



United States
Office of
Personnel Management

Office of Merit Systems
Oversight and Effectiveness
Washington, DC 20415-6000

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- Date: December 30, 2002 •
- Claimant: [name]
- File Number: 02-0029
- OPM Contact: Deborah Y. McKissick

The claimant is requesting pay retention and retroactive back pay for incorrect pay setting for a position within the Department of Air Force, offered to the claimant as part of the agency's Priority Placement Program (PPP). The Atlanta Oversight Division of the Office of Personnel Management (OPM) received the compensation claim on June 3, 2002, and forwarded the claim to the Washington, DC office. OPM received the agency administrative report on October 21, 2002. The claimant requested and was granted an opportunity to respond to the agency administrative report and OPM received the claimant's response on November 15, 2002. For the reasons discussed herein, the claim is denied.

Both the claimant and the agency provided information and official documentation pertaining to this claim. OPM must base its claim settlements in accordance with 5 CFR 178.105. It states:

The burden is upon the claimant to establish the timeliness of the claim, the liability of the United States, and the claimant's right to payment. The settlement of claims is based upon the written record only, which will include the submissions by the claimant and the agency. OPM will accept the facts asserted by the agency, absent clear and convincing evidence to the contrary.

This decision specifically addresses the claimant's request for pay retention and retroactive back pay. Other issues indirectly relating to the claim will be addressed to the agency under separate cover; the claimant will be provided a copy of that correspondence.

The claimant was a GS-13 National Guard Technician in the New York Air National Guard (NYANG). In a June 7, 2001 letter, a representative from the headquarters office of the Air National Guard wrote to the NYANG's Chief of Staff and informed him that the NYANG's request to extend the mandatory separation date for the claimant had been denied because continued funding of the claimant's position was no longer available. In a subsequent November 19, 2001, letter to the claimant, a representative from the NYANG's human resources (HR) office stated that the claimant would be discharged from the NYANG because he would reach his mandatory removal/separation date on February 3, 2002. That letter also stated that the separation would be classified as involuntary, effective on February 4, 2002, and that the claimant would be eligible for an immediate annuity. (A subsequent

email, dated January 31, 2002, documented a conversation between the claimant and the NYANG HR office regarding "termination-involuntary vs. discontinued service retirement" as it related to the claimant's retirement annuity questions.)

As a result of his impending separation, the claimant stated that he was enrolled in the PPP on January 7, 2002. The claimant was offered a priority placement in a GS-12 position at Langley Air Force Base (AFB) with the Department of the Air Force on January 24, 2002; he initially accepted the position on January 25, 2002. The claimant stated that he was informed by representatives of both the NYANG and the Langley AFB HR office that he would receive retained pay upon being placed in the Langley GS-12 position-including up until the afternoon of Friday, February 1, 2002. However, we received no written nor official documentation that the agency offered retained pay to the claimant. The claimant then states that, in the afternoon of February 1, 2002, he was informed by the Langley AFB HR office that he was not entitled to pay retention because his separation from NYANG was not involuntary for pay purposes and because he had reached his mandatory retirement date in the National Guard. The claimant then told HR representatives that he would delay making a final decision on reporting to duty until the retained pay issue had been resolved. The claimant also stated that his request to remain on the NYANG payroll until he was officially appointed to Langley AFB was denied. Based on information he had previously received about his benefits and retirement annuity and his impending separation date, he applied for retirement from Federal service. In a April 1, 2002, letter, the claimant was advised that his failure to report for duty at Langley AFB on April 29, 2002, would be considered a refusal to accept the GS-12 position and he would be re-registered in the National Guard Technician PPP for GS-13 positions. The claimant did not report for duty at Langley AFB and began pursuing avenues of recourse.

