

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

Claimant: [name]

Organization: [agency component]
Defense Finance and Accounting
Service (DFAS)
Department of Defense
Cleveland, Ohio

Claim: Correct pay setting upon promotion
from an Acquisition Demonstration
Project position to a National Security
Personnel System position in conjunction
with a geographic move

Agency decision: Denied

OPM decision: Denied

OPM file number: 09-0033

//Judith A. Davis for

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

2/25/2010

Date

The claimant, who retired on March 24, 2009, from a [YC-03] position with [agency component], DFAS, in Cleveland, Ohio, seeks to file a pay setting claim with the U.S. Office of Personnel Management (OPM). The claimant states DFAS failed to set his pay properly when he was promoted and geographically reassigned from an Acquisition Demonstration Project (ADP) position to a National Security Personnel System (NSPS) position on November 11, 2007. OPM received the claim on May 20, 2009, the agency administrative report (AAR) on July 9, 2009, additional information necessary to adjudicate the claim from the Defense Civilian Personnel Management Service on October 26, 2009, and comments on the AAR from the claimant on January 6, 2010. For the reasons discussed herein, the claim is denied.

The claimant's rationale is summarized as follows: DFAS failed to (1) process an SF-50 for a geographical reassignment from Vienna/Fairfax, Virginia, to Cleveland, Ohio, before taking any other action; (2) process an SF-50 converting him from his ADP position to the General Schedule (GS) under ADP conversion provisions (Federal Register, Volume 64, Number 5, Part VII) prior to promoting him to the an NSPS position; (3) determine his "full performance grade using the NSPS grade standard rule that was in effect on 11 Nov 2007, not an organization GS chart" [GS-15, not GS-14]; (4) process an SF-50 "for a full performance promotion with correct Paysetting [sic];" (5) process an SF-50 converting him to NSPS with the correct pay; and (6) process an SF-50 correcting his 2008 pay setting.

The agency denial states: (1) the ADP conversion provisions cited by the claimant are not applicable since they apply only to movement or conversion back to a GS position from the ADP; the claimant did not move from an ADP position to a GS position but rather from an ADP position to an NSPS position; (2) "the conversion-out procedures for employees transitioning to NSPS dated October 4, 2006 (Federal Register, Volume 61, Number 5)" [the proper citation is Federal Register, Volume 71, No. 192, October 4, 2006] are applicable to the claimant's situation; (3) the claimant's ADP NH-III position [NH-03 position] was found to be equivalent to an NSPS YA-02 position using Table SC1911-5 and SC1920, (3) placement in the YC-03 pay band was a promotion for which the claimant received a 10 percent pay increase; and (4) the YC-03 position is equivalent to GS-14, not GS-15, and if the claimant has concerns regarding how his position has been classified, he "may contact the Classification and Position Management Division and request a desk audit."

Movement into NSPS

Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990). This assumes Congress, when it passes a new statute, is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). In addition, it is a cardinal principle of statutory construction that a statute should be construed such that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). These same principles apply to the interpretation and application of regulations.

ADP Conversion-out Process (Federal Register, Volume 64, No. 5, January 8, 2009)

The claimant's proposed application of the ADP conversion process published in Federal Register, Volume 64, No. 5, January 8, 2009, is contrary to the plain language of the regulation which is limited to conversion from GS to ADP or conversion from ADP to GS. Thus, the claimant's reliance on this conversion process in his promotion from an ADP position into an NSPS position is misplaced; and we will not address this portion of his claim rationale further.

Federal Register, Volume 73, No. 188, September 26, 2008

The claimant's conversion rationale quotes extensively from NSPS regulations issued in Federal Register, Volume 73, No. 188, September 26, 2008. The principles contained in 5 CFR 531.205 and 5 CFR 536.303(b) cited by the claimant are referenced in and are part of these September 26, 2008, regulations. These regulations were effective November 28, 2008, were not in force during the period of the claim, and, therefore, do not apply to the claimant's promotion into an NSPS position effective November 11, 2007. Thus, the claimant's reliance on these regulations is misplaced; and we will not address this portion of his claim rationale further.

5 CFR 531.217

The claimant cites 5 CFR 531.217 regarding movement of an employee without a break in service to a GS position from a non-GS system in support of his claim.

Subpart C-Pay and Pay Administration, of Part 9901 of 5 CFR contains the implementing regulations for NSPS's compensation structure. Section 9901.301 of 5 CFR in force during the period of the claim states:

This subpart contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the structures and pay administration rules established under 5 U.S.C., chapter 53 and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902.

Thus, 5 CFR 531.217, an implementing regulation of 5 U.S.C., chapter 53, is not applicable to NSPS pay setting. Therefore, the claimant's reliance on this regulation is misplaced; and we will not address this portion of his claim rationale further.

Federal Register, Volume 70, No. 210, November 1, 2005

The NSPS pay administration regulations in effect at the time of this claim were initially issued in Federal Register, Volume 70, No. 210, November 1, 2005.

Section 9901.371 of 5 CFR states:

The terms "convert," "converted," and "converting," and "conversion" refer to employees who become covered by the pay system without a change in position (as a

result of a coverage determination made under § 9901.102(b)(2) and exclude employees who move from a noncovered position to a position covered by the NSPS pay system.

