

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

Claimant: [name]

Organization: [airport]
Transportation Security Administration
Department of Homeland Security
[city & State]

Claim: Request for Back Pay for Delayed Promotion

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 06-0012

/s/ for

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

11/1/2006

Date

Introduction

The claimant separated from the Transportation Security Administration's (TSA) [airport] component on November 12, 2005. He requests the Office of Personnel Management (OPM) assist his attempts to receive back pay from his former agency due to the agency's delay in processing a promotion action. OPM received this claim on February 16, 2005, and the agency's administrative report (AAR) on March 30, 2006. For the reasons discussed herein, the claim is denied.

The claimant asserts September 22, 2002, was the proposed effective date of his promotion from Supervisory Transportation Security Screener, SV-0019, Grade G, to Screening Manager, SV-0019, Grade H. He and another employee were verbally offered and accepted the position by telephone at the same time. Ten employees received temporary promotions to Screening Manager positions with September 22, 2002, effective dates. However, despite numerous follow-up actions, the claimant's paperwork was never processed. The claimant believes the human resources contractors repeatedly misplaced his personnel action requests. On August 10, 2003, he received a temporary promotion, not to exceed February 9, 2004, to a Screening Manager position. The claimant believes he is entitled to backpay for the period from September 22, 2002; i.e., the proposed effective date of his promotion, to August 9, 2003; i.e., the actual effective date of his promotion.

Initially, the claimant filed a backpay claim under the Fair Labor Standards Act (FLSA) provisions in section 4(f) of title 29, United States Code (U.S.C.). OPM's August 2, 2004, decision denied his claim as the position is exempt from FLSA provisions, and indicated the claim must be adjudicated as a compensation claim under part 178 of title 5, Code of Federal Regulations (CFR). Since he had not received a final agency decision on the matter, he was advised to file such a claim as required under section 178.102(a)(3) of title 5, Code of Federal Regulations.

Jurisdiction

TSA asserts in its March 22, 2006, final agency decision on this back pay claim that TSA's Transportation Security Officers (TSOs) are not subject to OPM jurisdiction with regard to compensation issues. It specifically states:

When TSA was created pursuant to the Aviation and Transportation Security Act of 2001 (ATSA), Congress gave the TSA Administrator (formerly the Under Secretary of Transportation for Security) exclusive jurisdiction over personnel and compensation actions involving TSOs. Section 111(d) of ATSA, codified at 49 U.S.C. § 44935, Note, authorizes the TSA Administrator to "employ, appoint, discipline, terminate and fix the compensation, terms, and conditions of employment" for the screening workforce "[n]otwithstanding any other provision of law." Therefore, OPM does not have the authority to review TSA actions on claims such as yours.

TSA apparently asserts its authority over all compensation and benefits matters for screener personnel is without limit based on language of section 111(d) of the ATSA:

SCREENER PERSONNEL – Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.

Analyzing the agency's position regarding OPM's jurisdiction over compensation claims requires an understanding of basic principles of statutory construction. It is well settled that "[t]he starting point for interpretation of a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990), citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

Further, laws in *pari material* (i.e., upon the same subject matter) must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-566 (1845); *Alexander v. Mayor and Commonality of Alexandria*, 9 U.S. (5 Cranch) 1, 7-8 (1809). This assumes that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). Where the provisions of two different statutes may be read together to give effect to provisions in both statutes, such an interpretation will prevail. If possible, the provisions of both statutes must be given effect unless: 1) provisions of one statute conflict with the other so as to require a different reading, 2) the later-enacted statute amends or overrides the provisions of the previously-enacted statute, or 3) provisions of one statute specifically authorize a different reading (e.g., statutory language specifically excludes one statute from coverage under another).

We agree section 111(d) of the ATSA provided apparent unfettered discretion to the agency to "fix the compensation" of and "establish levels of compensation" for screener personnel. However, we reject the agency's assertion that the application of OPM's compensation and leave claims settlement authority under 31 U.S.C. § 3702 and 5 CFR, part 178, to the screener workforce interferes or conflicts with either of these authorities. The language relied upon by the agency in determining these provisions do not apply to its employees generally speaks to pay setting, not to compensation claims adjudication authority. The plain language of the ATSA does not support the exclusion of TSA employees from OPM's compensation claims adjudication authority. It is noteworthy that numerous other agencies have been granted independent pay authorities conferred by similar statutory language and are still subject to OPM's compensation claims adjudication authority. See, e.g., 7 U.S.C. § 2, 12 U.S.C. § 1441a, 12 U.S.C. § 2245.

Eligibility for back pay does not conflict with or interfere in any way with TSA's authority or ability to establish rates or levels of compensation, as it is not a benefit within the common meaning of the term, e.g., health, life insurance, and retirement benefits. ATSA's statutory

language neither provides claims settlement authority to TSA nor excludes screener employees from the compensation and leave claims settlement provisions applicable to Federal civilian employees under 31 U.S.C. § 3702, including corrective action under the Back Pay Act codified at 5 U.S.C. § 5596. Therefore, this claim is subject to OPM's compensation claims adjudication authority. This jurisdictional analysis was shared with the agency in a previous claim decision.

Analysis of claim

In the claimant's situation, one of the interviewing officials verbally notified the claimant of his selection for a Screening Manager position and received his acceptance. The claimant was advised to turn in a copy of his SF-50 Notification of Personnel Action so paperwork could be processed by the human resources office. According to the record, the claimant assumed Screening Manager duties along with the other ten individuals. He contacted agency officials to determine the reasons for the delay in processing the promotion action; he said the personnel action request was sent to the human resources office several times and was repeatedly lost.

The AAR indicated there was no documentation showing the claimant should have been promoted in September 2002; i.e., no vacancy announcement or job advertisement, no documented interview, no selection certificate with his name, and no record of his promotion having been initiated. The record indicates the first personnel action submitted to promote the claimant was reviewed for qualifications and eligibility and approved for the effective date of his temporary promotion August 10, 2003. This temporary promotion, as documented in the SF-50, was made effective on August 10, 2003, but was not signed by the agency's authorized approving official until October 22, 2003. We assume the appropriate official approved the SF-52 Request for Personnel Action at an earlier date.

As discussed in Title I of the Civilian Personnel Law Manual, Chapter 7, Subpart B:

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, unless his exercise of disapproval authority is constrained by statute, administrative policy, or regulation. Where the error or omission occurs before he exercises that discretion, administrative intent to promote at any particular time cannot be established. After the authorizing official has exercised his authority by approving the promotion, all that remains to effectuate that promotion is a series of ministerial acts. In that case, since administrative intent to promote is established, retroactive promotion as a remedy for failure to accomplish those ministerial acts is appropriate. 58 Comp. Gen. 59 (1978) and B-190408, December 21, 1977.

The TSA AAR indicated TSA's authorized approving official in headquarters approves promotion requests after an individual's qualifications and eligibility for the position are reviewed. Because promotion appointment authority is discretionary with the agency official

granted such authority, an employee is not entitled to a promotion until such appointment authority has been exercised. Inasmuch as the official who was delegated authority to approve such promotions had not done so prior to August 10, 2003, there is no statutory authority under which a retroactive promotion and back pay; can be awarded. B-183969, July 2, 1975; B-183985, July 12, 1975; OPM decision S9802480, March 31, 1999. Consequently, the claimant cannot be retroactively awarded back pay and his promotion cannot be made effective on September 22, 2002. Therefore, the claim is denied.

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, March 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.