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

**Claimant:** [name]

**Organization:** Office of Hearings and Appeals

Social Security Administration

Falls Church, Virginia

Unpaid Washington DC Locality Pay Claim:

and annual leave

**Agency decision:** Denied

**OPM decision:** Denied; barred by res judicata

**OPM** file number: 06-0052

/s/ for

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

1/11/2008

Date

## Introduction

The claimant, formerly employed as an Administrative Law Judge (ALJ) with the Office of Hearings and Appeals (OHA) (now know as the Office of Disability Adjudication and Review (ODAR)), Social Security Administration (SSA), requests the U.S. Office of Personnel Management (OPM) direct SSA to pay him "the differential between the Fort Smith [Arkansas] and substantially higher Washington DC locality pay for the 33 month period [November 1997-August 12, 2000]" and pay him for 156.75 hours of leave lost due to the exigencies of the service while on detail to the U.S. Department of Labor (DOL) requested on November 24, 1997, and disapproved by SSA. OPM received the claim request on August 24, 2006, and the agency administrative report (AAR) on April 26, 2007. On June 1, 2007, we requested additional documentation from the claimant which we received on August 20, 2007, and October 26, 2007. For the reasons discussed herein, the claim is denied for lack of jurisdiction and is barred by res judicata.

## **Background**

In his August 14, 2006, claim request, the claimant states he served on a two-year detail in Washington, DC, from Fort Smith, Arkansas, with the DOL and an immediate subsequent ninemonth detail with the U.S. Department of Transportation beginning November 1997 and ending August 12, 2000. The claimant provided a copy of a November 22, 1997, fax he stated he sent to Charles R. Boyer, Chief ALJ, OHA, SSA, asking SSA "declare the existence of an exigency from December 1995 until January 2, 1998 which prevents the taking of annual leave other than November 26 and 28 and December 22-26, 1997." In the fax, the claimant stated "any substantial use of leave would be detrimental to the operations of the Board [Board of Alien Labor Certification Appeals], as DOL Chief ALJ John Vittone would attest" and that "Judge Vittone indicates he is willing to act as leave official if this function is delegated by SSA and it is so requested." In a copy of a December 1, 1997, fax to Judge Boyer, the claimant stated

the attached Employee Decision Form and 11/21/97 FS-71 Application for Leave "Use or Lose" were submitted to DOL Chief ALJ John Vittone who endorsed the SF-71 Disapproved "Exigency of Govt. Business."

It is requested that favorable administrative action on this matter and my detail to DOL with Washington area locality pay be expedited and that my now past due salary be promptly paid as continuing further legal expense were not contemplated in arriving at this settlement.

The claimant did not provide a copy of the cited SF-71, but provided copies of additional faxes to Judge Boyer. These include a: (1) a November 24, 1997, fax requesting the claimant's official duty station "be stated on the SF-50 as Falls Church, VA where my records have been transferred or the District of Columbia where I am now detailed to DOL, and stating the listing of Fort Smith as a duty station "would be a serious breach of an essential element of the settlement agreement...."; (2) a December 1, 1997, fax following up on the November 22, and 24, 1997, faxes; (3) a December 11, 1997, fax following up on both locality pay and use-or-lose leave; (4) an April 17, 1998, fax requesting the restoration of 156.75 hours of leave "with

supporting documents" (which were not sent by the claimant to OPM); and (5) an August 11, 2000, fax requesting reconsideration "denying carry-over of use or leave [sic] pay and in denying locality pay for my extended details in the DC area," stating: "Your earlier denials were apparently based on misconceptions and/or misrepresentations by your legal advisors who represented that the above items were deemed precluded by the settlement agreement and that leave was accrued during a period of suspension - a totally false position."

The claimant also submitted a copy of a September 21, 2000, grievance sent to Judge Boyer stating:

This is to record a grievance pursuant to the bargaining agreement with the Association of Administrative Law Judges, Inc., Judicial Council No. 1, AFP&TE.

