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

Claimant: [name]

Organization:	[agency component] Department of the Army Kaiserslautern, Germany
Claim:	Pay setting
Agency decision:	Denied
OPM decision:	Denied
<b>OPM contact:</b>	Robert D. Hendler
OPM file number:	06-0017

/s/ for

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

12/28/2006

Date

The claimant occupied a [GS-13] position at the [agency component], Department of the Army (DA), Kaiserslautern, Germany, at the time she filed her claim. She transferred there from the National Imagery and Mapping Agency (NIMA) (now the National Geospatial-Intelligence Agency) in Sterling, Virginia, on June 29, 2003. At NIMA, she was employed under the agency's payband system as a Contract Specialist at the NI-04 level, receiving a salary of \$81,785 per annum (including a locality adjustment of \$8,422). The claimant requests the Office of Personnel Management (OPM) reverse DA pay-setting actions by setting her pay at GS-13, step 00, at a salary of \$91,315, to provide the subsequent pay adjustments she believes she is due, and to code her records to recognize she is in receipt of retained pay. We received the compensation claim on October 27, 2005, and the initial agency administrative report (AAR) on July 14, 2006. We received additional documentation on October 2 and 3, 2006. For reasons discussed herein, the claim is denied.

The claimant stated she accepted the job in Europe based on the written salary offer of \$81,785, and would not have accepted the position had she been told the salary would be \$73,503 (GS-13, step 7). She further stated she made multiple life changing decisions based on the salary offer extended. The claimant indicated she is now expected to live on a salary that has been reduced by almost \$10,000 per annum, which is a significant hardship for her, and requested a retroactive pay adjustment.

In support of her claim, the claimant references pay setting rules that took effect May 1, 2005. The new regulations implemented section 301 of the Federal Workforce Flexibility Act of 2004, (Public Law 108-411, October 30, 2004), and significantly changed how pay setting involving locality rates are calculated. However, these pay setting rules were not authorized by law at the time of the claimant's transfer in 2003 and, therefore, have no force in deciding this claim.

The record shows that, prior to her transfer, the claimant was covered by NIMA's pay-banded system and policy, which did not have guidelines covering how employees would be converted out of the system. The record shows the DA job offer sent to the claimant in writing on April 30, 2003, stated her pay would be set at GS-13, step 00, at \$81,785 per annum, which was a retained rate of pay. The claimant received retained pay from the time of her transfer until January 2005, when during an internal review, the servicing DA human resources office determined she should not have been afforded retained pay (the AAR does not include a basis for this conclusion). The servicing agency human resources office adjusted her pay to GS-13, step 7, retroactive to her transfer date, following the maximum payable rate (MPR) regulations and procedures in effect at the time of her transfer to DA. Department of the Army's Civilian Human Resources Agency denied a request for a pay-setting variation on March 22, 2005.

Upon her transfer into a General Schedule (GS) position, determining the claimant's rate of pay was subject to OPM's pay-setting regulations in 5 CFR 531.203 in 2003, and the agency's pay setting policy in effect at the time of this action. USAREUR Regulation 690-530, Pay Setting Policy, August 24, 1995, paragraph 7, indicates the claimant's pay should have been set using the MPR rule.

The MPR rule allows an agency to set pay for a GS employee at a rate above the rate that would be established using normal rules, based on a higher rate of pay the employee previously received in another Federal job, i.e., his or her highest previous rate (HPR). The pay set under the MPR rule may not exceed the rate for step 10 of the GS grade of the position in which the

employee *is being placed* or be less than the rate to which the employee would be entitled under normal pay-setting rules. Therefore, the claimant's assertion that she should have been treated as occupying a GS-14 position ("I was in a Contract Specialist position at the NI-1102-04 (GS-1102-14(2) level") has no bearing on MPR. As stipulated in 5 CFR 531.203(c) in effect in 2003, MPR is determined as follows:

Step A: Compare the employee's HPR with the rates of basic pay in effect at the time the HPR was earned for the grade in which pay is currently being fixed. An employee's "rate of basic pay," as defined in 5 CFR 531.202 in 2003, excludes additional pay of any kind, such as locality pay. In this case, the claimant's rate of basic pay for determining HPR was \$73,363.

Step B: Identify the lowest step of the grade in which pay is currently being fixed, for which the rate was equal to or greater than the employee's HPR at the time the HPR was earned. If the employee's HPR was greater than the maximum GS rate for the grade, identify the step 10 rate. The claimant's HPR falls between steps 6 (\$71,461) and 7 (\$73,503) on the 2003 GS Salary Table. The lowest step that equals or exceeds \$73,363 is GS-13, step 7.

Step C: Identify the current rate of basic pay for the step identified in step B. This rate is the MPR of basic pay that may be paid the employee.

Therefore, GS-13, step 7, at \$73,503 was the maximum rate that could be paid to the claimant.

The claimant's pay would have been set at the same grade and step if the agency's pay setting policy was to provide pay retention under 5 U.S.C. 5363. Under the pay retention law and regulations in effect in 2003, an employee whose rate of basic pay is less than the maximum rate of the rate range is entitled to the lowest step that equals or exceeds the employee's existing rate of basic pay. As with the MPR rule in effect in 2003, locality pay was excluded from the definition of "rate of basic pay" and the 2003 GS Salary Table would have been used for the comparison. Pay retention ceases to apply to an employee's whose pay is set at or below the maximum rate of the range.

We are cognizant of the financial impact the claimant has suffered. However, payments of money from the Federal Treasury are limited to those authorized by law, even where this may cause hardship in individual cases. Also, it is well established that the misinformation provided by agency officials may not form the basis for the payment of a claim otherwise barred by law. *Richmond v. OPM*, 496 U.S. 414, 425-426; *Falso v. OPM*, 116 F.3d459 (Fed Cir. 1997); and 60 Comp. Gen. 417 (1981).

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. OPM concludes that the employee's pay has been properly set at GS-13, step 7, under the controlling MPR regulation, and no further adjustment is warranted.

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.