B-258257

November 28, 1994

The Honorable Karen L. Thurman
Member, United States
House of Representatives
2224 Highway 44 West
Inverness, Florida 34453

Dear Ms. Thurman:

This further responds to your letter of August 10, 1994, requesting additional information concerning our Claims Group's disallowance of Dr. claim for additional pay incident to his employment with the Department of State. Dr. claims the difference between a higher pay rate he thought he would receive and the rate of pay applicable to his appointment.

You state that Dr. feels that three individuals who could confirm his claim were not contacted. You ask that we provide you with copies of any information we received from these individuals, , Director, DES, EX, Ocean and Environmental Science; , American Association for the Advancement of Science; and , Deputy Chief of Station, Australia.

Our Claims Group considered Dr. claim based on material he submitted and the record and report submitted by the agency involved (the Department of State), in accordance with the Claims Group's general practice in settling claims against the government. See 4 C.F.R. § 31.7 (1993). We have reviewed the file and find that it includes a copy of a September 20, 1990, memorandum from Ms. to Ms. , copy enclosed. The file contains no other documents prepared by Ms. , Ms. or Ms. .

We also have reviewed the Claims Group's settlement and the record on which it was based. As we explain below, we find no errors of law, nor do we find that contacting the three individuals Dr. names could serve to confirm his claim.

According to the record, Dr. received a Fellowship working with the U.S. Agency for International Development (AID) from the American Association for the Advancement of Science (AAAS), a private organization. Although AID provided the funds for the Fellowship, Dr. was not appointed as a federal employee while working under this fellowship. At the end of his first year with AID, the State Department expressed interest in having hi.n work for the Department. In an April 2, 1991 letter, a program director of the AAAS informed Dr. that the State Department was interested in renewing his AAAS Fellowship for an additional year for which AAAS was offering him a $48,481 stipend, to be administered by the State Department. The stipend was comparable to the annual rate for a General Schedule (GS) 12, step 10 position. Rather than renew Dr. AAAS Fellowship, the State Department followed its practice and appointed Dr. as an employee of the Department. Because of a shortage of time in making the appointment, the State Department did not send its usual written employment offer to Dr. in advance, which would have stated the salary for the position being offered.[1]

Dr. appointment as an employee of the Department was subject to the statutes and regulations applicable to such appointments. Because his status was that of a new hire, the applicable statute and implementing regulations required the Department to set Dr. salary at the minimum rate of the grade to which he was being appointed, which was $37,294, the minimum rate for a grade GS-12 at that time. 5 U.S.C. § 5333 and 5 C.F.R. § 531.203(a). The statute and regulations provide that an appointment at a rate above the minimum may be made only upon a determination that certain criteria prescribed in Office of Personnel Management regulations are met, a so-called "superior qualifications appointment." See 5 C.F.R. § 531.203(b). Such appointments at higher than minimum rates must be submitted and justified on a case-by-case basis. The State Department advised us that requests for superior qualification appointments must be submitted to the Department's Office of Civil Service Personnel Management (CSP), which has the authority to make the Department's appointments. Regardless of whether Dr. 's credentials and the needs of the organization in which he was to work would have satisfied the applicable criteria for a higher salary rate, no request and justification for a higher rate was submitted to and approved by the CSP. Accordingly, upon his appointment, Dr. ' initial salary was set at the GS-12, step 1 rate, as required by the regulations, copy enclosed.

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[1]According to the agency, most new hires start work at the beginning of the first pay period after their applications have been accepted. Prior to their beginning work, the agency sends the applicants formal letters of offer. Because of a delay in obtaining Dr. security clearance, the agency did not have this extra time, and no formal letter offer was sent to him. The agency states that sending a written offer is not required by regulation, and Dr. was notified of his appointment by Standard Form 50, Notification of Personnel Action, after his appointment had been processed.

The general rule is that federal employees are entitled only to the salaries of the position to which they are appointed, regardless of the duties they perform. See 54 Comp. Gen. 263 (1975); and 61 Comp. Gen. 336 (1982). See also Testan v. United States, 424 U.S. 392 (1975). Also, as a general rule, a retroactive administrative change in salary may not be made in the absence of a statute so providing. See _ , 63 Comp. Gen. 417, 418 (1984), and decisions cited therein, copy enclosed. There are limited exceptions to this rule where an administrative error has deprived an employee of a right granted by statute or regulation, or where an administrative error occurred as a result of failure to carry out a nondiscretionary administrative regulation. In contrast to the foregoing, the failure of an agency to request approval of a higher pay rate in a timely manner under 5 U.S.C. § 5333 and 5 C.F.R. § 531.203(b) is neither a deprivation of a right granted by statute nor a violation of a nondiscretionary administrative regulation. Instead, appointment at a rate above the minimum rate is discretionary, and if approval is not secured at the time of appointment, there is no authority to allow payment at the higher rate. See _ B-203528, Apr. 13, 1982, copy enclosed; and , supra.

In Dr. case, although the three individuals he names may have thought he would receive the higher pay rate, none of those individuals had the authority to approve the higher rate or make the appointment. Since the approval required by law and regulation was not secured prior to his appointment, he was entitled only to the minimum rate of the grade to which he was appointed.[2] Therefore, statements from those three individuals would not confirm Dr. claim.

While it is unfortunate that was led to believe he would receive a higher salary, that does not provide a legal basis to allow his claim since the government cannot be bound by the unauthorized statements of its agents. OPM v. Richmond, 446 U.S. 414, 110 L. Ed.2d 387, 110 S.Ct. 2465 (1990).

We trust this is responsive to your inquiry.

Sincerely yours,

Robert P. Murphy
Acting General Counsel

Enclosures

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[2]The record indicates that about 3 months after his appointment as a GS-12, he received an increase to the GS-13 level. This, however, was not retroactive and the pay still did not reach the level he had expected.

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DIGEST

A new appointee's salary should be set at the minimum rate for the grade of the appointment. 5 C.F.R. § 531.203(a) (1993). Agencies may pay a higher rate only upon the determination that the applicant possesses certain criteria. These so-called "superior qualifications" appointments must be submitted and approved on a case-by-case basis. 5 C.F.R. § 531.203(b). Further employees may only be paid the salaries of the positions to which they are appointed. 54 Comp. Gen. 263 (1975); and 61 Comp. Gen. 336 (1982). A retroactive administrative change in salary may not be made in the absence of statutory authority. , 63 Comp. Gen. 417, 418 (1984). Therefore, an employee who started at the minimum rate for his grade, but who was under the impression that he would be receiving a higher salary, may not have his salary retroactively adjusted to the higher rate.