

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

Claimant: [name]

Organization: [agency component]
Department of the Army, Europe
Kaiserslautern, Germany

Claim: Pay setting; Retroactive pay

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 06-0016

/s/ for

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

1/8/2007

Date

The claimant occupies a [GS-15] position with the [agency component], U.S. Army, Europe, Kaiserslautern, Germany. He was previously employed by the Army Aviation and Missile Command, Department of the Army (DA), Redstone Arsenal, Alabama, as part of the Department of Defense (DoD) Civilian Acquisition Workforce Demonstration Project (Project), at the NH-346-4 level, receiving a salary of \$113,016 per annum (including a locality adjustment of \$11,648). He asks the Office of Personnel Management (OPM) to set his pay at GS-15, step 10, retroactively to January 9, 2005, in accordance with the "official job offer" made to him stating that salary rate. OPM received the compensation claim on October 27, 2005, and the initial agency administrative report (AAR) on July 6, 2006. We received additional documentation from the agency on October 3, and 18, 2006. For reasons discussed herein, the claim is denied.

The claimant stated he confirmed the salary offer of \$113,674 twice before accepting the job in Germany, and would have declined it if he had known he would be accepting a new salary \$11,660 less than his current salary. The claimant further stated this administrative error has caused great personal hardship to him, his family, and to his new organization. He asked OPM to consider his appeal and set his pay at the GS-15, step 10, in accordance with the official job offer made to him, retroactive to his first duty day at the overseas location. The Army Civilian Human Resources Agency denied a request for a pay-setting variation on March 22, 2005.

The record shows the servicing Civilian Personnel Operations Center (CPOC) determined its salary offer was incorrect and set the claimant's pay at GS-15, step 6, upon his January 9, 2005, reassignment to Germany. In February 2005, the CPOC cancelled the original SF-50, Notification of Personnel Action, documenting his reassignment and issued a revised SF-50, re-setting the claimant's pay at GS-15, step 7. It appears the CPOC processed this action based on receipt of SF-50s, dated January 9, 2005, from the claimant's former installation identifying a higher salary due to the claimant's Project contribution rating and general pay increases and a locality pay adjustment.

The Federal Register/Volume 64, No. 5, January 8, 1999, pages 1483-84, contains the controlling Project procedures applicable to a Project employee moving to a General Schedule (GS) position not under the Project. These procedures require the employee's Project pay band and demonstration rate of pay first be converted to a GS grade and a GS rate of pay. These must be determined before movement or conversion out of the Project and any accompanying geographic movement, promotion or other simultaneous action. The converted GS grade and rate will become the employee's actual GS grade and rate after leaving the Project (before any other action). Determining the employee's rate of pay involves first setting the employee's grade and then setting the employee's rate of pay following the provisions of the guidelines cited above.

An employee is converted to one of the grades in their current broadband level according to the following rules:

- (i) The employee's adjusted rate of pay under the demonstration project (including any locality payment) is compared with the step 4 rate in the highest applicable GS rate range. (For this purpose, a GS rate range includes a rate range in (1) the GS base

schedule, (2) the locality rate schedule for the locality pay area in which the position is located, or (3) the appropriate special rate schedule for the employee's occupational series, as applicable.)

- (ii) If the employee's adjusted Project rate equals or exceeds the applicable step 4 rate of the highest GS grade in the band, the employee is converted to that grade.

In converting the claimant to a GS grade and pay rate, the Huntsville, Alabama, 2004 Locality Salary Table must be applied since the initial conversion must be done prior to movement out of the Project and before any pay actions. When applying the conversion provisions to the claimant, his adjusted salary of \$113,016, in effect on January 8, 2004, before movement out of the Project, exceeds the step 4 rate on the GS-15 locality pay scale. Therefore, his converted grade is GS-15.

An employee's pay within the converted GS grade is set by converting the employee's Project rate of pay to a GS rate of pay in according with the following rules:

- (i) The pay conversion is done before any geographic movement or other pay-related action that coincides with the employee's movement or conversion out of the Project.
- (ii) An employee's adjusted rate of pay under the Project (including any locality payment) is converted to a GS rate on the highest applicable rate range for the converted GS grade. (For this purpose, a GS rate range includes a rate range in (1) the GS base schedule, (2) an applicable locality rate schedule, (3) an applicable special rate schedule.)
- (iii) If the highest applicable GS rate range is a locality pay rate range, the employee's adjusted project rate is converted to a GS locality rate of pay. If this rate falls between two steps in the locality-adjusted schedule, the rate must be set at the higher step. The converted GS unadjusted rate of basic pay would be the GS base rate corresponding to the converted GS locality rate (i.e., same step position).

