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

**Claimant:** [name]

**Organization:** Justice Prisoner and Alien
Transportation System Division
U.S. Marshals Service
U.S. Department of Justice
[city & State]

**Claim:** Request for treatment as Federal Government employee for pay and benefits

**Agency decision:** N/A

**OPM decision:** Denied

**OPM file number:** 07-0051

/s/ for

_____

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

8/1/2008

_____

Date

The claimant is employed as a personal services contractor prisoner guard with a working title of Aviation Security Officer (ASO) in the Justice Prisoner and Alien Transportation System (JPATS) Division, U.S. Marshals Service (USMS), U.S. Department of Justice, in [city & State]. In an August 24, 2007, letter to the U.S. Office of Personnel Management (OPM), received by OPM on September 5, 2007, she requests "full benefits and compensation as Federal Government employees from the date of our employment and is in response to your letter dated July 20, 2007 with regards to a blanket request for employee compensation." The claimant refers to a letter sent by OPM's Center for Merit System Accountability (CMSA) in response to a facsimile of an unsigned letter dated July 9, 2007, sent by the claimant and two other similarly situated ASOs to CMSA's parent organization, OPM's Human Capital Leadership and Merit System Accountability Division. The claimant asserts she is entitled:

> …to all benefits which include but [sic] not limited to the past and present, from the date of employment, (some being employed since 1996) and to allow complaints [sic] to immediately be enrolled in all present benefits enjoyed by all federal employee's [sic], such as outlined below;
>
> 1. Pay that is in line with any government employee performing the same duties. Yearly increase pay as was and is given to all federal employee's [sic] based on their anniversary date.
> 2. All medical & insurance benefits as provide [sic] to all other federal employee's [sic].
> 3. Sick Leave
> 4. Annual Leave
> 5. Overtime over 8 hours in a day.
> 6. Workers Compensation.
> 7. Retirement benefits due to each employee who submits a claim and pays 7.5 per cent of their earnings during the periods they worked for the U.S. Marshals Service.

The request relies on the U.S. Equal Employment Opportunity Commission's (EEOC's) March 13, 2007 determination the claimant was an employee of USMS for purposes of filing an EEO complaint under the provisions of 29 CFR part 1614.

*Jurisdiction and authority to settle the claim*

The claimant's July 9, 2007, letter was referred to CMSA which settles Federal civilian employee compensation and leave claims under the provisions of 31 U.S.C. § 3702(a)(2) and Fair Labor Standards Act (FLSA) claims under the provisions of 29 § U.S.C. 204(f). The letter listed three "complainants" and a personal representative. Since the letter was not signed, the listed personal representative, Marvin Woodworth, was not duly authorized, and he lacked standing to represent the claimant or the other two "complainants." (See 5 CFR 178.102(a) and 103.) In our July 20, 2007, letter to Mr. Woodworth, we advised him of these requirements, informed him compensation claims regulations do not provide for the filing of group claims, and indicated the request did not include a written denial of the claim which is required before OPM would accept a claim for adjudication (5 CFR §§ 178.102(a)(3) and 102(b)). Further, we stated:

> We are not aware of any law authorizing the EEOC to make determinations of federal employment jurisdiction for purposes other than the EEO complaint process as stated on page 6 of the decision you provided.

Despite this guidance, the claimant and a second ASO submitted the August 24, 2007, claim request in a single letter (we will process the claims separately). In response to our statement regarding claimant's reliance on the EEOC decision as being dispositive of their status as Federal employees for all purposes, claimant stated:

> 1. We believe that your office speaks as though EEO has no authority and we believe that your offices [sic] claims are based on personal perceptions and are based on personal unexamined assumptions and not base [sic] on facts and is arbitrary [sic] capricious and contract [sic] to law.
>
> 2. We assert that there is no law NOT authorizing EEO [sic] to make informal resolutions and in facts [sic] there are clearly defined Federal guidelines that authorize and demand compensation for ruling by the Commission….
>
> 3. And we submit that if we are considered employees for one purpose, we should be considered employees for all purposes. . . .
>
> **********
>
> 6. Furthermore we assert that there was a ruling against the U.S. Attorney General and in favor of the complainants and is [sic] sufficient legitimate ruling. While you state that you are not aware of law authorizing the office to determine employment it should be sufficient because discrimination is a crime and EEO [sic] does have the authority to resolve such matters and provide relief.