Thus, 5 CFR 9901.371 and the conversion process in Federal Register, Volume 71, No. 192, October 4, 2006, are not applicable to the claimant's movement into NSPS since the claimant changed positions when he was promoted from an ADP position to his NSPS position and moved from a noncovered position to a covered position. The claimant also was not reassigned (5 CFR 9901.352) into NSPS since he did not move "to a position in the same or comparable pay band" because the record shows he moved into a higher "comparable pay band" upon his placement in NSPS.

Section 9901.353 of 5 CFR is applicable to the claimant's movement into NSPS since the action was a promotion, and states:

Except as otherwise provided in implementing issuances, upon an employee's promotion, the employee will receive an increase in his or her rate of basic pay equal to at least 6 percent, unless this minimum increase results in a rate of basic pay higher than the maximum rate of the applicable pay band. An employee's rate of basic pay upon promotion may not be less than the minimum of the rate range.

Under 5 CFR 9901.103, basic pay: "means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by applicable law or regulation. For the specific purposes prescribed in § 9901.332(c) only, basic pay includes any local market supplement." Promotions are not listed as one of the specific purposes prescribed in 5 CFR 9901.332(c).

The NSPS implementing issuances in effect on November 11, 2007, in DoD 1400.25-M, do not directly address promotions into an NSPS position from a non-NSPS position:

SC1930.10.5, Setting Pay upon Promotion. A promotion occurs when an employee moves to a higher pay band, either within or across varying pay schedules and career groups regardless of the specific earning potential of the band, on either a temporary or permanent basis.

Under 5 CFR 9901.103, pay schedule: "means a set of related pay bands for a specified category of employees within a career group;" i.e., a career as defined in NSPS.

NSPS implementing instructions in place in DoD 1400.25-M during the period of the claim addressing movement from an ADP position to an NSPS position concern conversion from ADP into NSPS:

SC1911.3.1.2, Conversion from the Acquisition Demonstration Project. Acquisition demonstration project employees are placed in the career group and pay schedule that correspond to the occupational code and pay band of their position. NSPS pay band is assigned as shown in Table SC1911-5.

Table SC1911-5 converts “NH-BUS&TECH PROF, Level III”, the career group and pay band of the claimant’s ADP position, to NSPS schedule “YA-STND-PROF/ANALYTICAL” and NSPS “Pay Band 2.” Thus, while not directly applicable to the claimant’s situation, the agency used available NSPS implementing instructions to determine the NSPS-equivalent of the claimant’s ADP position “(Using Table SC1911-5 and SC1920 [Classification])”. Establishing the claimant’s NH-03 position as equivalent to the NSPS YA-2 level, it treated the claimant’s movement from the equivalent of a YA-2 position into a YC-3 position as a promotion and was at liberty to set the claimant’s pay anywhere within the range provided for in 5 CFR 9901.353. The claimant’s rate of basic pay (\$80,647) fell within both the YA-2 (\$38,824-87,039) and YC-3 (\$79,115-127,031) bands. The agency provided a 10 percent increase (\$88,712) which was more than the minimum six percent provided for in 5 CFR 9901.353 and was within the six percent to 20 percent increase permitted in SC1930.10.5.1. The agency then applied the Cleveland standard local market supplement (15.96 percent) to the claimant’s new rate of basic pay for a total salary of \$102,870.

The claimant’s reliance on the compensation and leave claims settlement authority in 31 U.S.C. § 3702(a)(2) to resolve what at heart is a classification issue is also misplaced; i.e., his assertion that his YC-03 position is equivalent to the GS-15 grade level. 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 appeals. Therefore, OPM may not rely on 31 U.S.C. § 3702(a)(2) as a jurisdictional basis for deciding position classification 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(a)(2), did not have jurisdiction to consider alleged improper job grading); *Connon R. Odom*, B-196824, May 12, 1980 (Comptroller General did not have jurisdiction to consider alleged improper position classification); OPM File Number 01-0016, April 19, 2001; OPM File Number 01-0045, January 7, 2002.

The clear and unambiguous language of 5 U.S.C. § 5112(b) requires OPM to adjudicate appeals under the provisions of subsection (a). This subsection requires OPM “ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position.” This statutory requirement is reiterated in section 5 CFR 511.607(a)(1) and cannot be met if the requesting employee no longer performs the work of the position he or she wishes to appeal. Therefore, the claimant’s apparent request to file a classification appeal with OPM on a position he never officially occupied; i.e., a GS-15 position, is barred by controlling statute and regulations. The claimant’s right to appeal the classification of the position he officially occupied prior to retirement; i.e., [YC-03 position], ended when the claimant vacated this position upon his retirement from Federal service.

Even assuming, *arguendo*, a favorable classification action had resulted from a classification appeal, the claimant may not be awarded back pay. It is well settled that employees are not entitled to back pay for periods of misclassification (5 U.S.C. § 5596(b)(3)). *See United States v. Testan*, 424 U.S. 392, 400 (1976) and *Erlyn D. Felder*, B-202685, August 17, 1982.

The claimant states the agency's pay setting determination "resulted in my loss of pay and affects my disability." However, the claimant's apparent attempt to seek Federal retirement benefits under 31 U.S.C. § 3702(a)(2) is similarly misplaced. Therefore, we will not respond further to this issue.

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. As discussed previously, we find the agency set the claimant's pay within the requirements of 5 CFR 9901.353. We find the methodology used was well reasoned and thus not arbitrary, capricious, or unreasonable. Therefore, the claim is denied.

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.