



United States
**Office of
Personnel Management**

Washington, DC 20415-0001

In Reply Refer To:

Your Reference:

Date: July 22, 2004

Claimant: [name]

File Number: 03-0001

OPM Contact: Robert D. Hendler

On October 18, 2000, the claimant's representative submitted a claim on behalf of the claimant to the U.S. Office of Personnel Management (OPM) for back pay and requested that we acknowledge it for purposes of tolling the statute of limitations. In our November 17, 2000, response, we acknowledged receiving the claim, but advised the representative that the denial of [claimant's] claim by his employing agency had to be completed before a formal claim could be submitted to OPM. We received the formal claim on October 2, 2002, and the agency administrative report on December 8, 2003. For the reasons discussed herein, the claim is denied.

The representative states that the claimant was responsible for the operations of the Roads Department for the [agency component], Bureau of Indian Affairs, U.S. Department of the Interior, at [city & State], and "should be compensated for the actual duties and responsibilities assigned to him." He says that the claimant assumed the role of Acting Branch Chief on May 20, 1994, and was responsible for the operation of the Roads Department for about five years. The representative states that the claimant performed these duties in a job graded as an Engineering Equipment Operator, WG-5, continued to perform these duties when he was promoted to an Engineering Equipment Operator, WL-8, job on May 15, 1995, and when he was subsequently promoted to Equipment Operator Supervisor, WS-7, on August 1, 1999.

The claimant's representative states that several supervisors told the claimant that they would "upgrade him to Engineering Equipment Operator Supervisor, WS-10." The written statements from co-workers and supervisors that he provided in support of the claim include a statement from one former co-worker that the claimant performed the same duties as WS-10 and WS-8 road maintenance supervisors who had worked under his own supervision at other Bureau of Indian Affairs activities. Other statements support the claimant's contention that he was in charge of the road maintenance function and that [agency component] managers stated that the claimant was placed in an acting status as the Road Maintenance Foreman/Supervisor. One statement describes the claimant as supervising maintenance personnel, scheduling work activities, acquiring and repairing of equipment, purchasing materials needed for road maintenance, staffing the department, and budgeting. Another statement describes the claimant as having "signed all personal (sic) evaluations;

leave forms and all road department forms as supervisor...all time and attendance for all Road Department crews... [exercised] the responsibility of employee work schedules, equipment repairs and purchasing; he has done all right of ways and easements and all the budget planning." The documentation submitted includes authorizations signed by the claimant to obligate funds.

The agency administrative response, written as a result of a congressional inquiry, states that there is insufficient documentation to support the claim. The report states that the claim does not specifically indicate what supervisory functions the claimant was performing and questions whether he was performing leader or supervisory duties. The agency report states that until the claimant's Supervisory Engineering Equipment Operator, WS-5716-7, job was established on June 8, 1999, the road construction and roads maintenance functions were not organizationally separated and the road program, at that time, required a qualified engineer to oversee the operation. Based on its review of the appellant's official personnel folder, the agency states that he would not have qualified for the position and would not have been eligible for a temporary promotion.

To establish a claim for back pay based on a detail to a higher-graded position, a claimant must show that (1) an agency regulation or agreement requires a temporary promotion for such a detail to a higher-graded position, and (2) the claimant, was in fact, detailed to a higher-graded position. See *Philip M Brey*, B-261517 (December 26, 1995); *Martin Kirchhausen*, B-261661 (December 26, 1995); and *Everett Turner and David L. Caldwell ("Turner-Caldwell JJ")*, 61 Comp. Gen. 408 (1982); and *Albert C Beachley and Robert S. Davis*, 61 Comp. Gen. 403 (1982). The claimant has the burden of proving that he was detailed to and performed the duties of the higher-graded position. *Philip M Brey, supra*; *Martin Kirchhausen, supra*.

