

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

Claimant: [name]

Organization: [agency component]
Drug Enforcement Administration
U.S. Department of Justice
Sterling, Virginia

Claim: Retroactive promotion and back pay

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0015

//Robert D. Hendler

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Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

8/3/2010

Date

In his November 30, 2009, claim request which the U.S. Office of Personnel Management (OPM) received on January 11, 2010, the claimant seeks to reverse the Drug Enforcement Administration's (DEA) November 17, 2009, grievance decision denying his request for retroactive promotion and back pay due to "an excessive delay in the implementation of [his] promotion due to clerical error." We received the agency administrative report (AAR) on February 16, 2010, and the claimant's comments on the AAR on February 22, 2010. For the reasons discussed herein, the claim is denied.

The claimant states that "[o]n April 24, 2008 the DEA Career Board (Board) provided final approval for [his] promotion from GS-13 [position title] to GS-14 [position title]." As "an impact promotion," the claimant states the promotion "was to take place immediately." The claimant describes his follow-up efforts when the promotion had not been implemented a full pay period after the Board's action. The claimant states:

The DEA Career Board actions are the last approval step for promotions, assignments and reassignments at the GS-14 level and higher within the DEA. The Career Board's actions are not recommendations, but directives. In fact, their decisions are binding upon employees and are typically implemented with speed. By all accounts, the Office of Forensic Sciences and the Career Board, the two entities with the authority to grant promotions in my case, intended for my promotion to be implemented immediately following the April 24, 2008 Career Board action. Apparently this did not happen due to the misplacement of my SF-52s [sic], a clerical error....

.....

Furthermore, the basis of the DEA HRD [Human Resources Division] denial is that the completed SF-52 was not received by the HRD until July 1, 2008. This is in contrast with the DEA [agency component's] firm belief that a SF-52 was provided with the original promotion packet that went to the Career Board in April of 2008. Regardless, the submission of any documentation, including the SF-52, was outside my control and authority and it is not reasonable that I be held responsible for a clerical error.

The claimant cites OPM Compensation and Leave Claim Decision #S000453 in support of his view that retroactive promotions are permitted in certain situations:

As a general rule, personnel actions may not be made retroactive. However, a number of exceptions to this rule have been recognized, and you suggest that either of the following exceptions justify back pay in these cases: (1) the promotions were not effected as intended by the person having the authority to grant the promotion, or (2) the promotion is a matter of nondiscretionary policy

The AAR describes the series of events that resulted in HRD not receiving the SF-52 in question until July 1, 2008, and states: "Based on regulations for setting effective dates of personnel actions, the appointing officer completed the appropriate regulatory reviews on July 3, 2008 and the SF-50 was made effective on July 6, 2008." The AAR cites 5 CFR 250.101 instructing agencies to comply with OPM's *Guide to Processing Personnel Actions* in setting effective dates for specific personnel actions. The agency cites its procedures for processing SF-52s (Request

for Personnel Action) and states it requires the HRD appointing officer to “approve the action indicating that the proposed action is in compliance with statutory and regulatory requirements. DEA Career Board decisions on proposed promotions are not exempt from these procedures.” Because the appointing official did not approve the action until July 3, 2008, with an effective date of July 6, 2008, the agency states a retroactive effective date is not legally permissible. The AAR also states “DEA does not have a nondiscretionary regulation or policy that requires the promotion action to be implemented and the claimant was not deprived of a right granted by statute or regulations.”

In his February 22, 2010, response to the AAR, the claimant restates his original rationale, relying on the previously cited OPM claim decision. The claimant asks:

for common sense to be applied. Paperwork was lost through no fault of mine or anyone who initiated or approved my promotion. My promotion was approved at the highest level, well before July of 2008 and was not implemented in a timely manner and would not have been implemented to this day without significant effort and intervention. The fact is, DEA HR is bound to implement the actions of the DEA Career Board, which they did not do in my case.

It is well established that the effective date of a change in salary resulting from an administrative action is the date action is taken by the administrative officer vested with the necessary authority or a subsequent date specifically fixed by that administrative officer. As discussed in OPM Compensation and Leave Claim Decision #01-0020 (May 19, 2001):

in cases involving approval of retroactive promotions on the ground of administrative or clerical error, it is necessary that the official having delegated authority to approve the promotion has done so. Thus, a distinction is drawn between those errors that occur prior to approval of the promotion by the properly authorized officials and those that occur after such approval but before the acts necessary to effectuate the promotion have been fully carried out. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request. Where the error or omission occurs before he exercises that discretion, administrative intent to promote at any particular time cannot be established.

B-190408, December 21, 1977

The claimant misreads OPM Compensation and Leave Claim Decision #S000453. The AAR shows the HRD appointing officer, and not the claimant’s supervisors or the DEA Career Board, functions as the DEA “authorized approving official.” Because promotion authority is discretionary with the agency official granted such authority, an employee is not entitled to a promotion until such promotion authority has been exercised. Inasmuch as the official who was delegated authority to approve such promotions had not made the claimant’s promotion effective until July 6, 2008, there is no statutory authority under which a retroactive promotion and back pay can be awarded. See B-183969, B-183985, July 12, 1975.

The claims jurisdiction of this office is limited to consideration of legal liability. OPM has no authority to authorize payment based solely on equitable considerations. 63 Comp. Gen. 50 (1983); OPM Compensation and Leave Claim Decision #S004004, December 29, 1999. OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. See *Frank A. Barone*, B-229439, May 25, 1988. Where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, Mar. 15, 1982, as cited in *Philip M. Brey*, *supra*.

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.