

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

Claimant: [name]

Organization: Environmental Management Service
Administrative Services
Veterans Affairs Medical Center
U.S. Department of Veterans Affairs
[city & State]

Claim: Back Pay for Delayed Promotion

Agency decision: N/A

OPM decision: Denied; Lack of Jurisdiction

OPM file number: 07-0045

/s/ for

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

12/4/2008

Date

The claimant was formerly employed in a Pest Control Worker, WG-5026-10, job in Environmental Management Services, Administrative Services, Veterans Affairs Medical Center, U.S. Department of Veterans Affairs (VA), in [city & State]. He retired from that job effective September 30, 2006. The claimant requests his promotion from the grade 7 to the grade 10 level, effective February 5, 2006, which occurred as a result of a job grading appeal, be applied retroactively by being treated as a correction of an administrative error rather than as a promotion. On January 25, 2007, the U.S. Office of Personnel Management (OPM) received his initial claim request, which was rejected for failure to provide a final agency-level claim denial. OPM received a subsequent request on March 7, 2007, which still relied on an activity-level claim denial, and another request on September 17, 2007. We received additional information from his former employing activity on September 21, 2007. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

Part 178 of title 5, Code of Federal Regulations (CFR), concerns the adjudication and settlement of claims for compensation and leave performed by OPM under the provisions of section 3702(a)(2) of title 31, United States Code (U.S.C.). Section 178.102(a)(3) of title 5, CFR, requires that an employing agency already has reviewed and issued an initial decision on a claim before it is submitted to OPM for adjudication. Based on the information submitted, we find no record of the claimant having filed a claim with his former employing agency or having received a written agency-level; i.e., VA headquarters level, denial of the claim on the matter at issue in his request. We advised the claimant of this requirement in a February 9, 2007, letter. Without a final agency decision, OPM may not adjudicate the claim. In addition, for purposes of 31 U.S.C. § 3702(a)(2), a job grading appeal decision does not constitute an agency compensation claim decision. Rather, the determination of the proper grading of a job is a decision governed by the provisions of 5 U.S.C. § 5346(c). The agency action to promote the claimant subsequent to that decision is a separate and distinct action which is not subject to the provisions of 31 U.S.C. § 3702(a)(2). However, we may render a decision on this matter based on jurisdictional grounds.

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 the matter is or was specifically excluded from the agreement's NGP. The Federal courts have found Congress intended 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, U.S.C., mandates 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 claimant's employing activity at our request shows the claimant was in a bargaining unit position during the period of his claim. The CBA between VA and the American Federation of Government Employees National Veterans Affairs Council of Locals, does not specifically exclude compensation and leave issues from the NGP (Article 42) covering the claimant. Therefore, the claimant's compensation claim must be construed as covered by the

NGP to which the claimant was subject during the claim period. Accordingly, OPM has no jurisdiction to adjudicate this claim.

Although we have no jurisdiction to consider this claim, we find the claimant's rationale is prohibited by statute and controlling case law. The claimant asserts his promotion from grade 7 to grade 10 should have been processed as a correction of an administrative error rather than as a promotion. He argues he should receive back pay from the "time of initial application (26 Sept. 2003) through the time of the ruling by Central Office Rating Board that the position **would be paid** at a Journeyman level on 26 January, 2006." The claimant points to numerous delays and a "gross misuse of power and position" which impeded the eventual upgrading of his job.

The record shows the claimant sought to file a job grading appeal with OPM and was advised both verbally and in a December 6, 2005, letter he must first receive a decision from his agency before he could file an appeal with OPM. See 5 CFR § 532.705. Although the claimant attempted to have the grading of his job changed at his activity, he did not file a formal job grading appeal with VA headquarters until after being advised to do so by OPM. It is this filing and not the activity-level attempts to resolve the grading of his job which constitutes "the application for review of the correctness of the... grade... of the employee's [claimant's] job" under the job grading review provisions of 5 CFR 532.705(a).

It is well established the Back Pay Act (5 U.S.C. § 5596(b)(3)) and the regulations issued pursuant to 5 U.S.C. § 5346(c), which authorizes a job grading system for prevailing rate employees, preclude the payment of back pay for periods of wrongful job grading other than to the limited extent provided for in 5 CFR 532.703(b)(8)-(10). The January 26, 2006, effective date for the claimant's promotion reflects the application of 5 CFR 532.703(b)(10) to implement the findings of the VA job grading appeal decision. *See* 57 Comp. Gen. 404 (1978), B-189492, February 14, 1978. These limitations are reiterated in 5 CFR 532.409 which states:

Except as provided in § 532.703(b)(10), a change in the employee's rate of basic pay as a result of the grading or regrading of the employee's position shall be effective on the date the grading or regrading action is finally approved by the agency or on a subsequent specifically stated date.

The Civilian Personnel Law Manual (as quoted in OPM Case #01-0020) states:

[I]n cases involving approval of retroactive promotions on the ground of administrative or clerical error, it is necessary that the official having delegated authority to approve the promotion has done so. Thus, a distinction is drawn between those errors that occur prior to approval of the promotion by the properly authorized officials and those that occur after such approval but before the acts necessary to effectuate the promotion have been fully carried out. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request. Where the error or omission occurs before he exercises that discretion, administrative intent to promote at any particular time cannot be established. 58 Comp. Gen. 59 (1978) and B-190408, December 21, 1977.

Since the authority to render a final agency decision on the claimant's job grading appeal rested at VA headquarters, claimant's request for retroactivity on the basis of "correction of administrative error" is misplaced.

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.