The claimant views OPM's role as merely the implementer of EEOC's decision:

> To further support our claim, [sic] that your agency must comply with the COMMISSIONS, [sic] in the ORDER from the Commission it is very important to view ; IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501). The Commission states ". . . If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. 29 CFR § 1614.503(a). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following and administrative petition for enforcement….
>
> The following is [sic] direct quotes from the 29 C.F.R. which apply [sic] to authorization of benefits and sanctions against the agency for non-compliance. Since your agency is responsible for carrying out the "benefit" part of the decision, we believe that you must comply with commissions [sic] findings….
>
> **********

> It is clear your agency has made a erroneous decisions [sic] which is arbitrary, capricious and contrary to the Commissions [sic] Decision, laws pursuant to Title VII of the Civil Rights Act of 2004, 42 U.S.C. 2000 et seq. Thus we are confident that in light of the foregoing additional information, your previous agency decisions will reconsider our requests for all entitled back and current benefits, consistence [sic] with the Commissions [sic] Decision and the Federal statutes cited that in fact we are government employees.

The claimant's November 15, 2007, response to the agency's November 1, 2007, agency administrative report (AAR) on this claim provides:

> [W]e submit that if we are considered employees for one purpose, we should be considered employees for all purposes….
>
> We believe that the matter of disallowing us to receive equal pay and benefits as other government employees is a clear case of harassment of a continuing nature and arbitrary [sic] capricious and contrary to a current decision in our favor and contrary to Spirides v. Reinhart 613 F.2d 826 (D.C. Cir. 1979 [sic] which addresses the issue of pension benefits, health benefits, or other federal employee benefits and we are now soliciting benefits once again.

Contrary to claimant's assertion, the EEOC decision holding that the claimant is an "employee" solely for purposes of adjudicating her discrimination complaint against USMS does not confer eligibility for or entitlement to the employment benefits the claimant seeks. These employment benefits are governed by other statutory provisions and are not within the scope of the EEOC's order.

As articulated by the U.S. Supreme Court, it is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (internal quotation marks omitted); see United States v. Menasche, 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' " (quoting Montclair v. Ramsdell, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883))."

The EEOC decision does not require OPM to take a corrective action on the claimant's behalf. The claimant's reliance on the EEOC decision as requiring OPM to take any action on the claimant's behalf with regard to Federal civilian employee compensation and leave benefits is unsupported by the law and the record, and would set aside, invalidate, and render superfluous OPM's statutory authority set out in 31 U.S.C. § 3702(a)(2) to render final administrative decisions on compensation and leave benefit claims. Thus, the claimant's view of EEOC's role and authority on the matters at issue in this claim must be rejected.

The "CONCLUSION" section of her November 15, 2007, response to the AAR evidences further confusion with regard to the compensation and leave claims process. The claimant refers to "the current Order issued on March 13, 2007 as directed by the OPM." However, the Order was issued by EEOC, not OPM. The claimant seeks "confidentiality…during an investigation of

an alleged equal pay violation" which she has "filed with the EEOC." This has no bearing on the compensation claim before OPM. The claimant states she is "willing to have EEOC to negotiate with your department for a settlement including back pay and appropriate raises in pay scales to correct the violation of the law." If this effort is not successful, the claimant states she "will ask U.S. EEO [sic] Office of Federal Operation and OPM to initiate court action to collect back pay wages and benefits under the various acts and rule of law based on the United States Constitution." OPM's statutory authority set out in 31 U.S.C. § 3702(a)(2) to render final administrative decisions on compensation and leave claims does not permit negotiation of settlements and does not confer upon OPM the right to sue another Federal agency on a claimant's behalf. The claimant asserts that the AAR responds "with meaningless, unrelated outdated certiorari and case examples…which do not apply to the federal government or federal employees and or have been out dated by present court opinions, rulings and appeals" and concludes the EEOC ruling has resolved these matters of law. Again, complainant misunderstands the scope of the EEOC's decision and the role of OPM in adjudicating claims for compensation. Since the EEOC decision is controlling only with regard to the claimant's right to file a claim under Title VII of the Civil Rights Act of 1964, it does not impact or control OPM's authority to interpret and apply the statutory provisions relevant to the compensation and leave claims settlement process.

*Portions of the claim jurisdictionally barred*

The claimant's attempt to obtain worker's compensation benefits from OPM action is similarly misplaced. The Federal Employees' Compensation Act, as amended, codified in 5 U.S.C. chap. 81 is administered by the U.S. Department of Labor (DoL). Provisions for unemployment compensation for Federal employees, codified in 5 U.S.C. chap. 85, are also administered by DoL. (See http://www.dol.gov/esa/regs/compliance/OWCP/fecacont.htm and http://workforcesecurity.doleta.gov/unemploy/unemcomp.asp.) Therefore, we must reject these aspects of the claim based on lack of jurisdiction. For the same reason, we decline to address other issues raised by the agency in the AAR which are not under OPM's jurisdiction; i.e., coverage under the Service Contract Act of 1965, 41 U.S.C. § 351, et seq., and tax withholding under the Federal Insurance Contributions Act, 26 U.S.C. § 3101 et seq.

