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

Claimant: [name]

Organization: [agency component]
U.S. Department of Veterans Affairs
[city & State]

Claim: Retroactive annual premium back pay

Agency decision: Denied

OPM decision: Denied; Lack of Jurisdiction

OPM file number: 08-0003

_/s/ for_____
Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

__7/22/2008_____
Date

The claimant formerly occupied a Social Worker, GS-185-12, position in the [agency component], U.S. Department of Veterans Affairs (VA), in [city 7 State]. He seeks to file a compensation claim for the period from August 1, 1998, through August 8, 2005, for "retroactive annual premium back pay." The U.S. Office of Personnel Management (OPM) received the claim on October 1, 2007, a partial agency administrative report from his former employing activity on March 28, 2008, and additional information from the claimant and his former servicing human resources office intermittently from March 28, 2008, through July 3, 2008. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

In his September 25, 2007, claim request the claimant requests OPM *inter alia* to subpoena documents and testimony "for the perfection of [his] claim for the $150,000.00 in uncompensated work" while he was employed at [agency component], and to investigate his claim for the payment of compensation provided for under "Title [sic] 5 CFR 550.143; 550.142; 550.143; 551.401; 551.431, 555.512 and 5 USC 5545." In an August 8, 2007, "Amendment to and Clarification of Claim," the claimant states he supervised employees in running a 24-hour-a-day program, should have been paid a "supervisory differential and premium pay like a head nurse over a bed care section" even though he was a social worker, and stated the issues of his claim were "Uncontrollable Administrative Overtime and unpaid overtime work for required tasks."

His request includes a September 11, 2007, letter from [agency component] responding to a July 12, 2007, letter sent by the claimant to the Secretary, Department of Veterans Affairs, and a June 7, 2007, letter to [agency component], which states:

> …there is no record that would validate your claim for any of the activities you have cited in your letter….
>
> The various types of compensation you cite, i.e., overtime, compensatory, premium, on-call, etc., require advance approval. Additionally, such special categories as premium or on-call pay require the establishment of special schedules and approval by higher management before implementation, none of which can be accounted for as you allege.
>
> Therefore, in the absence of any official record(s) that you are entitled to the compensation you are alleging you did not receive, it is necessary that I inform you your claim for said compensation must be denied.

In his January 4, 2008, letter in support of his claim, the claimant reiterated the basis of his claim, again asking OPM's assistance in obtaining documentation he believed would substantiate his claim. In separate correspondence, OPM advised the claimant under section 178.105 of title 5, Code of Federal Regulations (CFR), the claimant bears the burden of establishing the liability of the United States and his or her right to payment; OPM does not assist claimants in obtaining information in support of their claim; and the claims settlement process does not provide for the use of subpoenas. OPM further advised the claimant that the agency administrative report (AAR) should include all information responsive to the issues raised in his claim, and he would have an opportunity to comment on the AAR.

The March 28, 2008, AAR indicated there was a lack of documentation to reconstruct the claimant's assertions. Responding to the issues the claimant raised, the AAR acknowledged the claimant was on the on call Social Work Roster, may have been called at home by Domiciliary staff to advise the claimant of problems, but reiterated documentation was not available to substantiate the claimant had performed overtime during [agency component] or Presidential declared emergencies or other instances alleged by the claimant.

In his May 5, 2008, response to the AAR, the claimant stated: "The agency confirms that I was not paid for overtime worked nor did I receive Annual Premium pay." He asserted:

> The work I performed after hours, week-ends, holidays and while on approved leave or travel status could not be regularly scheduled and should fall under the rules for compensation provided under annual premium pay for administratively uncontrollable overtime.

The claimant also provided a rationale based on application of the Fair Labor Standards Act (FLSA), asserting it is OPM's responsibility under the FLSA to ascertain the facts necessary to administer the FLSA, including interviewing individuals he believes would support his claim.

In the AAR, the agency indicated the claimant was in a bargaining unit position during the period of the claim and was covered by a collective bargaining agreement (CBA). However, it did not indicate whether the negotiated grievance procedure (NGP) specifically excludes the claim from coverage. The agency provided an Intranet link to the contract which was not accessible to OPM. An August 7, 2005, Notification of Personnel Action, Standard Form 50, subsequently provided by the claimant confirmed the claimant occupied a bargaining unit position during the claim period.

OPM has authority to adjudicate compensation and leave claims for most Federal employees under the provisions of section 3702(a)(2) of title 31, United States Code (U.S.C.), and FLSA claims under the provisions of 5 CFR part 551, subpart G. However, OPM cannot take jurisdiction over the FLSA, compensation or leave claims of Federal employees who are or were subject to an NGP under a 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 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 5 U.S.C. mandates grievance procedures in negotiated CBAs are to 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).

The CBA between VA and the American Federation of Government Employees National Veterans Affairs Council of Locals in effect during the period of the claim does not specifically exclude FLSA, compensation and leave issues from the NGP (Article 42) covering the claimant. Therefore, the claimant's compensation and FLSA claim matters must be construed as covered by the NGP the claimant was subject to during the claim period. Accordingly, OPM has no jurisdiction to adjudicate the claimant's compensation or FLSA claim.

