

Date: March 16, 2006

Claimant: [name]

File Number: 05-0016

OPM Contact: Robert D. Hendler

The claimant currently occupies a [position] with the U.S. Department of the Justice (DOJ), Criminal Division, in Washington, DC. She requests that the U.S. Office of Personnel Management (OPM) direct her agency to provide her an equalization allowance based upon her reemployment by DOJ after completing a period of service with the United Nations. We accepted the claim on June 10, 2005. For the reasons discussed herein, the claim is denied.

The claimant states that she was transferred to the United Nations pursuant to 5 U.S.C. §§ 3581-3584 and implementing regulations 5 CFR 352.301-352.314. She cites a September 1, 2000, letter from the DOJ's Criminal Division which states: "upon reemployment by the Department of Justice, the equalization allowance established by the provisions of 5 C.F.R. [sic] 352.310 will be applied." In support of her claim, she points to another DOJ employee who "went to the United Nations, the same office as me and has already received equalization allowance," and provided copies of documents in support of that assertion.

The agency administrative report's claim denial states that it is:

based on the abolishment of the provision for equalization pay through the passage of Public Law 105-277, Section 2504, and the FY 98-99 Foreign Relations Act....These provisions were codified in 5 USCA 3582 in 1998....

OPM does not conduct adversary hearings, but settles claims on the basis of the written record involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. 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, March 15, 1982.

The claimant's rationale is two-pronged: first, that she was informed by DOJ that she would receive equalization pay upon her reemployment at the end of her assignment to the United Nations and, second, that another DOJ employee, now employed by the Department of Homeland Security (DHS) received equalization pay under similar circumstances. In effect, the claimant seeks, in part, to estop the Federal Government from denying her benefits because she expected to receive equalization pay, but the agency declined to do so. 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). Detrimental reliance is not a legal basis for the payment of appropriated funds. 56 Comp. Gen. 943 (1977). It is well established that the Government cannot be estopped from denying benefits that are not permitted by law, even where the claimant relied on mistaken advice from a Government official or agency. A claim for payment of money from the U.S. Treasury contrary to a statutory appropriation is prohibited by the Appropriations Clause of the Constitution, Art. I, 9, cl. 7. Recognition of equitable estoppel could nullify the clause if agents of the Executive agency were able, by their unauthorized oral or written statements, to obligate the U.S. Treasury contrary to the wishes of Congress. See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), *Falso v. Office of Personnel Management*, 116 F.3<sup>rd</sup> 459 (Fed Cir. 1997), and *Melvin Ackley, Jr.*, B-200817, April 21, 1981. Therefore, the claimant's rationale for equitable estoppel must be rejected. DOJ's September 1, 2000, letter and DHS's action on what the claimant describes as a case similar to her own may not influence, impact, or control our decision in this matter if they are contrary to law. As stated previously, the claims jurisdiction of this office is limited to consideration of legal liability.

The disposition of this claim rests on the proper application of law and regulation concerning equalization pay. The equalization pay provisions of 5 U.S.C. § 3582 were terminated by the enactment of Public Law 105-277 (October 21, 1998), section 2504(a), codified at 5 U.S.C. § 3581(b)(2) in 1998. We note that the current implementing regulations at 5 CFR 352.310 provide for "equalization allowance." However, as statute supersedes regulation, we must find that the agency erred in its September 1, 2000, letter to the claimant and properly denied equalization pay to her in its February 9, 2004, memorandum. Therefore, the claim is denied.

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.