

Compensation Claim Decision
Under section 3102 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
[city & State]

Claim: Request for Salary Adjustment
(FWS to GS conversion)

Agency decision: Denied

OPM decision: Denied for Lack of Jurisdiction

OPM contact: Robert D. Hendler

OPM file number: 06-0022

/s/ Judith A. Davis for

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

5/19/2006

Date

The claimant occupies a [GS-9] position with the Department of the Army at the [agency component] in [city & State]. He requests the Office of Personnel Management (OPM) reconsider his agency's decision to adjust his salary due to implementation of pay regulations issued May 31, 2005, and effective May 1, 2005. We received his request on January 31, 2006, which the agency stipulated was its final decision on the matter on February 21, 2006. For the reasons discussed herein, we do not have jurisdiction to consider this claim.

The claimant was previously employed as [a WG-11] with the U.S. Army Aviation and Missile Command at [city & State] (not Redstone Arsenal, Alabama, as implied on the Standard Form-50 in the claim file). Both duty stations are within the Boston locality pay area. On May 18, 2005, he received a written offer of employment for his current position at the [agency component] as [a GS-11], step 10. He accepted the position and entered on duty May 29, 2005. On August 25, 2005, he received written notification from the U.S. Army Civilian Human Resource Agency, Northeast Region Civilian Personnel Operations Center, that he had been overpaid as a result of the retroactive application of 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 locality rates are calculated. As a result, the claimant's pay was adjusted to [GS-9], step 4, retroactive to May 29, 2005. The claimant does not allege that his pay was set incorrectly under these regulations, but rather requests that his pay be restored to GS-9, step 10, because he feels that this was the commitment that was made at the time of hire. He states that the pay adjustment has caused him financial hardship and that he would not have accepted the position at GS-9, step 4.

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 that the claimant was in and continues to occupy a bargaining unit position covered by a CBA between the National Association of Government Employees, Local [number], and the [agency component] in [city & State], effective September 26, 2003, through September 25, 2006. 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. 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.

We note, however, 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 180th 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).

Under the maximum payable rate rule in effect before May 1, 2005, when an employee moved from an FWS position to a GS position, his or her FWS rate was first compared to the GS base rate range for the employee's grade, *excluding locality pay*. The maximum payable rate was set at the lowest step in the underlying GS rate range that equaled or exceeded the employee's FWS rate. The applicable GS locality payment was then computed as a percentage of that step, and that amount was added to the rate for the step.

In the claimant's case, his FWS rate of \$47,834, (his hourly rate of \$22.92 X 2,087 hours/year) was initially compared to the 2005 GS-9 rate range, excluding any locality pay. The lowest step that equaled or exceeded \$47,834 was GS-9, step 10 (\$48,604) and his pay was set at that rate. The 2005 locality payment applicable in Boston of 18.49 percent was then computed based on that rate. The resulting \$8,987 locality payment (\$48,604 X .1849) was added to the GS-9, step 10, rate (\$48,604). The resulting amount of \$57,591 equaled the GS-9, step 10, on the 2005 Boston locality salary table.

Under the new GS maximum payable rate rule at 5 CFR 531.221(d)(1), when an employee moves from an FWS position to a GS position, his or her FWS rate is compared to the highest applicable GS rate range for the employee's grade, *including locality pay at the time and place where it was earned*. The maximum payable rate is set at the lowest step in the locality rate range that equals or exceeds the highest previous rate where it was earned. In the claimant's case, since the agency was using the maximum payable rate rule, it appropriately compared his May 2005 FWS rate of \$47,834 to the GS-9 rate range on the 2005 Boston locality pay table. The lowest step in that range that equaled or exceeded \$47,834 was GS-9, step 4 (\$48,733) on the 2005 Boston locality pay table. The record shows the agency set his pay appropriately following these procedures.

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.