

Date: January 25, 2006

Claimant: [name]

File Number: 03-0034

OPM Contact: Robert D. Hendler

The claimant currently occupies a [GS-14] position with the U.S. Department of the Treasury (Treasury), Internal Revenue Service (IRS), in [city & State]. He requests that the U.S. Office of Personnel Management (OPM) direct his agency to correct his salary “to the Senior Manager (SM) Level 6 pay as of June 3, 2001 and for back pay to that time.” We accepted the claim on August 6, 2004, but did not receive the agency administrative report until October 6, 2005. For the reasons discussed herein, the claim is denied.

The claimant stated that he applied for IRS job announcement [number] on February 20, 2001, was interviewed on April 26, 2001, and was subsequently “offered the position of GS 526-15 Territory Manager.” He said that “A promotion certificate was signed by the Deputy Director of SBSE TEC, on 4-26-01, and that certificate indicated that the Series/Grade was GS526-15[sic].” The claimant said that he reported to his new position on June 3, 2001, but without the knowledge of the selecting official or him, a personnel action was initiated and completed indicating that his selection was a competitive reassignment. He said that the position which he competed for and was offered was to be reclassified as an SM under the IRS broadbanding system and that:

An explicit, verbal offer of a promotion to the GS-15 level, along with the accompanying raise in salary, was made. At that time, all other Territory Manager positions had been announced as GS-15 positions and all persons selected had received promotions under the existing General Schedule rules. These representations and this offer caused me to accept the position. I was later provided a copy of a signed document that affirmed the request by a Senior Executive to grant me a promotion.

The claimant’s rationale relies on sections 2302(b)(2), 2302(b)(12), and 2301 of title 5, United States Code (U.S.C.), asserting that the IRS committed a “prohibited personnel action” when it offered “a GS 526-15 position,” then arbitrarily decided to deny the promotion. His view of what constitutes “take or fail to take a personnel action” under 5 U.S.C. §2301 includes the personnel office’s change of a promotion to lateral transfer as previously discussed, the failure of the recommending official to take the “required action to ensure that the promotion offered me was in

fact instituted,” and the selecting official not taking “the required actions to complete the promotion that was instituted in writing.” His rationale is that these actions or inactions “violate 5 USC [sic] § 2301(b) (2) by virtue of their being inherently unfair personnel actions.” The claimant pointed to a May 1, 2002, memorandum from IRS to the U.S. Department of the Treasury requesting a waiver of SM payband rules:

to address unanticipated pay setting issues in order to ensure fairness to employees. Just prior to the effective date of the SM payband, there were several open vacancy announcements for GS-15 positions that were to be covered by the SM payband. Applicants for those announcements expected to have their pay set according to standard GS promotion rules. However, because selections were made after the effective date of the SM payband, their pay was set according to the rules for promotion into the payband. This resulted in placement into the SM payband at a salary level equivalent to a GS-14 position, not at a salary level equivalent to the GS-15 level.

We believe that because the selection process inadvertently straddled the conversion date and resulted in unanticipated pay setting consequences, a one-time waiver to the payband rule is warranted....We recognize that these actions do not constitute administrative error.

The claimant asked that these statements be “taken at their face value” and that the “use of the terms “unanticipated” and “inadvertently” should cause any reviewers or outside authority to question the handling of the matter. He pointed to an IRS Intranet site which he contended states that promotions will be granted under the following conditions:

‘you are selected for a position in the Senior Manager band that was previously classified at the GS-15 level (as indicated in the position description and job announcement), you will receive a full pay increase just as if you were promoted under the General Schedule.’ Both the position description and the job announcement for the position I was selected for clearly indicate that this was listed as a GS-15 position. In all other cases in the IRS, when a job classification or grade changes between the announcement date and the selection date, the IRS has re-announced the position on an amended announcement. This was not done with this position....I am introducing this document and restating the verbal contract issues because a further review of 5 USC [sic] § 2302(b) (4) may cover another violation....I was deceived both in writing and in explicit verbal offers as to the grade and salary for the position that I accepted....Clearly, the IRS did not establish the methodology to handle my pay setting under the broad band system as required by 5 USC [sic] 9509 even as late as October 2002. This also points to the IRS denying my promotion in violation of 5 USC [sic] 2301....I was not provided the actual written plan that includes policies and implementing procedures for the IRS broadbanding system until October, 2002. I then learned that this plan ***did not exist in final format on that date!*** I believe that this fact should certainly impact your decision ...since the agency has not met its legal requirements to allow employees to fully comprehend how their pay is set.

The claimant requested that OPM review the plan which he maintained:

does not address my specific situation. If it did, the request to correct my pay setting would not have been considered and certainly would not have included the language “unanticipated” or “inadvertent.” If this document does not specifically address my situation, then a violation of 5 USC [sic] § 2302(b) (12) exists. If it does not clearly address my situation, then a violation of 5 USC [sic] §2302(b) (4) exists....Arbitrary administrative actions and decisions then caused me to suffer severe economic harm. All of this has been done in violation of Merit System principles.

