

**U.S. Office of Personnel Management
Compensation Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name]

Organization: [agency component]
U.S. Patent and Trademark Office
(USPTO)
U.S. Department of Commerce
Alexandria, Virginia

Claim: Back pay for performing higher
graded work

Agency decision: N/A

OPM decision: Denied; Lack of subject-matter
jurisdiction

OPM file number: 11-0007

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

2/18/2011

Date

The claimant currently occupies [position] in the [agency component], USPTO, U.S. Department of Commerce, in Alexandria, Virginia. She seeks back pay and retroactive upgrade from GS-13 to GS-14 for the period of January 1, 2007, through July 4, 2010. The U.S. Office of Personnel Management (OPM) received the request on October 7, 2010. For the reasons discussed herein, the claim is denied.

Section 178.102(a) of title 5, Code of Federal Regulations (CFR), indicates that the claimant's employing agency must review and issue a written decision on a claim before it is submitted to OPM for adjudication. The claimant is responsible for preserving the claim period, proving the signed, written claim was filed within the applicable statute of limitations. *See* 5 CFR 178.104. The information provided by the claimant with her request does not show she has filed a signed, written claim with a USPTO component authorized to issue an agency-level decision or that she has received such a decision. Nevertheless, we may render a decision based on lack of jurisdiction.

According to the claimant's documentation, she requested a classification review and audit of her position in January 2007. The review and audit were finally conducted in June 2010, and on July 4, 2010, the claimant was promoted from [GS-13 to [GS-14]. The claimant states:

As the audit demonstrated, the work and level of responsibility being carried out in January 2007, at the time the classification review was first requested, was the same that is presently being performed today. Therefore, a retroactive grade to the GS-14 and back pay, is respectfully requested for the period of January 01, 2007 through July 04, 2010.

Even though section 5112 of title 5, United States Code (U.S.C.), authorizes OPM to decide position classification appeals, 5 CFR 511.701, which implements 5 U.S.C. § 5112, states: "Except as provided in § 511.703, classification actions may not be made retroactive." Section 511.703(a) of 5 CFR states: "A retroactive effective date may be required only if the employee is wrongfully demoted." Therefore, OPM lacks any authority to grant retroactive back pay to the claimant for a period of perceived misclassification as she was never "wrongfully demoted." Furthermore, back pay for periods of misclassification is statutorily barred. *See* 5 U.S.C. § 5596(b)(3). As stated in *United States v. Testan*, 424, U.S. 392 (1976): "The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. *United States v. McClean*, 95 U.S. 750 (1878); *Ganse v. United States*, 180 Ct. Cl. 183, 186, 376 F.2d 900, 902 (1967)." *See also* B-19065, July 7, 1978, and B-191360, May 10, 1978.

OPM's authority to adjudicate compensation and leave claims arises from a different law -- 31 U.S.C. § 3702. OPM's authority under 31 U.S.C. § 3702(a)(2) is narrow and does not include any authority to decide position classification or job grading appeals. Therefore, OPM may not rely on 31 U.S.C. § 3702(a)(2) as a jurisdictional basis for deciding position classification appeals and does not consider such appeals within the context of the claims adjudication function 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); *Connon R. Odom*, B-196824, May 12, 1980 (Comptroller General did not have jurisdiction to consider

alleged improper position classification); OPM File Number 01-0016, April 19, 2001; OPM File Number 01-0045, January 7, 2002.

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.