The claimant's effort to seek Federal retirement coverage, health insurance, and other Federal insurance benefits under 31 U.S.C. § 3702(a)(2) is similarly misplaced. We have referred this part of the claim to OPM's Center for Employee and Family Support Policy and Assistant Director for Insurance Services Programs for review and response.

*Compensation as a Federal employee*

We take the claimant's request to be compensated as a Federal employee "from the date of employment" and to receive "[p]ay in line with any government employee performing the same duties" to mean she contends she is a Government employee performing "guard" work covered by the General Schedule (GS) compensation provisions of title 5, U.S.C. In so doing, claimant seeks to apply the 42 U.S.C. 2000e-16 definition of "employee" for purposes of determining coverage under the provisions of title 5, U.S.C. Indeed, in her November 15, 2007 response to the AAR, the claimant asserts her right to be treated as a Federal employee based "on the facts

according to the Equal pay [sic] Act and the Civil Rights Act of 1964, which is broader than the definition of employee under the FLSA." The claimant also cites to the definition of employee in the Federal Insurance Contributions Act codified at 26 U.S.C. § 3121(d)(2), asserting:

> The IRS's analysis is similar to EEOC's ruling regarding the status of victims [the claimant]. The fact that payroll taxes are withheld from the victims's [sic] further supports the Claimant [sic] are [sic] "federal employee" for retirement, leave, health benefits, unemployment compensation purposes for the reasons previously cited for the reasons previously explained. And any further notion by the agency to reverse this determination we believe is arbitrary, capricious and contrary to law.

The claimant's rationale is contrary to basic principles of statutory construction and binding court precedent; and application of claimant's interpretation of the statutes would be arbitrary, capricious, and contrary to law. Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990); United States v. Freeman, 44 U.S. (3 How.) 556, 564-566 (1845); Alexander v. Mayor and Commonality of Alexandria, 9 U.S. (5 Cranch) 1, 7-8 (1809). Another basic principle of statutory construction is the assumption that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. Erlenbaugh v. United States, 409 U.S. 239, 243-244 (1972). Furthermore, "under a basic principle of statutory construction, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535 (as quoted in Radazanower v. Touche Ross & Co., 426 U.S. 148 (1976)). Also see, e.g., Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961); Rodgers v. United States, 185 U.S. 83, 87 -89 (1902).

These requirements mandate we adhere to the statutory definition of "employee" in 5 U.S.C. § 2105(a) for determining whether the claimant is a Federal employee for the purposes of receiving compensation under the provisions of title 5, U.S.C. Section 2105(a) of title 5 provides:

> (a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--
>
> (1) appointed in the civil service by one of the following acting in an official capacity--
>
> (A) the President;
>
> (B) a Member or Members of Congress, or the Congress;
>
> (C) a member of a uniformed service;
>
> (D) an individual who is an employee under this section;
>
> (E) the head of a Government controlled corporation; or
>
> (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by

> paragraph (1) of this subsection while engaged in the performance of the duties of his position.

The claimant does not contest that she is under the provisions of a personal services contract. Page 1 of the UNITED STATES MARSHALLS SERVICE, JUSTICE PRISONER AND ALIEN TRANSPORTATION SYSTEM (JPATS) STATEMENT OF WORK (FY06), PERSONAL SERVICES CONTRACT GUARDS (AVIATION SECURITY OFFICER) (AAR, Enclosure 2), states the objective of the Statement of Work (SOW) "is to enter into individual guard service contracts to provide for the safety and security of all federal prisoners, aliens, certain non-federal detainees, and military prisoners during transportation." Page 6 of the document, Special Conditions, states:

> Guard agrees that he/she is NOT an employee of the USMS, or its designee, and is NOT entitled to pension benefits, health benefits, or other federal employee benefits.
>
> Guard is providing services under this contract as an independent contractor. No master/servant; employer/employee or agency relationship is created by this contract.
>
> - Guard shall submit a written request for reimbursement (voucher) on a bi-weekly basis, or upon the completion of each assignment.

The record shows the claimant signed page 7 of the SOW on June 2, 2006.

