

Date: September 16, 2002
Claimant: [name]
File Number: 02-0023
OPM Contact: Deborah Y. McKissick

The claimant is an employee of the Department of the Army. He is requesting retroactive salary adjustment on his initial appointment to the agency. The Office of Personnel Management (OPM) accepted the claim on April 17, 2002, and received the agency administrative report on July 19, 2002.* The claimant requested and was granted an opportunity to respond to the agency administrative report. We received the claimant's response on July 26, 2002. For the reasons discussed herein, the employee's claim is denied.

The claimant stated that he was offered and accepted a superior qualifications appointment to an Attorney Advisor, GS-0905-12, step 6, position in June 2000. He began employment on July 17, 2000. The claimant noted that his first leave and earnings statement reflected that he was being paid at GS-0905-12, step 1. On March 17, 2001, the agency obtained approval from OPM to set his pay at GS-0905-12, step 6. In his response to the agency administrative report, the claimant stated that "apparent authority should be recognized as an independent basis" to grant relief.

The agency administrative report states that the claimant's superior qualifications appointment was officially approved after the effective date of his appointment due to an administrative error. A variance for the claimant's superior qualifications appointment became effective on March 25, 2001. The agency does not dispute the claimant's claim, but the agency referenced current compensation law and Comptroller General Decisions to substantiate its lack of legal authority to provide back pay to the claimant. 5 CFR 531.203(b) (5)

5 U.S.C. § 5333 states, "under regulations prescribed by the Office of Personnel Management which provide for such considerations as the existing pay or unusually high

*Effective June 30, 1996, the authority of the General Accounting Office to adjudicate the claims of Federal civilian employees for compensation and leave was transferred to OPM. See the Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514. Subsequent to the enactment of Pub. L. No. 104-53, Congress amended 31 U.S.C. § 3702 to codify the transfer. See the General Accounting Office Act of 1996, Pub. L. No. 104-316, § 202(n), 110 Stat. 3826.

or unique qualifications of the candidate, or a special need of the Government for his services, the head of an agency may appoint, with the approval of the Office in each specific case, an individual to a position at such a rate above the minimum rate of the appropriate grade as the Office may authorize for this purpose.”

OPM prescribes in 5 CFR 531.203(5) that, “each agency using the superior qualifications authority must establish appropriate internal guidelines and evaluation procedures to ensure compliance with the law, these regulations, and agency policies.” The agency had established guidelines to process a superior qualifications appointment.

Headquarters, U.S. Army Recruiting Command (HQ USAREC) provided internal policy guidelines on superior qualifications appointments in the USAREC Personnel Handbook, Chapter 3, Pay Administration, dated October 18, 1996. According to the agency’s handbook, the servicing civilian personnel office (CPO) “must forward all documentation for superior qualification appointments to the USAREC CPO for coordination and approval.” The agency stated that the paperwork for the claimant’s superior qualification appointment was not forwarded to the USAREC CPO prior to the effective date of his appointment on July 17, 2000. Since agencies do not have authority to approve variations, the agency requested, through its major command, and was granted a variance from OPM. The claimant’s step was changed to GS-0905-12, step 6, effective March 25, 2001.

A clerical error or administrative error may be corrected if the error prevents a personnel action from taking effect as originally intended. *Michael Kostishak*, B-248460, November 10, 1992. However, the word “intended” refers to the personnel action that actually was approved. OPM Ref. #1996-01638. *Thomas L. Wild*, B-240781, Feb. 5, 1991. The claimant’s superior qualifications appointment was not approved by the USAREC CPO prior to his effective date of appointment as prescribed by the internal policy of the agency. Hence, the personnel action to authorize setting the claimant’s pay at GS-0905-12, step 6, was not effective on the claimant’s employment effective date on July 17, 2000.

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Moreover, according to 5 CFR 178.105, the burden of proof is on the claimant to prove liability of the government and his or her right to payment. *Matter of Jones and Short*, B-205282, June 15, 1982. Thus, 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. We concur with the agency that the claimant was not affected by an unjustified or unwarranted personnel action that resulted

in the withdrawal, reduction, or denial of pay, since the variance that changed the claimant's step from GS-0905-12, step 1, to GS-0905-12, step 6, was not effective until March 25 2001. Therefore, the claim is denied.

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