<b>Compensation Claim Decision</b>
Under section 3102 of title 31, United States Code

Claimant:	[name]
Organization:	88 <sup>th</sup> Regional Readiness Command AMSA 101 Department of the Army Fort Snelling, Minnesota
Claim:	Pay setting (Geographic Conversion from FWS to GS with Movement to Lower Locality Pay Area at Employee's Request and Subsequent Termination of Retained Pay)
Agency decision:	Denied
OPM decision:	Denied; Lack of Jurisdiction
OPM contact:	Robert D. Hendler

/s/ for

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

9/6/2006

Date

The claimant is employed as a [GS-6] with the U.S. Army Reserve Command, 88<sup>th</sup> Regional Readiness Command, at Fort Snelling, Minnesota. He requests the Office of Personnel Management (OPM) review his agency's decision to adjust his salary under new pay setting regulations issued by OPM on May 31, 2005, and effective May 1, 2005. We received the claim on November 21, 2005, and the agency administrative report on or about March 14, 2006. For the reasons discussed herein, we do not have jurisdiction to consider this claim.

The claimant was previously employed in a [WG-6] job at step 00, with the retained rate of \$21.12 per hour, at Tracy Army Depot, California. On June 2, 2005, he accepted his current position at Fort Snelling at the offered salary of \$51,368 per annum and entered on duty July 24, 2005. On September 14, 2005, he received written notification from his agency he had been overpaid as a result of retroactive application of the new pay setting regulations issued by OPM. The new regulations implement Section 301 of the Federal Workforce Flexibility Act of 2004 (Public Law 108-411, October 30, 2004) and significantly change how pay actions involving retained pay and locality pay are calculated. As a result, the claimant's salary was adjusted to \$46,978 per annum. The claimant does not allege that his pay was set incorrectly under these regulations, but rather requests that his pay be restored to the previous salary rate because that was the basis on which he accepted the position. He states the pay adjustment has caused financial hardship and he would not have accepted the position at the lower salary.

OPM cannot take jurisdiction over the compensation or leave claims 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 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 (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 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 agency at our request shows the claimant was in and continues to occupy a bargaining unit position covered by a CBA between the 88<sup>th</sup> Regional Support Command, Fort Snelling, and the American Federation of Government Employees, Local 1882, effective March 1997. Because compensation and leave issues are not specifically excluded from the NGP covering the claimant, they must be construed as covered by the NGP the claimant was subject to during the claim period. Since the NGP was available to the claimant when the claim arose and was his exclusive remedy, OPM has no jurisdiction to adjudicate his compensation claim.

Although we have no claims settlement jurisdiction in this case, we examined whether the claimant's agency interpreted and applied the new pay setting regulations as intended. Based on the information provided by the claimant and his agency, we note that his pay was set incorrectly, although not as a direct consequence of the new regulations.

The claimant was entitled to pay retention under 5 U.S.C. 5363 when he applied and was selected for his current position. Under 5 CFR 536.304(c), when an employee receiving a retained rate undergoes a change in position or pay schedule, the agency must determine whether the employee's pay retention may continue. The conditions under which pay retention must be terminated are addressed in 5 U.S.C. 5363(e) and 5 CFR 536.308. One of these, in 5 U.S.C. 5363(e)(3) and 5 CFR 536.308(4), is when the employee is reduced in grade for personal cause or at his or her request. When the employee is moving from one position to another in the same pay system (e.g., from one General Schedule (GS) position to another GS position), a reduction in grade is readily apparent. However, when the employee is moving to a different pay system (e.g., from a prevailing rate Wage Grade (WG) position to a GS position), the two positions cannot be directly compared to determine if there is a reduction in grade because the grading structures are different. Instead, the "representative rates" of the two positions are compared. "Representative rate" is defined in 5 CFR 536.103 as the highest rate of basic pay for the fourth step of the grade for a GS position, and, for a position under a regular prevailing rate system (e.g., WG), the highest rate of basic pay that applies to the second step of the grade. If the positions being compared are in different geographic locations where different pay schedules apply, the representative rate of the employee's existing position (i.e., the position occupied before the geographic move) must be determined as if the official worksite of that position were the same as the official worksite of the new position (5 CFR 536.105(b)). In other words, the representative rates for the two positions are compared in the new geographic location to determine whether there is in effect a reduction in grade.

In this case, assuming that the claimant's change in position was at his own request, the agency should have determined whether that change constituted a reduction in grade. Since he was moving to a different pay system (i.e., from WG to GS), the representative rates of the two positions at the location of the new position should have been compared. That is, the rate of pay for a GS-6, step 4, position in the Minneapolis-St. Paul-St. Cloud locality pay area in 2005 should have been compared to the WG-6, step 2, rate applicable in that same locality pay area to determine whether the claimant was being reduced in grade when he moved from the WG position in California to the GS position in Minnesota. The WG representative rate (i.e., WG-6, step 2) was \$18.98/hour, or \$39,611 per annum (derived by multiplying the hourly rate by 2,087 consistent with 5 U.S.C. 5504(b)), and the GS representative rate (i.e., GS-6, step 4) was \$35,096 per annum. Because the GS representative rate is less than the WG representative rate, the claimant's move from the WG position to the GS position should have been considered a reduction in grade and his pay retention should have been terminated accordingly.

Under 5 CFR 536.308(d), if an employee's entitlement to pay retention terminates, the employee's rate of basic pay must be set using the pay setting rules applicable to the new position, e.g., 5 CFR part 531, subpart B, for GS positions. Under 5 CFR 531.215(a), an employee who is demoted is entitled to the minimum payable rate of basic pay for the lower grade. In the claimant's case, this would have been the rate for GS-6, step 1, in the 2005 Minneapolis-St. Paul-St. Cloud locality pay area, or \$31,905 per annum. Alternatively, the agency *may* set the claimant's pay at a higher rate under the maximum payable rate rule in 5 CFR 531.221(d). However, this is at agency discretion and is, therefore, subject to individual agency regulations and policy.

We based this analysis on the assumption that the claimant's change in position was at his request, since there is no information to the contrary indicated by either him or his agency. The discrepancy between our analysis and the claimant's pay as set by his agency was due largely to the agency not terminating his pay retention in response to this action, which would have been required under both the former regulations in effect before May 1, 2005, and the new regulations in effect on and after May 1, 2005.

We note the statutory requirements of Public Law 108-411, which resulted in a change in OPM's pay-setting regulations at 5 CFR part 531, subpart B, and the consequent change in his salary, may not be waived or otherwise modified. Section 301(d) of the Act stipulated that its provisions "shall take effect on the first day of the first applicable pay period beginning on or after the 180<sup>th</sup> day after the date of the enactment of this Act," i.e., May 1, 2005. While OPM did not publish interim regulations until May 31, 2005, (see Federal Register, Volume 70, No. 103, Tuesday, May 31, 2005, 32178-31315) the regulations were effective May 1, 2005, as mandated by the Act. Payments of money from the Federal Treasury are limited to those authorized by law, even where this may cause hardship in individual cases. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

This settlement 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.