

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

Claimant: [name]

Organization: San Diego International Airport
Transportation Security Administration
Department of Homeland Security
San Diego, California

Claim: Request for Pre-Appointment Compensation

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 06-0057

/s/ for

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

6/14/2007

Date

The claimant was employed by the Transportation Security Administration (TSA) in an excepted service position as [position], at the San Diego International Airport (SAN) from September 8, 2002, to October 5, 2002. He requests compensation for work performed in this capacity for the period of June 19, 2002, through September 7, 2002, prior to his actual date of hire. The Office of Personnel Management received the initial claim on July 8, 2003, which was returned pending the claimant's receipt of a formal written denial of the claim from the agency. The agency denial was subsequently issued on August 29, 2005. The claim was resubmitted to OPM and received on August 31, 2006, and the claim administrative report on November 29, 2006. For the reasons discussed herein, the claim is denied.

There are contradictory indications of the issues the claimant intends to include in his claim. The claim letter signed by the claimant refers only to "compensation for services rendered in 2002" and requests "full back pay with interest at the maximum rate which is owed me, along with any penalties and interest attached to the claim." However, the accompanying June 26, 2003, letter prepared by the claimant's attorney states "his claims consist of unpaid wages for hours worked and wrongful termination/discrimination for complaining about unpaid wages." The remedy sought consists of "wages, penalties, liquidated damages, attorney fees, costs, emotional distress damages relating to the retaliatory discharge and eligibility to become a Federal employee again." The claimant also requests a special hearing in connection with the claim.

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. Section 178.105 of title 5, Code of Federal Regulations (CFR); *Matter of John B. Tucker*, B-215346, March 29, 1985. 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 and under this authority we address the claimant's request for pre-appointment compensation. Section 3702 does not include any authority to assess penalties or to settle claims for liquidated damages (unspecified in the claim), costs (such as parking fees), or emotional distress damages. Section 3702 also does not include any authority to grant eligibility for future Federal employment or appeals of adverse actions, including removal from the civil service. The agency notified the claimant of the actions he could take within TSA if he believed the termination of his appointment resulted from discrimination based on race, color, religion, gender, national origin, disability, age, sexual orientation, or reprisal, and the time limits for taking such action. Complaints of discrimination are not within OPM jurisdiction.

The claimant was interviewed by the Federal Security Director (FSD) of the San Diego International Airport on June 19, 2002, for a position in [organizational component]. He states that during the interview he was given the assignment of preparing a press release and was told to report back on June 21, 2002. When he returned then with the completed assignment, he states that the FSD "assured claimant that he had the job and that it would take a couple of weeks for the paperwork to be processed in order for it to become official and for claimant to begin receiving his paycheck." In the meantime, he states that the FSD "told him to report back on Monday." The claimant alleges he continued to perform work for the following twelve weeks prior to his actual appointment, and he submitted a copy of a log he kept of the hours he worked. In this log he recorded visiting the work site intermittently during this period for several hours at a time. Some of these visits are identified as involving presumably work-related meetings and telephone calls, others relate to his efforts to secure appointment, and others are unannotated. The claimant was officially hired on September 8, 2002, under an excepted service appointment

not to exceed two years. The appointment was terminated on October 5, 2002, for conduct reasons. Prior to the effective date of the termination, the claimant was authorized two weeks of paid administrative leave to seek other employment.

The agency's position is that the claimant was a volunteer during the period in question and thus is not entitled to compensation for work performed prior to his actual appointment. The agency submitted a statement signed by the FSD wherein he states that, a few days after interviewing the claimant, he offered him a position in the organization but explained to him "the actual offer would have to be made through the government's contracted agency, NCS Pearson," and "the hiring process was lengthy." The FSD's statement continues that the claimant "understood how the job offer would be made and that it would take time," and "since he was unemployed at the time he volunteered to help in standing up the organization pending his actual hiring." The FSD also states "two other current employees assisted at SAN under the same voluntary circumstances," "each individual was allowed to set their own schedule and work load," and "neither [claimant] nor the other two future employees were ever led to believe nor was there an expectation of compensation for their assistance." The FSD further states "sometime prior to [claimant's] hiring, on the advice of local counsel, I recall specifically reiterating that his assistance was voluntary and that he was not entitled to any compensation." The agency also submitted signed statements from the two other employees referenced in the FSD's statement, who were working at SAN at the same time and under basically the same circumstances, wherein they state that they had volunteered their services to the SAN office prior to appointment without expectation or advisement of compensation and that they were unaware of any such commitment having been made to the claimant. The agency additionally states the FSD, local field counsel, and other members of the FSD's staff told the claimant on numerous occasions between June 19, 2002, and August 27, 2002, the claimant would not be paid for any service he chose to provide prior to his appointment.

