

Date: September 8, 2003
Claimant: Milk Market Administrator
File Number: 03-0033
OPM Contact: Deborah Y. McKissick

This responds to a claim dated, May 9, 2003, requesting adjudication of a claim for the value of an employee's annual leave with the Center for Merit System Compliance of the U.S. Office of Personnel Management (OPM). The claim was submitted in accordance with Part 178, Subpart A of title 5, Code of Federal Regulations. The AMS filed the claim "to compel the National Credit Union Administration (NCUA) to compensate the Office of the Milk Market Administrator (MMA) in the amount of \$3,009.44 for the value of a transferring employee's annual leave balance." The AMS clearly filed the claim on behalf of the MMA, an office within the AMS, rather than on the employee's behalf. This claim is an interagency claim, rather than an employee's claim for compensation or leave under 31 U.S.C. § 3702. OPM Office of General Counsel provided input in this response. For the reasons stated below, OPM lacks jurisdiction to adjudicate this claim.

When [employee] transferred from the NCUA to the MMA in July 2001, the NCUA transferred his annual leave. Based on a 1952 opinion of the Comptroller General, the MMA asked the NCUA for a payment of \$3,009.44, the value of the transferred annual leave. The NCUA refused the request, stating that 5 U.S.C. § 6308(a) permits transfers of annual leave between agencies, but does not provide for exchanges of monetary payments representing the actual value of that leave. The NCUA stated that, based on an opinion from an attorney in its Office of General Counsel, the Comptroller General opinion did not relieve it from the obligation to follow the provisions of 5 U.S.C. § 6308(a). The MMA and NCUA both are covered under Subchapter I of 5 U.S.C. Chapter 63. Therefore, they are under the same leave system. Neither agency challenges [employee's] entitlement to the annual leave that he earned, but did not use, while he was employed with the NCUA.

Section 6308 provides for the transfer of annual leave on an adjusted basis when an employee transfers between positions under *different* leave systems, and OPM's regulation at 5 CFR 630.501(b) describes the adjustment. OPM's regulation at 5 CFR 630.501(a) provides that, when an employee transfers between two positions in the *same* leave system, the losing agency shall certify his annual leave account to the gaining agency for credit or charge.

The Comptroller General opinion, B-109025 (June 23, 1952), specifically concerns transfers of annual leave between milk markets and other Federal agencies. The opinion states that employees who transfer between other Federal agencies and milk markets generally may not receive a lump-sum payment for their unused annual leave because, in most instances, the transfer occurs within the same leave system. It also states, however, that when employees transfer from other Federal agencies to milk markets, the value of their accumulated annual leave may be paid to the milk market and the losing agency would charge the amount paid to the fund properly chargeable with the employee's salary. The opinion states that this method merely is a different accounting method for accumulated annual leave, designed to maintain intact the trust funds resulting from assessments on milk handlers, and from which milk market employees are paid. The Comptroller General took the same position in a more recent opinion. B-109025 (March 11, 1966).

The OLC opinion of August 5, 1991 discusses the Comptroller General's authority under 31 U.S.C. §§ 3527 and 3528 to relieve accounting and disbursing officers from liability for improper payments.¹ It also discusses the Comptroller General's authority under 31 U.S.C. § 3529, a provision that the OLC described as closely related to sections 3527 and 3528, to issue advance opinions to Federal agencies who request advice concerning proposed payments and vouchers presented for certification.² The opinion concludes that these statutory authorizations violate the separation of powers doctrine by delegating executive branch functions, including interpretation and implementation of statutes, to the Comptroller General, a legislative branch official. The opinion concludes further that the Comptroller General's interpretations of the law are not binding on the executive

¹Sections 3527 and 3528 still authorize the Comptroller General to relieve accounting and disbursing officers from liability.

²Section 3529 still authorizes the Comptroller General to issue advance opinions concerning proposed payments and voucher certification. The amended section 3529, however, authorizes the Director of the Office of Management and Budget (OMB) to issue advance opinions concerning functions that transferred to him through the Legislative Branch Appropriations Act of 1996, Pub. L. 104-53, and the General Accounting Office Act of 1996, Pub. L. 104-316. Section 3529 also gives to the heads of an executive agency the authority to issue advance opinions associated with functions that the Director of OMB initially received under the Legislative Branch Appropriations or the General Accounting Office Acts, but delegated to his or her agency. Thus, section 3529 authorizes the Director of OPM to issue advance opinions on compensation and leave questions. *See Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316*, Office of Management and Budget (December 17, 1996). NCUA has not asked OPM for an advisory opinion, pursuant to 31 U.S.C. § 3529, on whether 5 U.S.C. § 6308(a) and OPM regulations permit an agency to transfer to an other agency a monetary payment to cover the value of [employee's] unused annual leave in view of the extraordinary circumstances of this case.

branch, the Comptroller General could not relieve from liability any certifying and disbursing officers in the executive branch, and executive branch officials are bound to follow the opinion of the Attorney General, rather than that of the Comptroller General, in the event of a conflict. Finally, the opinion recommends that accountable officers seek the advice of their agency counsel concerning the legality of certain payments or certifications and that agency counsel may refer cases involving significant or novel legal questions to the OLC.

