

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

**Claimant:** [name]

**Organization:** [agency component]  
FAM Service (FAMS)  
Transportation Security Administration  
U.S. Department of Homeland Security  
[city & State]

**Claim:** Promotion to former supervisory  
position and back pay

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 09-0018

//Judith A. Davis for

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Merit System Audit and Compliance

11/23/2010

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Date

On January 18, 2006, the U.S. Office of Personnel Management's (OPM) Center for Merit System Accountability (now Merit System Audit and Compliance) received a back pay claim from [claimant]. He requested "promotion to former Supervisory position, along with related back pay" or, if a permanent promotion is not warranted, "Full compensation of back pay from periods of April 2002 to February 2003, as well as documentation on an SF-50." OPM's January 25, 2006, letter returned the claim without action because the claimant had not submitted a copy of a final agency-level denial as required under section 178.102(a)(3) of title 5, Code of Federal Regulations<sup>1</sup>. The claimant subsequently filed his claim with his agency, the Transportation Security Administration (TSA), and resubmitted his claim to OPM after receiving a claim denial from TSA. OPM received the agency administrative report on June 19, 2009. For the reasons discussed herein, the claim is denied.

The claimant states he was originally hired on October 7, 2001, for a Federal Air Marshal (FAM) band H non-supervisory position. He states he began performing the duties of "Acting Federal Air Marshal-J Band Series Pay Grade (Acting Assistant to the Special Agent-In-Charge)-Acting ATSAIC... at the direction Acting Special Agent-In Charge, [name] [ASAIC], of the [city] Field Office." The claimant states he was tasked to supervise 2 of the 10 squads in the office, approximately 40 FAMs, and "performed the duties of Operations Officer in addition to the (2) supervisory positions." He states he "continued to hold the 2 supervisory positions until February, 2003" and then "resumed the duties of Operations Officer, which is a non-supervisory position." The claimant states [ASAIC] informed him he had requested the claimant be "permanently" promoted "to the supervisor position, but had not been given a final word from Headquarters." The claimant also states during the latter part of 2002 he was told by the new permanent SAIC that he, the claimant, would be "permanently promoted in a very short time." During February 2003, the claimant states he was informed by the SAIC that someone else would be filling the permanent supervisory position at which time the claimant "was delegated to Operations Officer duties."

The claimant describes his attempts to be compensated for the 11 months he performed supervisory duties, but states each time he raised this issue with his supervisors, he was told he "did not have a claim" and feels this proves he has "had a continuous claim that is current as of today." The claimant states the "employer...knew it was against the FLSA guidelines to refuse to compensate [him] for the time served in a supervisory position" and that the ASAIC "showed reckless disregard for the FLSA requirements." The claimant also states the ASAIC and other managers in the [city] Field Office "failed to make adequate inquiry into whether their conduct was in compliance with FLSA." Based on this description of agency management actions, the claimant states he feels his claim "meets the three statute of limitations guidelines. The beginning dates of the claiming [sic] period are February 2003 and today's date is January 4, 2006."

The agency decision states [city]FAMS management has acknowledged the claimant served as Acting ATSAIC between May 2002 and February 2003. The agency states:

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<sup>1</sup> OPM declined to accept the claim under the Fair Labor Standards Act (FLSA) since the subject matter of the claim does not pertain to the claimant's exemption status or FLSA overtime pay. Thus, the claimant's application of FLSA claims criteria, such as willful violation of the FLSA and fear of retaliation for filing a claim, will not be addressed further in this decision.

During the entire period of the claim you served as an Acting ATSAIC, your position of record remained Federal Air Marshal...In your claim you acknowledge that you were advised that an SF 50 could not be issued reflecting a promotion until a promotion was approved by FAMS headquarters. You further acknowledge that no such paperwork was ever submitted to promote you temporarily.

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FAMS records, as well as the documents you submitted with your claim, show that you served as an Acting ATSAIC in a temporary capacity, and no formal promotion-temporary or otherwise-was ever effected. Likewise, other than your promotion to I Band in October 2002, no permanent promotion recommendation was ever processed or approved.

TSA states it follows the Federal Aviation Administration's (FAA) Core Compensation Plan policy on temporary internal assignments (Human Resource Policy Manual (HRPM), Temporary Internal Assignments in the Core Compensation Plan, COMP-2.14). TSA states employees assigned to such positions on details are not entitled to pay increases as a result of details and, citing the aforementioned policy, states temporary promotions are not mandatory and are left to the agency's discretion.

TSA states pay adjustments are only available in conjunction with temporary promotions when they are effected in accordance with policy and regulation. Relying on decisions of the Comptroller General and OPM (Comp. Gen. A-27284, 1929; Carol A. Barraza, B-219221, September 6, 1985; and OPM Case #S9802480, March 31, 1999), TSA states the effective date of a promotion is based on, or occurs when, the promotion was approved in writing by an appropriate approving official. The agency states the record shows the claimant served in the Acting ATSAIC position on a "temporary internal detail assignment." Responding to the claimant, TSA states:

Even if you were verbally informed that you had been considered or recommended for a promotion, such promotion is not effective unless and until formal action has been documented and approved in writing. As you have acknowledged, no promotion-temporary or otherwise-was ever formally effected...No legal basis exists to authorize back pay for the period of time you were acting as an ATSAIC.

Public Law 104-50, November 15, 1995, codified at 49 United States Code (U.S.C.) § 40122, authorizes FAA to establish a personnel management system largely exempt from the provisions of title 5, U.S.C. (See 49 U.S.C. § 40122(g)(2)). FAMS remained covered by this statute when they were transferred organizationally to TSA (See 49 U.S.C. § 114(n)). HRPM, Temporary Internal Assignments in the Core Compensation Plan, COMP-2.14, issued under FAA's statutory human resources management authority, does not require promoting an employee who is temporarily performing work at a higher level: "Managers should exercise sound judgment when considering temporary promotions and details. There is no requirement to promote an employee who is doing temporary work at a higher level."

The claimant's requested remedy of permanent "promotion to former Supervisory position" is contrary to FAA regulation. HRPM, Temporary Internal Assignments in the Core Compensation Plan, COMP-2.14, states: "If a permanent assignment to the position WOULD require

competition (e.g., is to a position in a higher pay band or to an employee's first supervisory position), competition is required if the temporary promotion is to last longer than six months." The record does not show the claimant competed for a permanent promotion as required by FAA regulation. It is well established that a Federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims he should have been placed in a higher grade. *U.S. v. Testan*, 424 U.S. 392 (1976). The record also shows no promotion for the claimant was approved in writing by an appropriate approving official for the six months he would have been eligible for a noncompetitive temporary promotion. Thus, the claim for back pay from April 2002 to February 2003 must be disallowed.

The claimant also appears to base his claim on his good faith reliance on action by ASAIC [name] to promote him. It is well established that payments of money from the Federal Treasury are limited to those authorized by law, and erroneous advice or information provided by a Government employee cannot bar the Government from denying benefits which are not otherwise permitted by law. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, *rehearing denied*, 497 U.S. 1046, 111 S. Ct. 5 (1990). See also OPM file number S9700423; OPM file number 9700369, January 15, 1998; OPM file number S98001982, October 2, 1998; and OPM file number S001584, November 16, 1998.

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.

This settlement is final. 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.