It is requested that you reconsider your earlier action in denying carry-over of use or lose leave and in denying locality pay for my extended details in the DC area.

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It is requested that this grievance be processed through arbitration in accordance with procedures being developed under the interim agreement and the master contract being negotiated.

The claimant provided a copy of an October 11, 2000, letter from Judge Boyer to the claimant rejecting the grievance:

...because you are not an employee as defined by the Interim Agreement or by 5 U.S.C. § 7103(a)(2).

Your grievance is rejected because it would be untimely even if you were an employee. Any grievance under the Interim Agreement must be filed within 35 working days following the date on which the grievant knew or should have known the of the facts giving rise to the grievance. Approximately two and one-half years passed between my final decision denying the subject requests and your presentation of the grievance. Your grievance is clearly untimely and in violation of the negotiated agreement.

Your grievance, even if it were timely and had standing to file it, is rejected because it is barred from the negotiated grievance procedure by operation of Sections 3(b) and (d) of the Interim Agreement and by 5 U.S.C. §§7121 (d) and (e). These provisions preclude raising the same matters under both the negotiated grievance procedure and the statutory provisions of either the EEOC or MSPB. Your requests for restoration of 'use or lose" leave and for Washington locality pay were matters before the EEOC in EEOC No. 100-AO-7347X (Agency No. SSA-99-00090). In that case, the EEOC Administrative Judge granted the Agency's Motion for Summary Judgment and found that the Agency did not discriminate against you based on reprisal when it denied your November 1997

requests for restoration of 'use or lose' leave and for Washington locality pay. Assuming, arguendo, that your grievance was properly before me I would deny it for lack of merits. You have not shown that my decision denying subject requests violated any provision of our negotiated agreement.

The agency's one page AAR stated:

we no longer have [claimant's] personnel file or any related documents pertaining to this claim...A collective bargaining unit agreement was entered into between the Social Security Administration/Office of Hearings and Appeals and the Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, effective August 31, 2001, after [claimant] filed his claim.

Compensation and leave claims are settled based on the written record which includes the submissions by the claimant and the agency (see 5 CFR 178.105). OPM contacted the agency to obtain copies of relevant documents, including the previously cited EEOC decision. A member of the agency's human resources staff advised in a June 15, 2007, email to OPM: "It appears that [claimant] retired August 12, 2000 and filed his grievance on September 21, 2000. Therefore, he had no standing to use the negotiated grievance procedure as he was no longer employed by the agency. We cannot find any grievance file or settlement agreement." The staff member further advised OPM to contact the agency "Equal Opportunity Staff to ask about any record of an EEO settlement." Contacts with the Equal Opportunity Staff were also unsuccessful.

Our June 1, 2007, letter to the claimant, stated:

Since both you and SSA refer to and dispute the effect of settlement reached between you and SSA, we would appreciate receiving a copy of both the complaint and decision. We would also appreciate receiving a copy of both the complaint and decision for EEOC No. 100-AO-7347X (Agency No. SSA-99-00090) which is also cited in the file. Your September 21, 2000, grievance submitted to Charles R. Boyer on the issues you raised in your claim to us refer to it as "a grievance pursuant to the bargaining agreement with the Association of Administrative Law Judges, Inc. Judicial Council No. 1, AFP&TE." We would appreciate receiving a copy of that agreement. Further, we would appreciate receiving any and all other information pertinent to issues you raised in your claim as provided for in section 178.102(a)(4) of title 5, Code of Federal Regulations.

In his August 20, 2007, faxed response, the claimant provided a copy of the January 15, 1997, Confidential Settlement Agreement (Agreement); the January 17, 1997, Recommended Decision; and the February 11, 1997, Final Decision and Order from MSPB. With regard to the MSPB case, the claimant stated: "The leave and pay issues herein arose subsequent thereto and were not raised or addressed before MSPB or in the settlement agreement. Hence, the voluminous requested documents would not bear upon this claim."

