

**U.S. Office of Personnel Management
Compensation Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name]

Organization: [agency component]
Defense Contract Audit Agency
[city & State]

Claim: Back Pay

Agency decision: N/A

OPM decision: Denied; Lack of jurisdiction

OPM file number: 11-0015

//Judith A. Davis for

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

7/15/11

Date

The claimant is currently employed as an Office Automation Assistant, GS-326-6, with the [agency component], Defense Contract Audit Agency (DCAA), in [city & State]. She is requesting back pay from her previous employing activity, Scott Air Force Base (AFB), Illinois, from February 2, 2010, through September 12, 2010. The U.S. Office of Personnel Management (OPM) received the claim request on February 24, 2011, and a second letter regarding her back pay request on April 28, 2011. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

The claimant states that upon her reinstatement with the 375th Medical Support Squadron, Air Mobility Command, at Scott AFB, she was entitled to “Safe Pay status” due to her separation from the Defense Finance Accounting Service (DFAS) in St. Louis, Missouri, effective June 30, 2007. The claimant states:

In February 2010, I began working at Scott Air Force Base, 375th Medical Support Squadron, Air Mobility Command (AMC). In the process of preparing my employment documents, I submitted my SF-50 from DFAS, but they refused to accept it because my pay had not been corrected by the Census Bureau.

In her second letter, the claimant states she has since been advised she is:

not eligible for pay retention, [sic] due to a break in service. I can only assume addition is a problem for some people. The email clearly states I was separated on 30 Jun 2007 and returned 25 May 2009. That is not two (2) years.

* * * * *

...there was no break in service. The Census Bureau corrected my pay. I “transferred” to Scott Air Force Base. What part of this cannot be understood?

The Notification of Personnel Actions (SF-50s) provided by the claimant show she was (1) separated on June 30, 2007, from DFAS as an Accounting Technician, GS-525-7, step 7; (2) appointed by the Census Bureau on May 25, 2009, to a term appointment not to exceed September 25, 2010, as a Regional Technician, GG-301-7, step 1, which was subsequently corrected, effective date May 25, 2009, to step 7 based on her previous employment with DFAS as a GS-7, step 7; (3) received a career reinstatement on February 2, 2010, as an Accounting and Budget Technician, GS-503-5, step 8, at Scott AFB; and (4) transferred from that position to DCAA on September 12, 2010, as an Office Automation Assistant, GS-326-6, step 10.

Section 178.102(a) of title 5, Code of Federal Regulations (CFR), indicates that the claimant’s employing agency must review and issue a written decision on a claim before it is submitted to OPM for adjudication. The claimant is responsible for preserving the claim period, by proving the signed, written claim was filed within the applicable statute of limitations. *See* 5 CFR 178.104. The information provided by the claimant with her request does not show she has filed a signed, written claim with an Air Force component authorized to issue an agency-level decision or that she has received such a decision. Nevertheless, we may render a decision based on lack of jurisdiction.

OPM has authority to adjudicate compensation and leave claims for Federal employees under the provisions of section 3702(a)(2) of title 31, United States Code (U.S.C.). OPM's adjudication authority is an administrative remedy, not a judicial remedy. *See* 5 CFR part 178. Section 7121(a)(1) of title 5, United States Code, directs that except as provided elsewhere in the statute, the grievance procedures in a negotiated collective bargaining agreement (CBA) shall be the exclusive administrative remedy for resolving matters that fall within the coverage of the CBA. The Court of Appeals for the Federal Circuit has found the plain language of 5 U.S.C. 7121(a)(1) to be clear, and as such, limits the administrative resolution of a Federal employee's grievance to the negotiated procedures set forth in the CBA. *Mudge v. United States*, 308 F.3d 1220, 1228 (Fed. Cir. 2002). Further, the Federal Circuit also found that all matters not specifically excluded from the grievance process by the CBA fall within the coverage of the CBA. *Id. at 1231*. As such, OPM cannot assert jurisdiction over the compensation or leave claims of Federal employees who are or were subject to a negotiated grievance procedure (NGP) under a CBA between the employee's agency and labor union for any time during the claim period, unless the matter is or was specifically excluded from the CBA's NGP. *See* 5 CFR 178.101(b).

Information provided by the claimant shows she occupied a bargaining unit position while employed at Scott AFB. The CBA between Scott AFB and the National Association of Government Employees (NAGE) in effect during the period of the claim does not specifically exclude compensation issues from the NGP (Article 20) covering the claimant. Therefore, the claimant's request for back pay must be construed as covered by the NGP the claimant was subject to during the claim period. Accordingly, OPM has no jurisdiction to adjudicate the claimant's compensation claim. As is clear in *Muniz v. United States*, 972 F.2d 1304 (Fed. Cir. 1992), the fact that the claimant is no longer employed by Scott AFB does not remove the Civil Service Reform Act's jurisdictional bar for claims covered by the CBA arbitration and grievance procedures that arose during and from her employment with Scott AFB.

Although we may not render a decision on this claim, we note the claimant misconstrues the plain language of the pay retention statute at 5 U.S.C. § 5363. Under 5 U.S.C. § 5363(e)(1), eligibility for pay retention, commonly referred to as "saved pay," ends when the employee has had a break in service of one workday or more. Thus, the claimant lost eligibility for pay retention one workday after she separated from DFAS on June 30, 2007. The "two year period of coverage" in 5 U.S.C. § 5363(a)(1) to which the claimant appears to refer does not, as she asserts, provide a separated employee with pay retention eligibility if that employee returns to Federal employment within two years of separation. Instead, it provides pay retention to an eligible employee whose two-year period of grade retention under 5 U.S.C. § 5362 has expired.

Based on the documents she has provided, it appears the Census Bureau set the claimant's pay at GS-7, step 7, using her highest previous rate under the maximum payable rate rule as provided for in 5 CFR 531.221¹. Thus, it appears the claimant disagrees with Scott AFB not having set her pay at GS-5, step 10, using her highest previous rate under the maximum payable rate rule when she was appointed on February 2, 2010.

¹ The remarks section of the SF-50 setting the claimant's pay at GS-7, step 7, states: "PREVIOUSLY EMPLOYED AT DEPT OF DEFENSE IN 2007, GS-7/7 \$38,088. BASE PA."

It is well established that unless an agency has adopted a mandatory policy or administrative regulation affirmatively relinquishing its discretion, receiving highest previous rate is not an entitlement. *Milton Morvitz*, B-192562, June 11, 1979. Indeed, an employee has no vested right to receive the highest salary rate previously paid to him or her and an agency may exercise its discretion not to set an employee's salary at the employee's highest previous rate. See *Donald R. Rutt*, B-247265, June 5, 1992; *Doris M. Arehart-Zuidema*, B-223356, August 21, 1987; *Milton Morvitz*, B-192562, June 11, 1979; *Michael F. Richardson*, B-140790, November 13, 1959; OPM File Number S9701098, January 14, 1998; OPM File Number S9700559, February 24, 1998; and OPM File Number S9701099.2, February 25, 1998.

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.