

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

Claimant: [name]

Organization: [agency component]
U.S. Department of Homeland Security
[city & State]

Claim: Pay for performing higher graded duties

Agency decision: N/A

OPM decision: Denied; Lack of Jurisdiction

OPM file number: 08-0005

//Judith A. Davis for

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

6/25/2008

Date

On or about December 31, 2007, the U.S. Office of Personnel Management (OPM) received a request dated December 26, 2007, seeking to file a claim for performing higher graded duties from July 26, 2004, through April 15, 2006. The claimant occupies a [position] in [agency component], U.S. Department of Homeland Security, in [city & State].

The claimant's request does not state whether he seeks to file a compensation claim under part 178 of title 5, Code of Federal Regulations (CFR) or whether he seeks to file a Fair Labor Standards Act (FLSA) claim under 5 CFR part 551. The rationale he presents; i.e., he performed higher graded work, the work was for the benefit of the agency, his supervisors knew or had reason to believe that he was performing the work at issue, etc., follows the line of analysis typical of FLSA suffer and permit claims. The FLSA ensures the payment of minimum wage and overtime premium pay to nonexempt employees. It does not cover pay-level disputes as the claimant seeks in the instant case; i.e., whether he should have received pay at the GS-10 level as an acting [position]. Therefore, we will treat this request as a compensation claim under 5 CFR part 178.

Section 178.102 specifies the documentation accompanying a claim should include a copy of the final written agency denial of the claim (5 CFR 178.102(a)(3)). Paragraph (b) of that section states that when an agency forwards the claim to OPM, the claimant is responsible for ensuring that OPM receives all the information listed in 5 CFR 178.102(a) which includes the agency's denial of the claim. Therefore, the procedures for submitting a claim require that an employing agency has already reviewed and issued an initial decision on a claim before it is submitted to OPM for adjudication. Although the record does not include an agency-level decision, we may render a decision on this claim based on jurisdictional grounds.

OPM has authority to adjudicate compensation and leave claims for most Federal employees under the provisions of section 3702(a)(2) of title 31, United States Code. However, OPM cannot take jurisdiction over the compensation or leave claims (or FLSA claims under 5 CFR part 551) 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. 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, 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, United States Code, 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).

Information provided by the claimant's servicing administrative office at our request confirms the claimant was in a bargaining unit position during the period of his claim (documented in block 37 on Standard Form 50 provided by the claimant). The CBA covering the claimant between the former Immigration and Naturalization Service and the National Immigration and Naturalization Service Council, American Federation of Government Employees (Article 47-Grievance Procedure) is silent on compensation (and FLSA) issues. The fact the NGP is silent on these matters and, therefore, does not specifically exclude them from the scope of the NGP, is

sufficient to remove this claim from OPM's jurisdiction. Accordingly, OPM has no jurisdiction to adjudicate this claim.

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