The claimant also advised copies of the complaint and decision for the previously cited EEOC case "are not readily available. However, the EEOC case is not pertinent to the issues in the instant claim since, as noted in the October 11, 2000 letter of Chief Judge Boyer, the issue therein resolved as whether *reprisal* was involved." The claimant also provided part of a copy of the requested bargaining agreement (Article 6, Use of Agency Equipment and Article 7, Grievance Procedure).

## **Evaluation**

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.). OPM cannot take jurisdiction over the compensation or leave claims of Federal employees who 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 (see 5 CFR 178.101(b)) The Federal courts have found Congress intended such a grievance procedure is to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452, 1454-55 (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 title 5, U.S.C., mandates that 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 agency's assertion that the claimant "had no standing to use the negotiated grievance procedure as he was no longer employed by the agency" is contrary to the previously cited precedent cases. A claimant's employment status notwithstanding, an NGP is the sole and exclusive administrative remedy available to an employee or former employee who was in a bargaining under position for any period of the claim unless the controlling CBA's NGP excluded the matter from the scope of the NGP.

The claimant does not dispute the agency's assertion the CBA entered into between the Association of Administrative Law Judges, Inc. Judicial Council No. 1, AFP&TE and SSA was effective August 31, 2001. The claimant's September 21, 2000, grievance supports the conclusion that a CBA with an NGP was not in place during the period of the claim which ended on August 12, 2000, the date the claimant left Federal service. Therefore, this claim is not precluded from OPM's potential jurisdiction since the claimant was not covered by a CBA's NGP any time during the period of the claim. However, we find the claim is barred from our jurisdiction for other reasons.

We do not agree with the claimant's assertion that the leave and pay issues of the instant claim "arose subsequent thereto and were not raised or addressed before MSPB or in the settlement agreement." These issues were directly covered by the January 15, 1997, Agreement for Docket Numbers CB-7521-95-0027-T-1, DA-1221-95-0782-W-1, and CB-7521-95-0034-T-1) which states, in pertinent part:

The Agency agrees to assure payment of Respondent/Appellant's [the claimant] salary and employee benefits for a period of two years while...[he] serves an assignment to a covered entity under the Intergovernmental Personnel Act (IPA) or an assignment on detail to another agency than the Social Security Administration. The Agency will agree to extend any IPA assignment or detail for nine months upon request by Respondent/Appellant and agreement by the covered entity or other agency.

The claimant's August 20, 2007, letter forwarding additional requested documentation states:

The Confidential Settlement Agreement provided for the agency "to assure payment ["] of my "salary and employee benefits." During the entire period of the assignment...my duty and work station was Washington, DC. During the 33 months assigned to and working in Washington, DC, SSA paid my salary plus locality pay based upon location in Fort Smith, AR, rather than the higher rate applicable to my actual workplace in Washington, DC....

The claimant seeks to dispute implementation of the salary and benefits provisions of the Agreement which also clearly states "the Board will retain jurisdiction to enforce compliance with this agreement." Therefore, the issues the claimant seeks to bring before OPM are under the jurisdiction of the MSPB which adopted this Agreement in its February 11, 1997, Final Decision and Order.

As discussed in *Stearn v. Department of the Navy*, 280 F.3d 1376 (Fed. Cir 2002):

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2423 (1981)* . . . The doctrine serves to "relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and . . . encourage reliance on adjudication." *Allen v. McCurry, 449 U.S. 90, 94, 66 L.Ed. 2d308, 101 S.Ct. 411 (1980)*.

MSPB has assumed jurisdiction over implementation of the Agreement entered into between the claimant and SSA. Therefore, the claim before us is barred by res judicata, which precludes relitigation of issues that have already been decided by an administrative body of competent jurisdiction.

The clear and unambiguous language of the Agreement also precludes the claimant from bringing the instant claim before OPM:

Respondent/Appellant agrees to waive any right to initiate within the Agency, before any administrative tribunal, or in any state or federal court any complaint, grievance, civil action or other matter which arises in any way out of any aspect of Respondent/Appellant's employment with the Agency....

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.