

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

Claimant: [name]

Organization: [agency component]
Federal Emergency Management
Agency
[city & State]

Claim: Pay setting upon reinstatement

Agency decision: N/A

OPM decision: Denied; Lack of jurisdiction

OPM file number: 08-0032

//Judith A. Davis for

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

8/4/2008

Date

The claimant currently occupies a [position] in the [agency component], Federal Emergency Management Agency (FEMA), in [city & State]. In her April 30, 2008, letter to the U.S. Office of Personnel Management (OPM), received by OPM on May 5, 2008, the claimant states she is owed back pay and interest from October 18, 1999, forward because she "should have been reinstated to the GS-7step7 [sic] in 1999when [sic] ...[she] was promoted in 2006 to a GS-9." The claimant submitted a Notification of Personnel Action, Standard Form (SF) 50, showing her reinstatement effective October 18, 1999, to a [GS-6 position] with a full performance level of GS-7, in the [agency component], Department of Health and Human Services (DHHS), in [city & State]. The SF-50 shows the claimant was appointed at step 10 under the superior qualifications appointment authority in section 531.203(b), Code of Federal Regulations (CFR) in effect at the time of her appointment to DHHS. The claimant also provided an SF-50 showing her promotion effective August 6, 2006, from [GS-6 position], step 10, to [GS-9 position], set at step 2. 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, Code of Federal Regulations (CFR), requires an employing agency to have already reviewed and issued an initial decision on a claim before it is submitted to OPM for adjudication. A claim must be submitted in writing and signed by the claimant (5 U.S.C. 3702(b)(1) and 5 CFR 178.102(a)). The burden of proof is on the claimant to establish the timeliness of the claim, the liability of the United States, and the claimant's right to payment (5 CFR 178.105). We find no record the claimant received a written agency-level decision from either FEMA or DHHS on the issue raised in her letter to OPM. However, we may render a decision on this matter based on jurisdictional grounds.

OPM has authority to adjudicate compensation and leave claims for most Federal civilian employees. However, OPM cannot take jurisdiction over the compensation and leave claims of Federal civilian employees *that 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. (Emphasis added). This is because the 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, United States Code (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).

Information provided by DHHS at our request shows the claimant was in a bargaining unit position at the time her claim arose; i.e., her reinstatement at GS-6, step 10, rather GS-7, step 7. The CBA between DHHS and the National Treasury Employees Union in effect at the time of the claimant's reinstatement does not specifically exclude compensation issues from the NGP (Article 31) covering the claimant. Therefore, the claimant's pay setting claim 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 pay setting claim.

Although we do not have jurisdiction to consider this claim or take a position on the propriety of the pay setting actions taken with regard to the claimant, we find the claimant's rationale is not supported by Government-wide regulations. Agency management has the right to appoint an individual by reinstatement, without competition, to a position without more promotion potential than a position previously held on a permanent basis in the competitive service (5 CFR §§ 315.401 and 335.103(c)(vi)). An agency is not required to reinstate at the highest grade level previously held as the claimant appears to assert. The Government is not required to match a previously held salary and grade. An agency is only obligated to set the employee's payable rate of basic pay at the minimum rate of the appropriate General Schedule grade upon reemployment. Setting pay above the minimum rate is at the discretion of the agency, whether based on the superior qualifications pay-setting authority in 5 CFR § 531.203(b) or the maximum payable rate rule in 5 CFR § 531.203(c) in effect at that time of the claimant's appointment to DHHS.

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.