Although we may not render a decision on this claim, we note the claimant occupied an FLSA exempt position. Since the claimant's position during the claim period was designated as exempt from the FLSA, and he has not disputed this exemption status, which the claimant confirmed in a June 17, 2008 to OPM, the claim for overtime allegedly worked from August 1, 1998, through August 8, 2005, is not covered under the provisions of the FLSA. We also note 5 CFR 551.702 stipulates all FLSA pay claims filed after June 30, 1994, are subject to a two-year statute of limitations (three years for willful violations). A claimant must submit a written claim to either the employing agency or to OPM in order to preserve the claim period. The date the agency or OPM receives the claim is the date that determines the period of possible back pay entitlement. Assuming his claim was received by his agency on or about June 7, 2007, any recovery period under the FLSA would be time-barred prior to June 7, 2005, or June 7, 2004, if willful violation attached to his claim.

We also note the claimant's rationale regarding his entitlement to administratively uncontrollable overtime (AUO) is misplaced. The authorization of AUO is discretionary; this is made clear and unambiguous by the use of "may" in 5 U.S.C. § 5545(c): "The head of the agency, with the approval of the Office of Personnel Management, ***may*** [emphasis added] provide that…." and in 5 CFR § 550.151 (misidentified by the claimant as 5 CFR §§ 550.142 and 143, which pertain to standby duty pay alluded to by the claimant and which is similarly discretionary on the part of the agency): "An agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart…." This decision must be based on the conditions in 5 CFR §§ 550.153-161 and may not be implemented until these conditions are met.

We note the claimant's rationale regarding uncompensated overtime is similarly misplaced:

> I find it difficult to believe No OT was found, unless you only reviewed the time cards (which show only pay for time worked) and ignored the implicit expectation of Managers to be available for and respond to CAVHCS, Mental Health and Dom requirements to handle situations during and before/after scheduled work hours.

Exempt employees as defined in section 5541(2) of title 5, United States Code (U.S.C.), are covered by the overtime pay provisions of 5 U.S.C. § 5542(a) and 5 CFR §§ 550.111(a) and (c). With respect to overtime allegedly worked, § 5542(a) provides for payment for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek." Five CFR §§ 550.111(a) and (c), the OPM regulation implementing § 5542(a), specifies "overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is officially ordered or approved . . . in writing by an officer or employee to whom this authority has been specifically delegated." Five CFR § 550.111(c) further specifies that overtime work "may be ordered or approved only in writing."

In his June 28, 2008, email to OPM, the claimant argues for fairness (as he does in his July 3, 2008, email seeking fairness), but acknowledges these requirements quoting the following from OPM file number 00-1256:

> Accordingly, to be entitled to overtime pay or compensatory time in lieu of such pay, the overtime must be ordered or approved by an authorized official. *OPM Decision #*

> *S004070* (January 19, 2000); *United States Information Agency Compensatory Time*, B-251636 (June 11, 1993); *Richard R. Bourbeau*, B-238987 (September 7, 1990), *affirmed*, 71 Comp. Gen. 432 (1992); 68 Comp. Gen. 385 (1989); *John W. Wright*, B-236750 (November 7, 1989); *Jim L. Hudson*, B-182180 (January 6, 1982); *Donald W. Plaskett*, B-183916 (March 8, 1976); *Garrett F. Masco*, B-179908 (December 20, 1973). Mere knowledge that an employee is working beyond his normal duty hours, without active inducement of the employee to perform the additional work, is not enough to support payment in the absence of an official order or approval for overtime work to be performed. *John W. Wright, supra.*; 68 Comp. Gen. 385 (1989); *Jim L. Hudson, supra.; Donald W. Plaskett, supra.; Garrett F. Masco, supra.* Indeed, it is not sufficient that an employing agency tacitly expected that overtime work be performed. *Jim L. Hudson, supra.*

Recent judicial decisions have upheld a strict interpretation of the pertinent statute and regulations. The United States Court of Appeals for the Federal Circuit concluded earlier judicial precedent broadly interpreting the phrase "ordered and approved" to include inducement, encouragement, and expectation were no longer good law. *Doe v. United States*, 372 F. 3d 1347 (Fed. Cir. 2004), *rehearing and rehearing en banc denied* (2004), *cert. denied*, 544 U.S. 904, 125 S. Ct. 1591 (2005). The Federal Circuit concluded, in this regard, the regulatory requirement for a written order was not invalid on the grounds it imposed a procedural requirement limiting the right to overtime compensation under the statute, or it was inequitable. Id. The Federal Circuit further concluded the regulatory writing requirement additionally served an important purpose of the statute; i.e., to control the Government's liability for overtime. 372 F. 3d 1361. The Federal Circuit also found the recording of overtime hours actually performed might indicate official awareness of overtime worked but does not provide prior written authorization or approval of overtime work, and the possibility of adverse personnel action resulting from an employee's refusal to work uncompensated overtime was not grounds for awarding overtime compensation that was not ordered and approved in strict compliance with the regulation. Id. On March 7, 2005, the Supreme Court of the United States declined to review the Federal Circuit decision. 544 U.S. 904, 125 S. Ct. 1591. The Federal Circuit reaffirmed its decision upon appeal, 463 F. 3d 1314 (2006) and, on April 2, 2007, the Supreme Court again declined to review the Federal Circuit decision. 127 S. Ct. 1910.

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.