The agency administrative report stated that Treasury approved the implementation of the SM payband on March 15, 2001, and provided a copy of the implementation policy dated March 25, 2001, and interim staffing guidance on the policy dated April 3, 2001. The report stated that:

On February 20, 2001, [claimant], then a GS-340-14, Program Manager, applied for the position of Supervisory Tax Specialist, GS-526-15....The IRS Career Opportunities List (COL) and the Modernization Homepage provided information that GS-15 and GS-14 mid and top-level management positions would be included in the Senior Manager (SM) Payband in the Future....As a result of the implementation the position occupied by [claimant] was converted from a GS-340-14, step 4 (\$84,695) into the SM Payband as an IR-340-SM (\$88,704)....[claimant] was subsequently interviewed and offered the position of Supervisory Tax Specialist, IR-340-01 on April 26, 2001. He was reassigned from IR-340-SM (\$88,704) in New York to IR-526-SM (\$84,067) in [city & State], effective June 3, 2001....Selection was made after implementation of the SM payband and pay was set according to the rules for movement within the payband. The Human Capital Office, formerly Strategic Human Resources, was previously asked to review the pay for [claimant]. That review identified no administrative error....However, it also determined there were unanticipated pay setting issues which caused the selection process to straddle the conversion date. On September 28, 2001, General Legal Services (GLS) conducted a review of the pay-setting steps. The GLS review supported the IRS determination that an employee could not be promoted retroactively and that backpay could not be awarded.

The report describes IRS’ effort to seek a one-time waiver to address the unanticipated pay setting issue and stated:

Treasury did not approve the waiver because the pay rules clearly outlined how an employee’s pay should be set. Additionally, Treasury indicated that the granting of a waiver would be contrary to the intent of these rules, and would not ensure fairness or consistent and equitable treatment of all employees....All applicable vacant and incumbered positions were converted at the implementation of the SM payband. The position [claimant] held at the time of the SM implementation

was also converted. However, he was subsequently selected for another SM paybanded position which resulted in his reassignment rather than a promotion.

OPM does not conduct adversary hearings, but settles claims on the basis of the written record involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, March 15, 1982.

The claimant would ask us to direct a retroactive promotion and back pay because he had applied and competed for a GS-15 grade-level position prior to IRS's implementation of the SM payband. However, employees of the Federal Government are entitled only to the salaries of the positions to which they are actually appointed. *United States v. Testan*, 424 U.S. 392 (1976). Therefore, the claimant has no standing to question the pay of the position of IR-526-SM in [city & State], until he was placed in that position by an authorized appointing official effective June 3, 2001. His rationale would also have us conclude that his claim should be granted because he had received an "explicit, verbal offer" which caused him to accept the position. However, it is well established that a claim may not be granted based on misinformation that may have been provided by Federal employees. See *Richmond v. OPM*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed Cir. 1997); and 60 Comp. Gen. 417 (1981).

The claimant asserts that the IRS' request for a waiver shows the merit of his claim. He equates failure on the part of IRS officials to expeditiously process his promotion based on a verbal offer as a prohibited personnel practice. The record shows that his selection for the position in question in Maine was after the implementation date of the SM payband. His placement in the SM payband effective March 25, 2001, removed him from the coverage under the GS pay-setting regulations and policies and placed him exclusively under the coverage of SM payband procedures which provide for reassignments rather than promotions for employees already within the SM Payband. We find the agency's factual determinations in the instant case well-reasoned and fully in conformance with SM payband implementing policies. Therefore, the claim is denied in its entirety.

OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702, is narrow, and is limited to adjudication of compensation and leave claims. OPM's authority to order the payment and interest due to unjustified personnel action is derived from 5 U.S.C. §5596. Neither section of law includes any authority to render decisions on claimed violations of merit system principles (MSPs) or the committing of prohibited personnel practices (PPPs). The Office of Special Counsel has the authority to investigate allegations of PPPs and has the authority to take such matters before the Merit Systems Protection Board or refer them to other appropriate entities as provided by law. Therefore, OPM may not rely on 31 U.S.C. §3702 as a jurisdictional basis for considering such issues within the context of the claims adjudication function that it performs under §3702.

The claimant's underlying reasoning is that he was disadvantaged by the fact that his selection for and placement in the position occurred after implementation of the SM payband. Had the action been processed before implementation, he would have received a two-step increase in pay based on 5 U.S.C. §5334(b) and would have received an additional increase upon conversion into the

SM payband. Although we may not rule definitively on the MSPs and PPPs, we note that the claimant's reliance on them is at variance with their plain meaning and common understanding. Fair and equitable treatment in U.S.C. §2301(b)(2) concerns protection for the conditions and affiliations enumerated in the section and not the broad brush of fairness posited by the claimant. Taking or failing to take any action if the taking or failure to take such action violates any law, rule, or regulation implementing or directly concerning the MSPs in 5 U.S.C. §2301(b)(12) similarly does not pertain to this case since the IRS would have violated its own SM payband implementing regulations had it adjusted the claimant's pay as he requested. The claimant appears to assert that management's verbal offer of promotion that was not accomplished is a violation of 5 U.S.C. §2301(b)(4); i.e., "deceive or willfully obstruct any person with respect to such person's rights to compete for employment." However, the record shows that the claimant successfully competed for and was placed in the position in question.

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