

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
Immigration and Customs
Enforcement
Department of Homeland Security
[city & State]

Claim: Pay setting upon entry into intern
program and subsequent promotions

Agency decision: Denied

OPM decision: Denied

OPM file number: 07-0052

/s/ for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

12/22/2008

Date

The claimant currently occupies a GS-1811, Criminal Investigator, position in the [agency component], Immigration and Customs Enforcement (ICE), Department of Homeland Security, in [city & State]. In his September 11, 2007, letter to the U.S. Office of Personnel Management (OPM), received by OPM's Center for Merit System Accountability on September 19, 2007, the claimant states he is submitting a claim for retroactive compensation from July 25, 2004, the date he transferred from Border Patrol Agent, GS-1896-11, step 2, position with Customs and Border Protection (CBP), DHS, to a Criminal Investigator, GS-1811-7, step 10, position with ICE. The claimant states he should have been afforded pay retention under the provisions of the Federal Career Intern Program (FCIP) on that date but was not. We received the agency administrative report (AAR) on or around February 20, 2008, and the claimant's comments on the AAR on May 13, 2008. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

Part 178 of title 5, Code of Federal Regulations (CFR), concerns the adjudication and settlement of claims for compensation and leave performed by OPM under the provisions of section 3702(a)(2) of title 31, United States Code (U.S.C.). In this case, the claimant asks OPM to find under these procedures his appointment to ICE was properly made under the FCIP (5 CFR 213.3202(o)), not 5 CFR 213.3205(e) as asserted by ICE and, thus, was entitled to mandatory pay retention. He points to conflicting information in the record, including citation of FCIP on actions taken by the agency under 5 CFR 213.3205(e), identified by ICE as "an authority granted to legacy United States Customs Service prior to the creation of [DHS]." However, OPM's authority under 31 U.S.C. § 3702 is narrow and limited to adjudications of compensation and leave claims. Section 3702 does not include the authority to determine whether an agency's appointment action was accomplished using the correct appointment authority. This determination would be necessary for OPM to render a decision on the merits of the claimant's underlying compensation claim. Accordingly, OPM has no jurisdiction to adjudicate the claimant's pay setting claim.

Although we may not render a decision on this claim, we will address the claimant's rationale with regard to the extension of retained pay under 5 CFR 536.104(a)(6), in effect at the time of the claimant's placement in ICE, to employees whose rate of basic pay would otherwise be reduced as a result of placement in a formal employee development program generally utilized Government-wide, including Career Intern Programs. The mandatory application of pay retention to career or career-conditional employees appointed to the FCIP at a lower grade level was subsequently made clear in the supplementary information of the 2005 final regulations implementing the staffing provisions of the FCIP. [70 Fed. Reg. 44220 (August 2, 2005)]. However, an employee is not entitled to pay retention if he or she is placed in a formal employee development program that is specific to his or her agency (i.e., the program is not generally utilized Government-wide). Since the underlying issue raised by the claimant is the propriety of ICE's use of 5 CFR 213.3205(e) to place him in his GS-1811-7 position, rather than the FCIP appointing authority (5 CFR 213.3202(o)), we have referred this matter to the Department of Homeland Security which will contact the claimant regarding his appointment to his GS-1811-7 position.

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.