The agency also notes that the claimant's contemporaneous log does not contain any entries indicating that he had a good faith belief he was entitled to compensation until he was actually hired, that a portion of the time for which he seeks compensation was, by his own log entries, devoted to his efforts to be hired, and that he accepted TSA's written offer of employment on September 3, 2002, which clearly established September 8, 2002, as his date of appointment.

The claimant counters that he did not consider himself a "volunteer" during the pre-appointment period. He states that since he was eventually hired as a salaried employee, he is entitled to and requests full compensation for that approximate twelve-week period, regardless of the actual hours worked.

Although the claim does not specifically state the basis for the requested compensation, the claimant is in effect alleging de facto employment, i.e., the rendering of services to the Government by an individual who was improperly or never actually appointed. There is considerable Comptroller General precedent addressing how these situations should be treated. A de facto employee is "one who performs the duties of an office or position with apparent right and color of an appointment and claim of title to such office or position." *Matter of: William A. Keel, Jr., and Richard Hernandez – Small Business Administration – De Facto Employee*, B-188424 (1977). A de facto employee must act in good faith with no indication of fraud. *Matter of: Jane Hartley, Susan Van Den Toorn, and Thomas Fletcher – Compensation for Services Prior to Appointment*, B-189351 (1977). The lack of an appointment presents no obstacle to de facto status and payment of unpaid compensation in cases where an individual has

rendered services under color of authority and in good faith with the reasonable expectation of compensation. *Lt. Colonel Robert G.M. Storey, 55 Comp. Gen. 109 (1975)*; Donald G. Stitts, B-216369, Mar. 5, 1985. In these cases, the individuals were treated as de facto employees because they began performing the duties of the positions to which they were subsequently appointed prior to their actual appointment when instructed by competent authority, i.e., with apparent right and under color of authority, with the reasonable expectation they would be paid.

For claims settled under OPM jurisdiction, the burden of proof is on the claimant to establish the liability of the government and his or her right to payment. The settlement of claims is based upon the written record only, which will include the submissions by the claimant and the agency. Section 178.105 of title 5, Code of Federal Regulations, *Matter of Jones and Short*, B-205282, June 15, 1982. 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. Section 178.105 of title 5, Code of Federal Regulations; *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.

The written record does not support the claimant's allegation he was directed by anyone in authority prior to his actual appointment to commence the duties of the [position] with the expectation he would be paid. First, the only written documentation he submitted consists of the names of former coworkers whom he claims knew he was working and not receiving wages during the period in question, along with a personal log of the dates and times he went to the worksite. However, nowhere in his claim does the claimant state he was instructed to commence the duties of the [position] by anyone in authority with the expectation or implication he would be paid for this work time. He did not submit any affidavits or signed statements from other individuals attesting to the fact that he was expected to commence the duties immediately in return for compensation, or any such affidavits or signed statements indicating he was led to believe this was the case.

The only place in the written record where the claimant alludes to any commitment having been made to him is in a letter attached to an October 4, 2002, email addressed to TSA Human Resources, wherein he states that two days after the interview the FSD had "given me 'his word' that I would well [*sic*] taken care of" and afterwards, when his appointment paperwork was in process, "promised that I was being taken care of" and "told me not to worry." However, these statements can be construed to mean other than an implied commitment of compensation, especially since in the same email the claimant indicates he was told the hiring process "could take some time."

