

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

**Claimant:** [name]

**Organization:** [agency component]  
U.S. Department of Veterans Affairs  
[city & State]

**Claim:** Back pay for performing higher  
graded work

**Agency decision:** N/A

**OPM decision:** Denied; Lack of Jurisdiction

**OPM file number:** 10-0003

//Judith A. Davis for

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

3/29/10

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Date

The claimant, formerly employed in a Fiscal Clerk, GS-503-6, position in the [agency component], U.S. Department of Veterans Affairs (VA), in [city & State], requests back pay from November 26, 2003, through June 30, 2009, the date she retired, for performing work properly classified as Purchasing Agent, GS-1105-7. The claimant requests the U.S. Office of Personnel Management (OPM) accept the “same claims that [she] filed under the AFGE MASTER AGREEMENT”: “retroactive pay for a grade GS-07 for the period...including all applicable step increases and allowances adversely impacted by this discrepancy, to include any negative impact on retirement and of other benefits.” OPM received the claim request on September 29, 2009, and additional information from VA on October 21, 2009. For the reasons discussed herein, the claim is denied.

The claimant requests back pay for a period of time she states she performed higher graded duties: “Management has agreed that I was not paid the correct pay grade, however, I was denied my claim under the bargaining agreement procedures because my grievance was filed after my retirement date.” A copy of the claimant’s response to a second-step grievance cites portions of OPM’s performance management regulations (5 CFR, Part 430), 5 U.S.C. § 5107 requiring Federal agencies use published OPM position classification standards to classify General Schedule positions, and OPM’s authority to review and change the classification of positions classified by agencies under the authority of 5 U.S.C. § 5107.

Even though 5 U.S.C. § 5112 authorized OPM to decide position classification and job grading appeals, OPM’s authority to adjudicate compensation and leave claims arises from a different law -- 31 U.S.C. § 3702. OPM’s authority under 31 U.S.C. § 3702 is narrow and does not include any authority to decide position classification or job grading appeals. Therefore, OPM may not rely on 31 U.S.C. § 3702 as a jurisdictional basis for deciding position classification appeals and does not consider such appeals within the context of the claims adjudication function it performs under section 3702. *Cf. Eldon D. Praiswater*, B-198758, December 1, 1980 (Comptroller General, formerly authorized to adjudicate compensation and leave claims under section 3702, did not have jurisdiction to consider alleged improper job grading); *Connon R. Odom*, B-196824, May 12, 1980 (Comptroller General did not have jurisdiction to consider alleged improper position classification); OPM File Number 01-0016, April 19, 2001; OPM File Number 01-0045, January 7, 2002. Only the classification of a position which results in the reduction in grade or pay of an employee may be grieved (see 5 U.S.C. § 7121(c)(5)).

The clear and unambiguous language of 5 U.S.C. 5112(b) requires OPM to adjudicate appeals under the provisions of subsection (a). This subsection requires OPM “ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position.” This statutory requirement is reiterated in section 5 CFR 511.607(a)(1) and cannot be met if the requesting employee no longer performs the work of the position he or she wishes to appeal. Therefore, the claimant’s apparent request to file a classification appeal with OPM on a position she never officially occupied; i.e., Purchasing Agent, GS-1105-7, is barred by controlling statute and regulations. The claimant’s right to appeal the classification of the position she officially occupied prior to retirement; i.e., Fiscal Clerk, GS-503-6, ended when the claimant vacated this position upon her retirement from Federal service.

Even assuming, *arguendo*, a favorable classification action had resulted from a classification appeal, the claimant may not be awarded back pay. It is well settled that employees are not entitled to back pay for periods of misclassification (5 U.S.C. 5596(b)(3)). See *United States v. Testan*, 424 U.S. 392, 400 (1976) and *Erlyn D. Felder*, B-202685, August 17, 1982.

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 is 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 VA and the American Federation of Government Employees National Veterans Affairs Council of Locals in effect during the period of the claim does not specifically exclude compensation issues from the NGP (Article 42) 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 VA 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 VA.

The claimant's effort to seek Federal retirement benefits under 31 U.S.C. § 3702(a)(2) is similarly misplaced. We have referred this part of the claim to OPM's Associate Director for Retirement Operations for review and response.

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.