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

Claimant: [name]

Organization: [agency & location]

Claim: Back pay due to erroneous personnel action

Agency decision: N/A

OPM decision: Denied; Lack of jurisdiction

OPM file number: 10-0026

//Judith A. Davis for

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Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

10/22/2010

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Date

The claimant, formerly employed in an Assistant Professor, AD-1701, position in [agency & location] requests that the U.S. Office of Personnel Management (OPM) "rescind the retroactive LWOP [leave without pay] from 15 September 2009 through 14 October 2009 and award back pay from 15 September 2009 through 04 December 2009 ($11,591.00) by applying the provisions of 5 USC 5596." OPM received the claim request on March 1, 2010, and additional information from the agency on March 5, 2010. For the reasons discussed herein, the claim is denied.

The claimant's main arguments in support of her claim are distilled as follows: (1) September 14, 2009, was the claimant's last workday due to an adverse probationary period termination; (2) on October 15, 2009, the agency Inspector General (IG) found the September 14, 2009, termination "an unlawful separation;" (3) on December 4, 2009, the agency cancelled the September 14, 2009, action allowing the claimant's appointment to naturally expire on her original not-to-exceed date of October 14, 2009; and (4) on December 4, 2009, the agency effected 32 days of "enforced leave without pay (LWOP)" from September 15, 2009, through October 14, 2009.

The claimant asserts she should receive back pay due to an unjustified personnel action under 5 U.S.C. § 5596 since (1) the IG as the appropriate authority found the September 15, 2009, action unwarranted; and (2) the period of the unwarranted action was September 15, 2009, until December 4, 2009, since the initial separation was erroneous and is treated under the Back Pay Act "as if it never occurred." The claimant also states the agency's "retroactive" LWOP is in "violation of OPM's "Guide to Processing Personnel Actions" [GPPA] regarding setting effective dates, which states "an action may not have an effective date earlier than the date on which it was approved." The claimant states neither she nor her supervisor requested LWOP for this period and this action creates a record that is factually incorrect. The claimant characterizes the August 11, 2009, agency letter to her not as a definitive end of employment notice, but "actually a notice informing the appellant that she needs to find an alternative position by the expiration of her contract." The claimant disagrees with the agency's statement that she has "not been prejudiced by this administrative oversight," stating the she was: "denied minimum due process of law when she was not provided an opportunity to respond before the termination was effected. This does not represent a non-prejudicial administrative oversight. This constitutes and meets the legal definition of harmful error."

The record shows the claimant received a Schedule A excepted service appointment under 5 Code of Federal Regulations (CFR) 213.3107(g) effective September 15, 2008, with a not-to-exceed date of October 14, 2009. Remarks on the appointment Notification of Personnel Action, Standard Form 50 (SF-50), state "Appointment is subject to completion of a one year trial period beginning 15-SEP-2008." The original separation SF-50 shows the Nature of Action (NOA) as "Termination During Prob/Trial Period" and the Legal Authority (LA) as "Reg 315.804 Eq" with an approval date of September 15, 2009. The SF-50 identified by the claimant as "Corrected Separation SF-50 (non-adverse)" shows the NOA as "Termination-Exp of Appt," shows no LA, and reflects an approval date of December 4, 2009.

Although OPM has the authority to adjudicate compensation claims for many Federal employees, OPM cannot take jurisdiction over compensation claims of Federal employees that

are or were subject to a negotiated grievance procedure (NGP) under a collective bargaining agreement (CBA) between the employee's agency and labor union for any time during the claim period, unless that matter is or was specifically excluded from the agreement's NGP. The Federal courts have found Congress intended such a grievance procedure to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc), *cert. denied*, *Carter v. Goldberg*, 498 U.S. 811 (1990); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). Section 7121 (a)(1) of 5 U.S.C. mandates the grievance procedures in negotiated CBAs be the exclusive administrative procedures for resolving matters covered by the agreements. *Accord, Paul D. Bills, et al.*, B-260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992).

The CBA between DLIFLC and the American Federation of Government Employees Local [number] in effect during the period of the claim does not specifically exclude compensation issues from the NGP (Article 8) covering the claimant. Therefore, the claimant's compensation claim must be construed as covered by the NGP the claimant was subject to during the claim period and OPM has no jurisdiction to adjudicate this claim. As is clear in *Muniz v. United States*, 972 F.2d 1304 (Fed. Cir. 1992), the fact the claimant is no longer employed by DLIFLC does not remove the Civil Service Reform Act's jurisdictional bar for claims covered by CBA arbitration and grievance procedures which arose during and from her employment with the DLIFLC.

Although we may not render a decision on this claim, we note the claimant and her agency misconstrue the coverage of the probationary period provided for in Subpart H-Probation on Initial Appointment to a Competitive Service Position, of Part 315-Career and Career-Conditional Employment, in title 5, CFR. These regulations implement 5 U.S.C. § 3321 which provides for probationary periods for employees appointed to the competitive service. As an excepted service employee, the claimant was not covered by these regulations. Thus the agency IG erred in concluding the claimant had completed a probationary period under 5 CFR 315.804(b) and the servicing human resources office erred in citing and using 315.804 Eq as the LA for the claimant's initial SF-50 terminating her time-limited appointment.

We also note an SF-50 is not a legally operative document controlling on its face an employee's rights and status. *Grigsby v. U.S. Department of Commerce*, 729 F. 772 (Fed. Cir. 1984). The GPPA recognizes that SF-50s may need to be corrected, cancelled or replaced (Chapter 32-Interim Relief Actions, Corrections, Cancellations, and Replacement Actions for Cancellations). By their very nature, these corrective actions are approved at a later date than the action being changed and do not, as the claimant appears to believe, constitute retroactive personnel actions. A Federal employee is entitled only to the salary of the position to which the employee is appointed. *United States v. Testan*, 424 U.S. 392 (1976). Thus, any potential entitlement to pay would have ended no later than October 14, 2009, the date her NTE appointment expired.

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