

**DECISION**

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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-204729**DATE:** October 28, 1981**MATTER OF:** R. Dewayne Noell - Claim for Grade and Pay Retention

**DIGEST:** Employee who held a GS-13 position with the Department of the Air Force transferred to a GS-12 position with the Department of Energy after receiving notice that his GS-13 position would be transferred from Colorado to Virginia incident to a transfer of function. He is not entitled to grade and pay retention under 5 C.F.R. § 536.202(a), since he was not placed in a lower-grade position as a result of declining to transfer with his function, but rather as a result of his voluntary action based on his belief that he might be separated.

Mr. R. Dewayne Noell has appealed our Claims Group's denial of his claim for grade and pay retention. Mr. Noell accepted a lower-grade position with another agency after receiving notice that his position would be transferred to another area incident to a transfer of function. Mr. Noell is not entitled to grade and pay retention since he was not placed in a lower-grade position as a result of his declining to transfer with his function, but rather as a result of his voluntary action.

Mr. Noell was employed as a grade GS-13 Realty Officer with the Aerospace Defense Command, Peterson Air Force Base, (AFB), Colorado. By letter dated May 11, 1979, entitled "Preliminary Offer of Transfer of Function" Mr. Noell was advised by the Air Force that the function with which his position was identified was scheduled to transfer to Langley Air Force Base, Virginia, on or about October 1, 1979. He was asked to return the letter and indicate whether he was interested in accompanying the transfer of function. Mr. Noell replied that he was interested in accompanying the transfer of function. Mr. Noell received another "Preliminary Offer of Transfer of Function" dated September 4, 1979, wherein he was advised that his function was scheduled to transfer

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to Langley AFB no earlier than January 4, 1980. On September 5, 1979, he informed the Air Force that he declined the offer to transfer with his function.

By letter dated September 5, 1979, Mr. Noell was offered employment in Montrose, Colorado, with the Western Area Power Administration, Department of Energy, as a grade GS-12 Realty Specialist. The letter stated in part that it confirmed an earlier verbal offer and Mr. Noell's acceptance. Effective September 23, 1979, Mr. Noell transferred to the grade GS-12 position with the Western Area Power Administration.

Mr. Noell contends that he is entitled to grade and pay retention since he accepted the lower grade position rather than waiting to be separated.

Title VIII of the Civil Service Reform Act of 1978, amended title 5 of the United States Code to provide grade and pay retention for certain Federal employees who have been subject to reductions in grade as a result of grade reclassification actions or reductions in force. 5 U.S.C. §§ 5361-5366 (Supp. III, 1979). A qualifying employee who is reduced in grade as the result of a reduction in force is entitled to retain his grade for 2 years and thereafter retain his pay indefinitely unless his entitlement ceases under prescribed conditions. Under its authority at 5 U.S.C. § 5365(b)(3) to provide for application of all or portions of the statutory grade and pay retention provisions of that subchapter to justifiable situations, the Office of Personnel Management, at 5 C.F.R. § 536.202(a) (1980), has extended grade retention and pay retention to individuals who decline to transfer with their functions and who, prior to separation "for declining the transfer" are placed in a lower-graded position provided:

"(1) The transfer of function is to a location outside the employee's commuting area; and

"(2) The employee has served for 52 consecutive weeks or more in one or more positions at a grade or grades higher than that of the lower-graded positions in which placed."

In this instance, Mr. Noell was not placed in a lower-grade position as a result of declining to transfer with his function, but rather as a result of his applying for and accepting a lower-grade position with the Western Area Power Administration prior to the scheduled transfer of function. As pointed out by Mr. Noell, he chose to avoid the risk of being separated from Government service as a result of not being able to find suitable employment subsequent to the transfer of function. While this was an understandable decision in view of the preliminary notices of a transfer of function, the fact remains that Mr. Noell voluntarily accepted a lower-grade position prior to any definite action by the agency that would have separated him or placed him in a lower-grade position as a result of the prospective transfer of function. We have held that such circumstances do not qualify an employee for the remedy of grade and pay retention. See Louis Rubinstein, B-198941, August 19, 1980, Albert D. Minear, B-201775, August 3, 1981.

Mr. Noell also contends that he should be entitled to grade and pay retention because the personnel office at Peterson AFB advised employees that they would be eligible for all the benefits and protection normally afforded employees during a reorganization or a reduction in force. While it is not precisely clear what Mr. Noell may have been advised with respect to entitlement to grade and pay retention, any erroneous or incorrect advice he may have received would not expand the circumstances under which he would be entitled to grade and pay retention not authorized by the applicable statute and regulations. See Elton L. Smalley, B-181311, August 21, 1974, and court cases cited therein.

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Accordingly, Mr. Noell is not entitled to grade and pay retention and our Claims Group's disallowance of his claim is sustained.

*for Milton J. Fowler*  
Comptroller General  
of the United States