OLC issued this opinion before the enactment of both the Legislative Branch Appropriations Act of 1996, and the General Accounting Office Act of 1996, which transferred at least some of the Comptroller General's authority, including the authority to issue advance opinions, to the Director of OMB and other executive branch agencies. Questions concerning the impact, if any, of these statutes upon the OLC opinion August 5, 1991, are matters for consideration by the Department of Justice, rather than OPM.

Accordingly, this claim is an interagency claim. AMS filed it on behalf of the MMA and believes that NCUA should be compelled to transfer to the MMA the monetary value of annual leave that [employee] had earned but did not use before he transferred from the NCUA to the MMA. The AMS believes that the MMA should be paid for the monetary value of [employee's] annual leave, based on the Comptroller General opinions and informal advice from OPM. Notwithstanding informal advice from OPM that payment to the MMA for the monetary value of [employee's] leave would be permissible under the circumstances, the NCUA refuses to effect such a payment, based on its own interpretation of 5 U.S.C. § 6308(a) and the OLC opinion of August 5, 1991. OPM does not have jurisdiction to adjudicate or settle such a claim.

The language in 31 U.S.C. § 3702(a)(2), the statute authorizing OPM to settle claims for compensation and leave, conceivably could be interpreted to include claims made by Federal agencies, on their own behalf, against other Federal agencies. Section 3702(a)(2), provides in relevant part that the Director of OPM “. . . shall settle claims involving Federal civilian employees' compensation and leave.”³ Section 3702, in its entirety, suggests that it is limited to settling claims from individuals, or from

³Effective June 30, 1996, the Legislative Branch Appropriations Act of 1996, Pub. L. 104-53, 109 Stat. 535 (November 19, 1995), transferred certain claims adjudication functions from the General Accounting Office to the Office of Management and Budget. The Director of the Office of Management and Budget delegated to OPM the responsibility for adjudicating “claims involving federal civilian employees' compensation and leave.” *Determination with Respect to Transfer of Functions Pursuant to Public Law 104-53* (June 28, 1996). Section 202(n)(1)(B) of the General Accounting Office Act of 1996, Pub. L. 104-316, 110 Stat 3826, 3843-44, October 19, 1996, codified at 31 U.S.C. § 3702(a)(2), transferred the Comptroller General's authority to settle claims for Federal civilian employees' compensation and leave to the Director of OPM. *See also* Memorandum for the Director of the Office of Management and Budget

organizations outside the Federal government, and does not address claims brought by one Federal agency against another Federal agency. The language in subsection (a)(2), however, is broad enough to suggest that OPM's claims settlement authority could include a Federal agency's claim of entitlement to a monetary payment from another Federal agency.⁴

The majority of OPM claims regulations in 5 CFR Part 178 refer to "the claimant," a general term that some might interpret to include a Federal agency prosecuting a claim on behalf of itself. The language in 5 CFR 178.102(b) and (c), however, clearly reflects that OPM's interpretation of 31 U.S.C. 3702(a)(2) limits the scope of that provision to the claims of individuals. Section 178.102 describes requirements for submitting claims and subsection (b) provides for agency submissions of claims. Subsection (b), however, limits such agency action to submission of a claim on behalf of a claimant and does not address an agency's submission of a claim on behalf of itself. No other OPM regulation addressing claims for compensation and leave provides for agency submissions of claims. Section 178.102(c) further provides:

Administrative report. At OPM's discretion, OPM may request the agency to provide an administrative report. This report should include: (1) The agency's factual findings; (2) The agency's conclusions of law with relevant citations; (3) The agency's recommendation for disposition of the claim; (4) A complete copy of any regulation, instruction, memorandum, or policy relied upon by the agency in making its determination; (5) ***A statement that the claimant is or is not a member of a collective bargaining unit, and if so, a statement that the claim is or is not covered by a negotiated grievance procedure that specifically excludes the claim from coverage;*** and (6) Any other information that the agency believes OPM should consider. [Emphasis added].

Federal agencies are not members of collective bargaining units. Thus, according to OPM regulations, "claimants" are individuals or their representatives, rather than Federal agencies.

