

Date: March 1, 2006
Claimant: [name]
File Number: 05-0015
OPM Contact: Robert D. Hendler

The claimant is employed in a [position] with the Broadcasting Board of Governors, in Washington, DC. He requests that the U.S. Office of Personnel Management (OPM) direct his agency to restore leave that it recouped from him based on its determination that he had received an erroneous overpayment of leave. In his initial letter to OPM dated August 10, 2004, the claimant sought to file a request for waiver and reinstatement of leave. In a letter dated September 3, 2004, we informed him that a waiver request must be submitted to an office in his agency authorized to act on such a request, and that we would hold his correspondence pending resolution of that request. The waiver request was denied on May 5, 2005, and the claimant resubmitted his claim to us on May 9, 2005. We received the claim administrative report on September 21, 2005, and additional information from the agency on January 9, 2006. For the reasons discussed herein, OPM does not have jurisdiction to adjudicate this claim.

OPM cannot take jurisdiction over the compensation or leave claims of Federal employees that are or were subject to a negotiated grievance procedure (NGP) under a collective bargaining agreement 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. This is because the courts have found that Congress intended that 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, United States Code (U.S.C.), mandates that the grievance procedures in negotiated collective bargaining agreements 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 agency at our request shows that the claimant is in a bargaining unit position. The claimant is covered by the collective bargaining agreement between the agency (the former United States Information Agency) and the American Federation of Government Employees, Local 1812. Because compensation and leave issues are not specifically excluded from the NGP covering the claimant, they must be construed as

covered by the NGP that the claimant was subject to during the claim period. Therefore, OPM has no jurisdiction to adjudicate the claim.

We note that in his May 9, 2005, claim request, the claimant stated:

I do not understand the part about the Comptroller General Decision stated in the denial. As I understand it, they could have just as easily approved the waiver. I still feel, as I stated in my first request...that after 10 years I should not be held accountable for a mistake that was made by Personnel and corrected by them in 1994. However, no action was taken until 2004. I would hope there is a statute [sic] of limitations.

The claimant misconstrues the waiver process. Contrary to the claimant's assertions, the waiver of debt to the Government under 5 U.S.C. § 5584(a) is permitted only when "the collection ... would be against equity and good conscience and not in the best interests of the United States." Furthermore, as discussed in the agency's September 9, 2005, claim administrative report:

if the employee has a positive leave balance, the error may be easily corrected through the reduction of the employee's account, and there is no overpayment that may be considered for waiver. The correction made to [claimant's] leave balance was a means to correct the previous erroneous actions and did not result in a financial liability of the employee for repayment.

The proper application of 5 U.S.C. § 5584 is clearly articulated in *Carl H.L. Barksdale*, B-219505 (November 29, 1985):

We have consistently held that when an employee's leave account must be adjusted to correct a previous error and the employee has sufficient leave to his credit to cover the adjustment, there is no overpayment of pay which may be considered for waiver. Where the employee has insufficient leave to his credit to cover the adjustment, then to the extent that such leave reduction produces a negative leave balance, the employee has received pay to which he is not entitled. Only that amount is subject to possible waiver. This is based on the fact that the statute authorizing waiver, 5 U.S.C. § 5584 extends to overpayments of pay and allowances. Daniel F. Cejka, 63 Comp.Gen. 210 (1984); Bessie P. Williams, B-208293, August 15, 1983.

The claimant further says that he should not be held accountable for a mistake made by his agency. However, as addressed in *Barksdale*:

Mr. Barksdale asserts that since the erroneous credit of leave to his account was due to a mistake made by the Government and he, in good faith, relied upon it, the hours should be reinstated. While it is unfortunate that Mr. Barksdale relied on the erroneously credited leave the Government

is not stopped from correcting the error. Nor does the error in determining Mr. Barksdale's service computation create liability on the part of the Government, since it is a well established rule that the Government may not be bound by the erroneous acts or advice of its agents. E. Paul Tischer, M.D., 61 Comp.Gen. 292 (1982).

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.