Federal regulations do not mandate temporary promotions to employees detailed to perform higher-graded duties for more than 120 days, and therefore cannot receive back pay for said duties. *Matter of Evelyn O. Cheeseboro*, B-217830 (August 29, 1985). While Federal law prohibits agencies from detailing employees for more than 120 days unless the detail has been renewed, it is well settled that the failure of an employing federal agency to comply with the 120 days restriction does not result in entitlement to back pay. *United States v. Testan*, 424 U.S. 392,400 (1976); *Wilson v. United States*, 229 Ct. CL 510 (1981); and *Everett Turner ("Turner-Caldwell III"), supra*.

The claimant does not assert that applicable agency regulations or agreements required that he receive a temporary promotion. In fact, the claimant has provided no official documentation detailing him; i.e., a Standard Form 50, Notification of Personnel Action, or a Standard Form 52, Request for Personnel Action. Generally speaking, where the official record does not support a claim, the claim must be denied. See 4 C.P.R. § 31.i. See also *Nathaniel C Carter*, B-238487 (May 25, 1990); *Jones and Short*, B-205282 (June 15, 1982); and *Wade B. Bumgardner*, B-184795 (August 5, 1976). However, the lack of official documentation is only one of the reasons why the claim for back pay has been denied.

An employee is entitled to salary only for the position occupied, even when performing duties of a higher-graded position. Comptroller General Decision B-240239 (October 29, 1990). The claimant's representative rejects the agency rationale, stating that "it would not be unusual for a job to be classified as a professional job, when the duties did not actually

require a professional. The Bureau of Indian Affairs apparently recognized this when it separated the roads construction and roads maintenance function in 1999." The statements provided by the claimant's representative do not establish that a higher-graded position existed to which the claimant could be detailed. On the contrary, documents provided by the representative show that the claim is based on the claimant performing one aspect; i.e., the road maintenance function, of a position that was responsible for both the road maintenance and road construction programs.

We note that even though 5 U.S.C. § § 5112 and 5346 (c) authorize OPM to decide position classification and job grading appeals, respectively, OPM's authority to adjudicate compensation and leave claims flows from a different law- 31 U.S.C. §3702. The authority in section 3702 is narrow and limited to adjudication of compensation and leave claims. Section 3702 does not include any authority to decide position classification or job grading appeals. Therefore, OPM may not rely on 31 U.S.C. § 3702 as a jurisdictional basis for deciding position classification or job grading appeals and does not consider such appeals within the context of the claims adjudication function that it performs under section 3702. *Cf Eldon D. Praiswater*, B-198758, December 1, 1980 (Comptroller General, formerly authorized to adjudicate compensation and leave claims under section 3702, did not have jurisdiction to consider alleged improper job grading); *Conan R. Odom*, B-196824, May 12, 1980 (Comptroller General did not have jurisdiction to consider alleged improper position classification).

The representative states that "The disappointing part of the Bureau's response is their lack of investigation. It appears that they looked at the papers involved which does not tell much of the story and did not talk with a single witness who would be able to tell them what really happened." OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. *Frank A. Barone*, B-229439(May 25, 1998).

As a general rule, Federal government employees are entitled only to the salaries of the positions to which they are appointed, regardless of the duties they actually perform. Thus, even if a position to which an employee is appointed is subsequently reclassified to a position of higher grade, entitlement to the pay of the higher grade does not commence until the employee is actually appointed to the higher grade. A Federal employee performing the duties of a higher-graded position is not entitled to the salary of the position until the employee is actually promoted to the higher-graded position. *Cynthia A. Griffin*, B-254444 (December 8, 1993). Delays in reclassifying a position to a higher grade do not provide a basis for back pay. Comptroller General Decision B-245737 (November 25, 1991). Where the record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. *Jones and Short*, B-205282, June 15, 1982. Since the claimant was never officially detailed to and cannot show that he performed the full range of the Supervisory Civil Engineer position, that portion of his claim is denied. The claimant was not assigned to the WS-7 level job until August I, 1999. Accordingly, the claimant cannot be retroactively awarded back pay for the period prior to the effective date of his promotion to the WS-7 job. Therefore, that portion of his claim is denied.

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.

¹On October 31, 1996, OPM published a *Federal Register* notice stating that it would apply to any authority transferred from GAO any applicable GAO regulations in effect at the time of the transfer. 61 Fed. Reg. 51730.