

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

Claimant: [name, et al.]

Organization: [field office]
Federal Grain Inspection Service
Grain Inspection, Packers and
Stockyards Administration
U.S. Department of Agriculture
New Orleans, Louisiana

Claim: Overtime Pay

Agency decision: Denied

OPM decision: Denied; Lack of Jurisdiction

OPM contact: Robert D. Hendler

OPM file number: 06-0059

/s/ for

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

10/13/2006

Date

The claimants' representative, an Area Representative of the American Federation of Government Employees (AFGE), Local 3157, seeks to have a claim filed under the Fair Labor Standards Act (FLSA) transferred from the U.S. Department of Agriculture to the Office of Personnel Management (OPM). The initial request, which we received on August 1, 2006, concerns a group of six claimants who work in Agricultural Commodities Grader (Grain), GS-1980 and Agricultural Commodities Technician (Grain), GS-1981, positions in the [field office]; Federal Grain Inspection Service; Grain Inspection, Packers Stockyards Administration, U.S. Department of Agriculture (USDA), in [city & State]. The second request, which we received on September 25, added two employees in similar positions. We received the agency claim materials on August 11, 2006, which we find adequately cover all eight claimants. For the reason discussed herein, we do not have jurisdiction to consider this claim.

The claimants' representative asserts the claimants "were forced to work a CWS [compressed work schedule] schedule And [sic] never waived their rights under the Flsa [sic]." The claimants' letters to USDA state the claim as follows or a variant thereof:

FLSA-OVERTIME AFTER 40 HOURS
TITLE 5-ANNUAL AND SICK LEAVE
PAY COMPARABILITY ACT OF 1990-OVERTIME AFTER 8

In so doing, the claimants' representative seeks to file a claim under the provisions of both the FLSA and title 5, United States Code (U.S.C.). The record shows the USDA headquarters November 9, 2005, letter to each claimant on this matter stated the hours of work included in the claims were hours worked under a CWS; agency management and the union agreed to the CWS; and, based on the information available, "we find that your employing Agency correctly applied the rules and regulations for compressed work schedules and overtime compensation under the FLSA. Accordingly, you are not entitled to additional compensation." The letters stated: "This is the final Department of Agriculture decision. Any further claim you may wish to make must be directed to the Office of Personnel Management...."

The claimants' representative would appear to ask us to invalidate an agreement negotiated under the provisions of 5 U.S.C. § 7114 between the [field office]; Federal Grain Inspection Service and AFGE, Local [number], in April 2004, establishing a CWS as one of the scheduling options under the Local Supplement Agreement of April 20, 1995. OPM has no authority under chapter 71 of title 5, U.S.C. to intervene in or set aside bilateral agreements entered into under 5 U.S.C. § 7114. OPM's authority to adjudicate compensation and leave claims flows from a different law - 31 U.S.C. 3702. The authority in section 3702 is narrow and limited to adjudications of compensation and leave claims, and does not include any authority to intervene in or set aside bilateral agreements entered into under 5 U.S.C. § 7114. Therefore, while the claimants appear not to agree with the CWS agreement, we must conclude it is valid and controlling with regard to the case at hand.

Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-566 (1845); *Alexander v. Mayor and Commonality of Alexandria*, 9 U.S. (5 Cranch) 1, 7-8 (1809). This assumes that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). The claimants' representative also asserts the FLSA is controlling since the claimants "never waived their rights under the Flsa [sic]." The

representatives' rationale relies on case law which stipulates employee rights under the FLSA may not be waived. In doing so, he misconstrues and misapplies the controlling statute. The provisions of 5 U.S.C. § 6128 are clear and unambiguous; the overtime provisions of the FLSA do not cover employees under a CWS. Therefore, they have no FLSA overtime rights to waive.

SUBCHAPTER II--FLEXIBLE AND COMPRESSED WORK SCHEDULES

Sec. 6128. Compressed schedules; computation of premium pay

(a) The provisions of sections 5542(a) and 5544(a) of this title, section 7453(e) of title 38, *section 7 of the Fair Labor Standards Act (29 U.S.C. 207)*, or any other law, which relate to premium pay for overtime work, *shall not apply to the hours which constitute a compressed schedule* [emphasis added].

(b) In the case of any full-time employee, hours worked in excess of the compressed schedule shall be overtime hours and shall be paid for as provided by the applicable provisions referred to in subsection (a) of this section. In the case of any part-time employee on a compressed schedule, overtime pay shall begin to be paid after the same number of hours of work after which a full-time employee on a similar schedule would begin to receive overtime pay.

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, mandates that the grievance procedures in any negotiated CBA shall be the exclusive administrative procedures for resolving matters covered by the agreement. *Accord*, *Paul D. Bills, et al.*, B-260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992).

Information forwarded by the agency at our request shows the claimants were in and continue to occupy bargaining unit positions covered by a CBA between the Federal Grain Inspection Service and the National Council of Federal Grain Inspection Locals, AFGE (AFL-CIO). Because FLSA, and compensation and leave issues under 31 U.S.C. 3702, are not specifically excluded from the NGP (Article 13) covering the claimants, they must be construed as covered by the NGP the claimants were subject to during the claim period. Since the NGP was available to the claimants when the claim arose and was their exclusive remedy, OPM has no jurisdiction to adjudicate any claim on the matters at issue in the representative's request.

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.