In the agency administrative report, Langley AFB confirmed the claimant's statement that he was offered a GS-12 position prior to his separation from his GS-13 civilian position with NYANG. The agency acknowledged that its representatives "erroneously advised the claimant that he was eligible for pay retention if placed at a lower grade through" the PPP. The agency has subsequently submitted a "Headquarters U.S. Air Force (HQ USAF) memorandum dated March 17, 1999, Subject: 'Pay Retention for Status Quo Employees,'" which states that employees facing mandatory retirement due to mandatory separation date are "ineligible for pay retention." An email from an agency representative further stated that there is no distinction made between Air Reserve Technicians and "military technicians from the ANG" regarding pay retention and that, for both types of employees, the agency would follow guidance IAW API 36-802 1.3.3.I. This guidance states:

Within the Department of Defense, pay retention will be granted when:

An Army or Air Force reserve technician has or is scheduled to lose eligibility through no fault of his or her own (that is, "status quo" employees), and he or she accepts placement in a lower grade non-reserve position. (NOTE: In the Air Force, pay retention is not authorized when an air reserve technician (ART) accepts a voluntary CLG ('change to lower grade' *added*) in lieu of separation under the high year of tenure (HYT) program.)

The agency has also denied the claim because the claimant had a break in service and is no longer a Federal employee in a covered position.

In the claimant's response, he states that his current break in service is the result of poor advice and misinformation from representatives of the Langley AFB human resources office. The claimant believes the agency was in violation of proper pay setting guidelines when the agency denied him entitlement to pay retention upon movement to the GS-12 position.

Under law and regulations, pay retention benefits are mandatory for an employee whose rate of basic pay would otherwise be reduced as a result of (1) the expiration of the two-year period of grade retention; (2) reduction-in-force or reclassification when the employee does not meet the eligibility requirement for grade retention; (3) a reduction or elimination of scheduled rates, special schedules, or special rates; (4) the placement of an employee into a non-special rate position or into a lower special rate position from a special rate position; (5) the placement of an employee in a position in a lower wage area or in a position in a different pay schedule; or (6) the placement of an employee in a formal employee development program generally utilized Governmentwide. *See* 5 U.S.C. 5363 and 5 CFR 536.104(a). The claimant would not have been *entitled* to mandatory pay retention upon movement from his NYANG GS-13 position to the Langley AFB GS-12 position because his situation -- i.e., placement in a lower-graded position upon meeting a mandatory separation requirement -- does not meet one of the conditions in 5 CFR 536.104(a), cited above.

As the agency explained in a May 31, 2002, letter to the claimant, under 5 CFR 536.104(b), OPM has delegated authority to the head of each agency the discretion to provide pay retention to eligible employees whose rates of basic pay would otherwise be reduced as the result of a management action, but who are not *entitled* to pay retention under the mandatory conditions in 5 CFR 536.104(a). This gives responsibility for determining pay retention for non-entitlement situations to the agency head. In its October 21, 2002, administrative report, the agency reaffirms the May 31, 2002, letter, which states that "DOD pay policies do not preclude agencies from denying pay retention to employees who accept lower-graded positions incident to mandatory separation from a National Guard technician position due to length of service." The agency further states in its October 21, 2002, administrative report that it continues to deny pay retention to all employees who accept lower-graded positions when they are mandatorily separating from any Air Reserve or National Guard technician positions due to length of service. The agency also states that the claimant is not eligible for pay retention because he had a break in service of 1 workday or more [*see* 5 U.S.C. 5363(c)(1) and 5 CFR 536.209(a)(1)] and is no longer an employee under a covered pay schedule, as defined in 5 U.S.C. 5361, with NYANG nor Langley AFB. *See* the definition of "employee" at 5 CFR 536.102. Since the claimant's situation does not meet any of the mandatory pay retention provisions, the responsibility for determining eligibility of the claimant's situation for pay retention lies within the agency. Where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. *See Jimmie D. Brewer*, B-205452, March 15, 1982, as cited in Philip M. Brey, *supra*. Therefore, the claim is denied.

OPM does not conduct adversary hearings, but settles claims on the basis of the written evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CPR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Although it appears that the agency provided the claimant erroneous information, Comptroller General decisions have long held that the Federal Government cannot be held liable for mistakes or advice of employees (*B-193588*, April 10, 1979). We do concur, however, with the claimant's assertions that the agency needs to provide clarification on its pay retention policy within the appropriate regulations and guidance; we will address this under separate cover to the agency.

This settlement is final. No further administrative review is available within the Office of Personnel Management. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.