Not all persons employed by the Federal Government are Federal employees under civil service law. In Lodge 1858 v. Webb, 580 F.2d 496 (D.C. Cir. 1978), the court held that an individual must satisfy all three provisions of 5 U.S.C. § 2105(a) in order to be deemed an employee within the meaning of the civil service laws. In Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979), a case cited by claimant, the court held that individuals who have a direct employment relationship with a Federal Government employer, and who are not independent contractors, may file discrimination claims under title VII. This case does not support the proposition that an "employee" for purposes of filing claims under title VII is also an "employee" under title 5. In fact, Spirides clearly rejects such an interpretation. ("Examining the plain language of the Civil Service statute, we find the definition of "employee" applies only to . . . Title V"), Spirides at 830. ("In this case, however, the issue to be decided is not whether Spirides is an employee under the civil service laws [Title 5], but whether she may in any respect be deemed an employee under Title VII as amended. Therefore, resort to the civil service definition is unwarranted . . .") Id. at 831

In the instant case, the claimant was not appointed in the civil service under 5 U.S.C. § 2105(a). In fact, there was an unequivocal intention by USMS not to bring the claimant, a personal service contractor, into the civil service. See AAR, Enclosure 2. Therefore, we find the claimant is not a Federal employee for purposes of 5 U.S.C. § 5102(a)(2) et seq. and, therefore, is not due "pay that is in line with any government employee performing same duties" or the "raises" she describes in her claim request.

*Overtime pay*

As noted in the AAR, generally Federal employees are entitled to overtime compensation under 5 U.S.C. § 5542 (title 5 overtime pay) for work in excess of 40 hours in an administrative workweek or in excess of eight hours in a day. Receipt of title 5 overtime pay is applicable only to an "employee" as defined in 5 U.S.C. § 5541(2)(A); i.e., "an employee in or under an Executive agency." As provided for in 5 U.S.C. § 105, an "'Executive agency' means an Executive department, a Government corporation [see 5 U.S.C. § 103], and an independent establishment [see 5 U.S.C. § 104]." The term "employee" under 5 U.S.C. § 2105(a) is applicable to 5542, as modified by 5 U.S.C. § 5541(2)(i) et seq. which excludes certain groups of employees meeting the requirements of 5 U.S.C. § 2105(a). Since the claimant was never appointed to a Federal position as discussed previously in this decision, the claimant is not an employee for purposes of 5 U.S.C. § 5542 and may not receive title 5 overtime pay.

The original August 24, 2007, claim requested "overtime over 8 hours in a day." The claimant first raised the issue of overtime pay under the Fair Labor Standards Act (FLSA) in her response to the AAR's discussion of the claimant's potential coverage under the FLSA and stated:

> [T]he FLSA does mandate overtime payment for work performed by a government employee in excess of eight hours in an administrative workday. See 29 C.F.R. § 778.102.
>
> Payment of FLSA overtime may be obligated to none [sic] federal employees if and only if a personal services contractor accumulates more than 40 hours in a workweek. But in this case it has already been ruled and held that the victims are and were government employees.
>
> Regardless, the current practice by USMC is to pay overtime pay when the victims accumulate more than 80 hours of work in a workweek and this is further harassment and disparate treatment of the Mexican American female victims of this case.

In general, Federal employees are subject to the provisions of the FLSA; and most agencies and their components, including USMS, fall under OPM's FLSA regulations. Exercising its authority under 31 U.S.C. § 3702(a)(2) and 29 U.S.C. § 204(f), OPM requires claimants to file FLSA claims under the procedures set out under 5 CFR part 551, subpart G. (See also 5 CFR 178.101(b)). The claimant has failed to provide the information described in 5 CFR 551.705(c) required to file an FLSA claim with OPM, including evidence of the number of hours of overtime worked for which she believes she has not been paid. Therefore, we decline to address the FLSA issued raised by the claimant in this decision.

Because of the protective nature of the FLSA, the claimant may use OPM's September 5, 2007, receipt of her compensation and leave claim as evidence of her having preserved her FLSA claim (see 5 CFR 551.702). Should the claimant wish to pursue her allegations of unpaid overtime under the FLSA, she may do so with this office under the provisions of 5 CFR 551.705(c).

*Annual and Sick Leave*

As noted in the AAR, generally Federal employees are entitled to annual and sick leave under the provisions of 5 U.S.C. chapter 63 (title 5 leave). Accrual of title 5 leave is applicable only to an "employee" as defined in 5 U.S.C. § 6301(2)(A); i.e., "an employee as defined by section 2105 of this title….". As discussed previously in this decision, the claimant is not an employee as defined in 5 U.S.C. § 2105 and may not receive title 5 annual and sick leave.

OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. See Frank A. Barone, B-229439, May 25, 1988. We find the claimant is not a Federal employee for purposes of compensation, title 5 overtime pay, or title 5 annual and sick leave as discussed in this decision. Therefore, the claim is denied for the reasons stated previously.

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.