

Date: April 15, 2004  
Claimants: [name]  
File Number: 03-0031  
OPM Contact: Deborah Y. McKissick

The Office of the Chief of Staff, Headquarters, United States Army Recruiting Command, Department of the Army, filed a compensation claim on behalf of [claimant]. The claimant is a [GG-10] with the Department of the Army. The claimant believes that she is entitled to back pay for the difference in salary between a GG-10 and a GG-09 grade level for the period from April 14, 1996, to November 18, 2000. The Office of Personnel Management (OPM) received the claim with the agency administrative report on August 8, 2003. For the reasons discussed herein, the claim is denied.

Our office contacted OPM Office of General Counsel (OGC) to determine our jurisdiction for compensation and leave claims of Defense Civilian Intelligence Personnel System (DCIPS) excepted service employees. (See title 10, United States Code, §§ 1601-1614)) DCIPS, formerly known as the Civilian Intelligence Personnel Management System (CIPMS), is a statutory excepted personnel management system for the civilian intelligence employees in the Military Departments – Army, Navy, and Air Force. On November 12, 2003, OGC confirmed that OPM has jurisdiction to consider the pay (compensation) and leave claims of DCIPS employees.

The claimant stated, on February 22, 2000 she discovered that an incorrect value had been assigned to a position classification factor (Factor C) for her position description for the period, from April 14, 1996 to November 19, 2000. The agency corrected Factor C and promoted her to a GS-10 position on November 19, 2000. The claimant asserts that she is due backpay for the period from April 14, 1996 to November 19, 2000, because she believes had the factor been corrected on April 14, 1996, she would have been promoted in April 1996, not November 2000. The claimant provided Notification of Personnel Action forms (SF-50s) showing that she received a series of temporary promotions to the position in question until she was permanently promoted effective September 14, 1997. As a result of position review, she was promoted, from [GS-09] to [GS-10] effective November 19, 2000, and approved on November 17, 2000. This SF-50 also stated that the “Employee is not entitled to backpay.”

The agency administrative report states the claimant’s position was originally classified in 1996, “at which time the incorrect degree and number of points were assigned to one factor.

When totaled with the remaining points, this reflected a grade of GS-09. Employee was therefore placed in the position as a GS-09 on April 14, 1996.” The agency confirms that the error was discovered and corrected in 2000, resulting in the claimant’s promotion to GS-10 on November 19, 2000.

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. Delays in reclassifying a position to a higher grade do not provide a basis for backpay. Comptroller General Decision B-245737, November 25, 1991.

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); *Conon R. Odom*, B-196824, May 12, 1980 (Comptroller General did not have jurisdiction to consider alleged improper position classification).

The Back Pay Act, as 5 U.S.C. §5596(b), provides for back pay when the appropriate authority finds that an employee was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of all or part of the employee’s pay. However, in specifying that subsection (b) does not apply to “any” reclassification action, section 5596(b)(3) excludes reclassification actions from coverage under the Back Pay Act. The Back Pay Act, as 5 U.S.C. §5596(a) applies to employees of agencies defined as:

- (1) an Executive agency;
- (2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;
- (3) the Library of Congress;
- (4) the Government Printing Office;
- (5) the government of the District of Columbia;
- (6) the Architect of the Capitol, including employees of the United States Senate Restaurants; and
- (7) the United States Botanic Garden.

Because the Back Pay Act does not exclude excepted service employees in the DCIPS, we find that the Act covers such employees.

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. An employee is not entitled to the salary of the higher grade until he or she is actually promoted to the position. *Cynthia A. Griffin, supra*. 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. The claimant was not assigned to the GS-10 grade level position until November 19, 2000. The Civilian Personnel Law Manual states that:

a federal employee is entitled only to the salary of the position to which the employee is appointed, regardless of duties performed. Even though a position is subsequently reclassified to a higher grade consistent with the duties the employee has been performing, such action may not be made retroactively effective. *United States v. Testan*, 424 U.S. 392 (1976).

Accordingly, the claimant cannot be retroactively awarded back pay for the period prior to the effective date of her promotion to the GS-10 position. Therefore, the 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.