 3/01-12/2/01 is \$26, 165.

On 2/26/02 the Delegated Examining Unit, Army, NEPOC, Aberdeen Proving Ground, MD 21005 notified me that I was eligible on certificate #BAU 200362 for Contract Specialist GS-9 at Picatinny Arsenal. Approximately one year later, 2/09/03, I was hired. I subsequently learned that the agency did the same thing again by hiring an eligible, who had a lower rank on the certificate than I, in my spot. The eligible was advanced to GS-11 one year later while I would have to wait another year for my advancement. My damage claim for this illegal passover is \$42, 574.

OPM cannot take jurisdiction over the compensation or leave claims of Federal employees who are or were subject to a negotiated grievance procedure (NGP) under a collective bargaining agreement (CBA) between the employee’s agency and labor union for *any time during the claim period*, (emphasis added) unless that matter is or was specifically excluded from the agreement’s NGP. The Federal courts have found that Congress intended that such a grievance procedure is to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc), *cert. denied*, *Carter v. Goldberg*, 498 U.S. 811 (1990); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). Section 7121 (a)(1) of title 5, United States Code (U.S.C.), mandates that the grievance procedures in negotiated CBAs be the exclusive administrative procedures for resolving matters covered by the agreements. *Accord, Paul D. Bills, et al.*, B-260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992).

Information provided by the agency at our request shows the claimant was in a bargaining unit position covered by a CBA between the American Federation of Government Employees, Local [number], and the Army Armament Research and Development Center, Army Armament Munitions and Chemical Command, Dover, New Jersey during the period of the claim. Because

compensation and leave issues are not specifically excluded from the NGP covering the claimant, they must be construed as covered by the NGP the claimant was subject to during the claim period. Since the NGP was available to the claimant when the claim arose and was his exclusive remedy, OPM has no jurisdiction to adjudicate his compensation claim against DA, and that portion of his claim is dismissed for lack of jurisdiction.

During the period of the claim with DOL, the claimant was in bargaining unit positions covered by a CBA between DOL and the National Council of Field Labor Locals, AFGE. The CBA's NGP (Article 15, Grievance Procedures), specifically excludes matters subject to statutory appeal procedures except for Fair Labor Standards Act claims and within-grade increases. Therefore, we have jurisdiction over the claim against the DOL.

In his September 30, 2003, letter to OPM, the claimant requested we accept a claim:

...for damages in the amount of \$51,810 because the Dept. of Labor illegally passed over me by selecting a non-veteran who had a lower rank than me on the certification for Workers' Compensation Claims Examiner in May 1999 and then promoted the employee one year later before me on June 4, 2000.

This claim for damages may be increased at the rate of \$52,563 per annum beginning September 7, 2000, depending on the action of Sonia Santiago with regard to announcement #DEA-03-63 (closing date 8/15/03) for Workers' Compensation Claims Examiner GS-9.

In the attached copy of a September 13, 2000, letter to the Secretary of DOL, he stated:

On 3/15/99 a certificate of eligibles was issued for #ML-99-10 Workers' Compensation Claims Examiner GS-9. On 3/16/99 a telephone call was received scheduling an interview. On 3/18/99 I reported for the interview on time. While the interview was delayed it finally took place on that day. During the interview I made it clear that I was ready, willing and able to start work immediately. On 4/19/99 a call was received by my wife with the only message being to call back. I called back on 4/19/99 and again on 4/20/99 and left messages. Nevertheless a letter, dated 4/22/99, from the Department of Labor states that no return call from me was received and that if I continue to be interested in the position I should contact the office on 4/23/99. That letter was neither mailed on 4/22/99 nor 4/23/99. It was withheld from mailing until Monday 4/26/99 when it was sent certified, postmarked 4/27/99 00:29, signed for and received by me on 4/28/99. Upon receipt of the letter I called both ASAM and OWCP and made clear my interest in the position never waivered [sic] from 3/16/99 and continued. I reconfirmed my interest in writing, as well, on 4/28/00. That letter was ignored as were follow-up letters, resulting in my loss of valuable time in employment as a Workers' Compensation Claims Examiner, of more than a year-a most important period to be on the job to prepare for what was to come. Even though I am a veteran and was considered highly qualified, perhaps highest qualified, other less qualified people were hired and, what is extremely important, had the benefit and the advantage of that year of exposure when new things were developing. In addition they were advanced to a higher grade at the end of the period. These

actions and inactions were improper and just plain wrong resulting in my loss of over one year's salary at grade 9 step 9 and four months salary at grade 11 step 5. Please authorize back pay for this period.

In an October 16, 2000, letter to the claimant, the agency stated:

It is most unfortunate that an administrative error occurred in May 1999 which resulted in your loss of employment consideration on Delegated Examining Certificate ML-99-10, whereby a non-veteran with a lower score was selected. OPM provides specific guidance in its Delegated Examining Operations Handbook for agencies when this occurs....Therefore, we have met our legal obligation as you were offered and accepted an identical position of Workers Compensation Claims Examiner, GS-991-9, on June 4, 2000.

The agency declined to provide back pay from May 1999 until the claimant's appointment on June 4, 2000. It further stated:

Even had back pay been warranted, you would not have received compensation at the GS-11 level as career ladder promotions are not guaranteed. An employee can only be promoted when he/she demonstrates ability to work at a higher level, and when the promotion is in line with the agency's authorized ceiling and staffing policies. Additionally, the decision to promote lies with an authorizing official, who makes that determination based on a number of factors. We can't assume that you would have been promoted to the GS-11 level at the precise time that you allude to in your letter.

In his February 7, 2001, letter to DOL, the claimant disagreed with the agency's response to his claim, asserting:

After careful review, I am unable to find any prohibition, given the egregious nature of the illegal action, to providing back pay at GS-9 from the date that a non-veteran was placed on the payroll until the date I was placed on the payroll, a period of approximately thirteen months. The "error" was not simply one of omission by a clerk. The "error" was clearly one of commission in an effort to subvert the law with the intention of illegally hiring a non-veteran with a lower score than mine.

OPM's authority to adjudicate compensation and leave claims flows from 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 or direct corrective personnel action on claims of lost employment opportunity or delayed promotions as the claimant would have us do.

The claimant's assertions with regard to his view that he is entitled to back pay for missed selections and delayed promotions conflicts with U.S. Supreme Court precedent which has held that an employee is entitled to the pay of the position to which he or she is appointed. *United States v. Testan*, 424 U.S. 372 (1976). There must be an entrance on duty under a valid appointment before payment of compensation is authorized. 20 Comp. Gen. 267 (1940) and cases cited therein. See also B-183440, August 12, 1975 and B-224600, October 8, 1986.

Therefore, there is no provision in law to grant back pay and interest prior to the claimant prior to his appointment.

The claimant appears to assert that his agency was obligated to promote him automatically upon meeting eligibility for a career ladder promotion. Documentation provided by the agency causes us to conclude that such promotions are not mandatory as may be provided for as a provision in a CBA. *See* B-190408, December 21, 1977, and B-186916, April 25, 1977. Furthermore, since such actions are not excluded from the relevant CBA, we may not address the underlying issue of the career ladder promotion in our adjudication of this claim for back pay. However, we note that since the career ladder promotion at issue was not effective on the dates suggested by the claimant, the general rule that a promotion may not be effective earlier than the date of approval by an authorizing official would prevail in the instant case. *See* 64 Comp. Gen. 844 (1985); B-219221, September 6, 1985; and B-217831, October 23, 1985.

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.

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