

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

FILE: B-173815.45

DATE: JUL 6 1976

MATTER OF:

Earl Frasier - Retroactive Adjustment of Rate  
of Pay

DIGEST:

1. Employee appointed at step 1 of GS-11 may not be authorized retroactive adjustment to higher rate on basis of greater qualifications, even though he was advised at interview that effort would be made to appoint him at step 6 of GS-11, since authority to appoint at above minimum step is discretionary and there was no abuse of such discretion.
2. Employee appointed at minimum step of GS-11 may not be authorized retroactive adjustment to higher step based on "contract" purportedly established by advice at interview that effort would be made to appoint him at step 6 of GS-11 since it is established rule that public employment does not create a contractual relationship in conventional sense.

This action is in response to a claim by Mr. Earl Frasier, an employee of the Department of the Army, for adjustment of his rate of compensation retroactive to his date of appointment.

The record indicates that on August 13, 1973, Mr. Frasier was interviewed and offered a position by the Department of the Army as a computer systems analyst, GS-334-11. At the conclusion of his interview, the selecting official advised Mr. Frasier that an effort would be made to hire him at step 6 of grade 11 of the general schedule (GS), and on the referral form to the civilian personnel office, he requested the appointment to be made at GS-11, step 6. However, when Mr. Frasier reported for duty on September 10, 1973, he was advised that his appointment would be in step 1 of GS-11. The record does not conclusively establish whether Mr. Frasier was advised prior to appointment that he would actually be entering at step 1 of GS-11 rather than at step 6. Mr. Frasier previously was employed by the Federal Government as a Computer Programmer, GS-9, until June 1967.

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In August of 1974 Mr. Frasier filed a formal grievance of his appointment at pay rate GS-11, step 1, and requested that his pay rate be established at GS-11, step 6, retroactive to his date of appointment. The record shows that on February 10, 1975, the agency determined that his pay rate had been properly established and denied the grievance. The Civil Service Commission reviewed the case and stated that the setting of higher rates upon appointment is a matter initially for agency determination.

The law governing the rate of pay to which an employee is entitled upon appointment is contained in 5 U.S.C. § 5333(a) (1970) which permits an exception to the basic legislative policy of appointment at the minimum rate of the appropriate grade. 5 U.S.C. § 5333(a) provides that new appointments in GS-11 or above may be made at a rate above the minimum rate of the appropriate grade under regulations prescribed by the Civil Service Commission on the basis of such considerations as the existing pay or unusually high or unique qualifications of the candidate, or a special need of the Government for his services, with the approval of the Commission in each specific case.

The Civil Service regulations implementing this section may be found in title 5, Code of Federal Regulations (CFR), § 531.201, et seq., and the Federal Personnel Manual, Supplement 990-2, book 531, subchapter S2. Superior qualifications appointments at a rate above the minimum rate of the appropriate grade may be made by new appointment or by reemployment after a minimum 90-day break in service. 5 C.F.R. § 531.203(b)(2) (1973). However, our review of these regulations indicates that the authority to seek the approval of the CSC of an appointment at a rate above the minimum rate of the appropriate grade is discretionary. There is no mandatory requirement for the exercise of this authority in any particular instance.

Under the circumstances here, we can ascertain no basis for a determination that the agency acted improperly in establishing Mr. Frasier's salary at the minimum step of GS grade 11 at the time of his appointment. We also find no abuse of discretion in the agency action.

Section 5334 of title 5, United States Code, and implementing Civil Service regulations permit an agency to appoint a former Federal employee upon reemployment at a rate above the minimum on

the basis of his pay rate in a previous Federal position. However, our examination of the record indicates that Mr. Frazier's prior Federal salary did not entitle him to a rate in excess of step 1 of GS-11.

We note also that Mr. Frasier refers to the notation on his referral form by the selecting official that consideration be given to appointing him at a step 6 of GS-11 as a "contract" and also points to his July 1974 Civil Service Commission rating of eligibility for a GS-13 as evidence of his qualification for a GS-11, step 6. However, it is an established principle of law that public employment does not give rise to a contractual relationship in the conventional sense. Urbina v. United States, 192 Ct. Cls. 875, 881 (1970); Borak v. United States, 110 Ct. Cls. 236, cert. denied, 335 U.S. 821 (1948).

In view of the foregoing there is no legal basis for retroactive adjustment of Mr. Frasier's salary rate, and his claim is disallowed.

R. F. Keller

Deputy Comptroller General  
of the United States