Further, the claimant does not refute the agency's statement in its August 29, 2005, decision letter to him that "the FSD, local field counsel, and other members of the FSD's staff informed you on numerous occasions between June 19, 2002, and August 27, 2002, that you would not receive compensation for any service rendered prior to your appointment and that volunteer service to the government required additional administrative measures." He also does not refute the FSD's signed statement, referenced above, that he was specifically told the hiring process would take time and he, the claimant, volunteered his services in the interim. The claimant bases his claim solely on the fact of the work performed rather than on the conditions under which it was performed. Thus, since the claimant does not specifically deny or contradict the agency's account of the circumstances of this case, or submit written documentation to substantiate the

basis for his claim, there is no “clear and convincing evidence” which would compel us to reject the facts asserted by the agency.

Second, there is ample indication in the claimant’s submission that he was well aware he was not on the TSA payroll, that his appointment paperwork was still in process, and that he would not be paid until he was officially appointed to the position. In his initial claim letter dated July 16, 2003, he reports that “during their meeting on Friday, June 21, 2002, [FSD] assured claimant that he had the job and that it would take a couple of weeks for the paperwork to be processed in order for it to become official and for claimant to begin receiving his paycheck.” The claimant thus acknowledges he was told he would not begin receiving a paycheck until the appointment paperwork had been processed. Further, there are numerous references in his work log to his meeting with various individuals to resolve apparent problems associated with his resumé and expressions of his frustration with the length of time the hiring process was taking.

Third, the claimant was not, during the period in question, acting under color of appointment with respect to the position to which he was ultimately appointed, rendering services in good faith with reasonable expectation of compensation. The claimant’s e-mail copy of what is identified as his September 20, 2002, letter to President Bush indicates the claimant initially expected appointment as Director of Public Relations, not the [position] to which he was ultimately appointed. During this period, consisting of 58 work days (including two Federal holidays) or 464 work hours, the claimant self-reports in his work log having gone to the work site only 2-3 times per week for a total of 24 days. On those days when he recorded the number of hours spent at the work site, he reports having stayed for 3-5 hours for a total of 66.25 hours. He recorded only his arrival time for seven of those days. Based on his work log entries, on at least four of those days his sole purpose for being at the work site was to pursue appointment. Thus, the claimant was not comporting himself in a manner consistent with “apparent right and color of an appointment.” He was going to the work site only intermittently and for a few hours at a time. He was not acting as if he had been appointed to the position to which he was ultimately appointed and thus had a reasonable expectation of compensation.

The claimant has not established his right to compensation for work performed prior to his appointment. The written record contains no evidence that would indicate the claimant may be considered a *de facto* employee for the period in question. The compensation claim is accordingly denied.

We note that under 5 CFR § 550.807, an employee or an employee’s personal representative may request payment of reasonable attorney fees related to an *unjustified or unwarranted* personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. That is, the employee must prevail in his or her case in order for payment of attorney fees to be considered. Since the claimant was not an employee and his claim is denied, there is no provision for the payment of attorney fees.

We note that the claimant requested full compensation for the period in question, regardless of how many hours he actually worked, citing 29 CFR § 541.118(a). This regulation has no relevance to the case at hand and further does not provide any basis for paying full salary to Federal employees regardless of hours worked. This is a Department of Labor regulation defining the salary test for a *private sector* employee to be exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). Under the section 4(f) of title 29, U.S.C, OPM administers FLSA in the claimant’s former employing agency. OPM must

harmonize its implementation of the FLSA with other statutory Federal compensation pay level practices. *Billings v U.S.*, 322 F.3d 1328, (Fed. Cir.2003)). Federal employees may only be paid for time not worked when authorized leave is used. The basic workweek for full-time Federal employees is 40 hours (5 CFR § 550.103). Under chapter 61 of 5 U.S.C., Federal employees and OPM's FLSA regulations, employees may only be paid for hours actually worked (see 5 CFR § 551.401) or when authorized leave is used. Even had the claimant been an employee, his request to be paid full salary for the limited number of hours he claims to have worked conflicts with controlling statutes and their implementing regulations.

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.