When applying these provisions, the claimant's rate of pay was properly set at GS-15, step 6, since the claimant's adjusted rate of pay fell between steps 5 (\$110,485) and 6 (\$113,735) on the applicable locality rate schedule. This is the maximum rate that could be paid to the claimant through initial conversion. We note this is the conclusion reached in the DA-level AAR.

However, the record shows that on February 16, 2005, the servicing agency human resources office approved a pay adjustment of \$7,168 effective January 9, 2005, including the 2005 general pay increase, a contribution rating increase (CRI) under the Project, and the 2005 locality pay adjustment applicable in the Huntsville, Alabama, locality pay area. Using the new adjusted rate of basic pay, that office determined the claimant's pay should have been set at GS-15, step 7, under the conversion procedures for the project.

The Project notice, however, indicates the claimant's converted GS grade and rate of pay must be determined "*before* movement or conversion out of the demonstration project and any

accompanying geographic movement, promotion, or *other simultaneous action*.” In the instant case, the claimant moved to the GS position on the same date that the claimant’s 2005 general and locality pay increases and CRI increase would have been effective under the Project (i.e., January 9, 2005). However, under the terms of the conversion procedures in the Project notice, the agency was required to determine the claimant’s converted GS grade and rate of pay before any other simultaneous action that occurred on the date of conversion. Once the converted GS grade and rate of pay was determined, there was no basis for increasing the claimant’s GS rate of pay by the CRI. Therefore, as noted above, the claimant’s 2004 adjusted rate of pay should have been used for the conversion out of the Project, and his pay should have set at GS-15, step 6. We find no basis for setting the claimant’s pay above GS-15, step 6.

The Army Operating Procedures for the Project, updated on November 11, 2003, and effective at the time of the claimant’s personnel action, specifies (in Chapters 6.4 and 6.6) it is Army policy that an employee who has earned a CRI but leaves to a non-Acquisition Demonstration Federal agency after the end of the rating period but before the pay out, will receive the amount that would have been paid out as a lump sum contribution award. The claimant left the Project after the end of the rating period but before the January 9, 2005, pay-out date. As indicated on the SF-50, effective on January 9, and approved February 16, 2005, by the claimant’s former installation, it appears the claimant received a CRI in addition to a general pay increase for a total of \$5,538. Under Army policy, the CRI portion of this amount should have been paid out to the claimant as a lump sum contribution award. The record also includes an SF-50, effective January 9, 2005, and approved on February 16, 2005, showing the claimant received a contribution award of \$2,056, separate and distinct from the CRI. We assume this contribution award was properly awarded.

While we acknowledge the hardship suffered, controlling statutes and case law preclude us from granting the claim. It is well established that an agency is not authorized to pay retroactive benefits as a result of any claim based on misinformation that may have been provided by Federal employees. See *Richmond v OPM*, 496 U.S. 414, 425-426 (1990); *Falso v OPM*, 116 F.3d 459 (Fed Cir. 1997); and 60 Comp. Gen. 417 (1981). *Carl H.L. Barksdale*, B-219505 (November 29, 1985); *E. Paul Tischer, M.D.*, 61 Comp. Gen. 292 (1982). It is also well established that an agency is not authorized to pay retroactive benefits as a result of any such misinformation since erroneous advice does not constitute an unjustified or unwarranted personnel action under the Back Pay Act, Pub. L. No. 100-202, 5 U.S.C. 5596, 60 Comp. Gen. 417 (1981).

OPM does not conduct investigations or preside over adversary hearings in adjudicating claims, but relies on the written record submitted by the parties. See *Frank A. Barone*, B-229439, May 25, 1988. OPM concludes that the employee's pay should have been set at GS-15, step 6, under the provisions of the Project.

Accordingly, the agency is directed to correct the claimant’s rate of pay for the subject reassignment action and any affected subsequent actions and initiate appropriate pay actions. The authority to waive overpayments of pay and allowances resides with the heads of agencies, regardless of the amount (5 U.S.C. § 5584). See the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826, approved October 19, 1996, and the Office of Management

and Budget (OMB) Determination Order dated December 17, 1996. Debts due the employee from the United States, e.g., if the CRI was not paid to the claimant as a lump sum contribution award, may be set off against the claimant's indebtedness to the Government prior to consideration for waiver under 5 U.S.C. § 5584. B-168323, December 22, 1969.

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.