The regulations that the General Accounting Office (GAO) issued pursuant to its former claims settlement authority under 31 U.S.C. § 3702, prior to the 1996 amendment of that statutory provision, also reflect this interpretation. The GAO regulations governing

(December 11, 1996) and *Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316*, Office of Management and Budget (December 17, 1996).

⁴The legislative histories of the Legislative Branch Appropriations Act of 1996 and the General Accounting Office Act of 1996 are silent as to whether the authority granted under 31 U.S.C. § 3702 includes jurisdiction to adjudicate and settle interagency claims.

claims against the United States (4 CFR Part 31) clearly limited themselves to claims from individuals, or from organizations outside the Federal government, rather than claims filed by one Federal agency against another agency. Section 31.4 of title 4, Code of Federal Regulations (1992 Ed.) provides in relevant part:

A claimant should file his or her claim with the administrative department or agency out of whose activities the claim arose. . . . If the claimant is not satisfied with the agency's determination, he or she may appeal that determination to the Claims Group, General Accounting Office. . . .

Thus, section 3702 in its current or superseded form does not include the authority to adjudicate and settle claims arising between Federal agencies.

Although the GAO assisted Federal agencies in resolving their interagency claims, it acted under the authority of another regulation, 4 CFR 101.3 (1992 Ed.). Section 101.3 concerns the Federal Claims Collection Standards, which the GAO formerly administered in conjunction with the Department of Justice. It provides in pertinent part:

(c) This chapter does not apply to claims between Federal agencies. Federal agencies should attempt to resolve interagency claims by negotiation. If the claim cannot be resolved by the agencies involved, it should be referred to the [GAO].⁵

The *Principles of Federal Appropriations Law* (General Accounting Office, 2d Ed. 1991), popularly known as the *GAO Redbook*, also addresses the settlement of interagency claims. It provides in relevant part:

As a general proposition, the government cannot sue itself because the same party cannot be both plaintiff and defendant in the same lawsuit. [Citations and footnote omitted.] Thus, as discussed further in Chapter 13, the resolution of interagency claims is largely a matter of comity. Agencies should first pursue good faith negotiations. If this doesn't

⁵The Department of the Treasury, in conjunction with the Department of Justice, currently administers the Federal Claims Collection Standards, now found in Chapter IX of Title 31, Code of Federal Regulations. The current Standards, at 31 CFR 900.3, include a provision similar to section 101.3. Section 900.3(c) reads:

Parts 900-904 of this chapter do not apply to claims between Federal agencies. Federal agencies should attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146 (3 CFR, 1980 Comp., pp. 409-412).

work, GAO is available to help. See 4 C.F.R. 101.3(c). Alternatively, the agencies may invoke the aid of the Attorney General pursuant to Executive Order 12146, §§ 1-4 (1979).

Chapter 12 (Claims Against the United States), § 4.

With respect to the exclusion of interagency claims from the Federal Claims Collection Standards, the *Principles of Federal Appropriations Law* states in relevant part:

The exemption of section 101.3(c) . . . is not merely an example of the government being good to itself. Rather, it is a recognition that the collection tools set forth in the Standards simply are not available when asserting a claim against another federal agency.

The range of options in collecting a claim from another federal agency is extremely limited. The Standards instruct agencies to attempt to resolve interagency claims by negotiation. If this fails, the claim should be referred to GAO. 4 C.F.R. 101.3(c). The agency should not simply “write off” the claim. B-214972-O.M., April 26, 1985. GAO will review the claim and render its objective opinion as to the claim’s validity, for whatever persuasive influence that may have. GAO cannot, however, enforce collection any more than the creditor agency itself could.

Chapter 13 (Debt Collection), section 4.

Although GAO assisted Federal agencies in resolving their interagency claims, GAO did so under 4 CFR 101.3(c), rather than under 31 U.S.C. § 3702, the statute authorizing GAO to adjudicate and settle Federal employees’ claims for compensation and leave. Moreover, the GAO’s functions associated with the former 4 CFR 101.3(c) clearly did not transfer to OPM.

Section 3702 of Title 31, United States Code, does not authorize OPM to adjudicate and settle interagency claims. Therefore, OPM does not have jurisdiction to adjudicate or settle the claim that the AMS has filed to compel the NCUA to compensate the MMA for the monetary value of [employee's] unused annual leave. In view of Executive Order 12146, which provides a mechanism for solving disagreements between agencies, and the NCUA’s reliance on the OLC opinion of August 5, 1991, we suggest that the AMS pursue with the Office of Legal Counsel whether that entity would provide guidance on resolving this matter.

This settlement is final. No further administrative review is available within the Office of Personnel Management.