

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

Claimant: [name]

Organization: [agency component]
U.S. Nuclear Regulatory Commission
[city & State]

Claim: Pay setting

Agency decision: N/A

OPM decision: Denied; Lack of jurisdiction

OPM file number: 10-0010

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

3/12/10

Date

The claimant was formerly employed in a Mechanical Engineer, GG-801-13, position in [agency component] with the U.S. Nuclear Regulatory Commission (NRC) in [city & State]. In his May 23, 2009, letter received by the U.S. Office of Personnel Management's (OPM) Center for Merit System Accountability, now Merit System Audit and Compliance, on May 27, 2009, the claimant requested \$183,947.50 for what he described as a fair compensation for not having been paid "compatible with [his] experience, knowledge and skills" at the GS-15, step 10 level ("however in case of disagreement, and to reach a consent, I can agree with \$121, 967 which is GS-14 Step 10 in the year 2007") by NRC when he was appointed by that agency in 2007. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

The claimant's May 23, 2009, request included a copy of NRC's March 27, 2009, letter to the claimant stating:

In response to your e-mail dated March 13, 2009, this is to advise you the Nuclear Regulatory Commission has acted in accordance with Federal law and regulation and NRC policies and procedures with regard to your NRC appointment and the correction of your employment records. If you wish to pursue this matter, you may file a claim regarding compensation with the Office of Personnel Management pursuant to 5 CFR Part 178, Subpart A, sections 178.101-107.

The claimant stated he had "suffered enough and would highly appreciate if the matter is negotiated and settled."

Our June 3, 2009, letter to the claimant stated the information he had provided did not establish he had filed a signed written claim with NRC to preserve his claim (5 CFR 178.104), since emails do not satisfy this requirement, and thus NRC erred in advising the claimant to file a claim at this time. The letter also discussed the fact the claimant did not indicate whether he occupied a bargaining unit position during the period of the claim under circumstances which might require him to use a negotiated grievance procedure (NGP) to resolve his pay setting dispute since:

OPM cannot take jurisdiction over compensation and leave claims of Federal civilian employees that are or were subject to a negotiated grievance procedure (NGP) under a collective bargaining agreement 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 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).

The letter also stated the compensation claims process does not provide for negotiated settlements as the claimant appeared to request and since Federal salaries are based on specific statutory and regulatory criteria, any claim submitted should refer to the appropriate statutory and regulatory criteria applicable to the NRC pay setting action he wished to dispute.

NRC, in its August 19, 2009, letter to the claimant, stated it was in receipt of the claimant's March 7, 2009, signed pay claim request (copy provided in the December 18, 2009, agency administrative report (AAR) to OPM as an enclosure). NRC also stated:

When you filed your claim with the NRC, you were not covered by the collective bargaining agreement. In addition, claims concerning pay setting and retirement are subject to government-wide regulations and are not covered by the collective bargaining agreement. Thus, Mr. Carsley [NRC's Deputy Associate Director, Human Resources Operations and Policy] was correct in advising you to pursue further action on the pay matter with OPM.

As to your reply to Ms. Mona Williams and Ms. Dannette Simms, the NRC disagrees that it owes you \$183,947.50. It appears that you are claiming this amount for back pay due to a breach of settlement agreement. The NRC rendered a decision on your claim that the NRC breached a settlement agreement and you appealed that decision to the Equal Employment Opportunity Commission, the proper forum for that appeal. Thus, the NRC is not going to address this claim here.

In his October 20, 2009, second claim request to OPM, received on October 27, 2009, the claimant restated the essence of his first claim request. In attempting to respond to the questioning of his bargaining unit status, the claimant states his "box 37 designation of 8888 by Navy and 0020 by NRC poses a complex situation, than the case would have been if only one designation was used" and that he "was for sometimes [sic] member of and dealing with the NTEU union during [his] employment with NRC, So [sic] I was a subjected [sic] to [a] negotiated grievance procedure (NGP)."

In his December 22, 2009, letter to OPM concerning NRC's failure to submit an AAR within 30 days of its receipt of OPM's October 28, 2009, letter requesting same AAR, the claimant states: "Since NRC has defaulted, I appeal to you to decide the matter in my favor and ask NRC to pay the compensation and reparations, [sic] I have already suffered immensely." We received this letter from the claimant and the December 18, 2009, AAR on January 5, 2010.

The AAR, referring to the agency's August 19, 2009, letter states:

Previously, the agency had replied to OPM that the Claimant's claim regarding his salary offset was not covered by the CBA because as a former employee he was no longer in the bargaining unit. (Exhibit 8) That statement correctly addressed Claimant's assertion in his March 7, 2009 letter that the agency incorrectly billed him \$4316 for the pension offset. In the March 7, 2009, letter, the Claimant did not clearly articulate a pay setting claim, and, therefore, the Agency did not reply to such a claim¹. Rather, much of that letter pertained to the allegation that the Agency breached a settlement agreement with him. In the subject claim before OPM, Claimant asserts a pay setting claim and requests

¹ The agency's August 19, 2009, letter which erred in stating "claims concerning pay setting...are subject to government-wide regulations and are not covered by the collective bargaining agreement" has no bearing on the proper disposition of this case.

almost \$184,000 in back pay. The agency addresses the pay setting claim for the first time here.

While Claimant was employed by the NRC, he occupied a position in the bargaining unit that was covered by a collective bargaining agreement between the NRC and National Treasury Employees Union (CBA), dated April 1, 2005. (Exhibit 9, Declaration of Michael R. Gartman) The CBA provides that a bargaining unit employee must file a grievance within fifteen work days of when he or she knew or reasonably should have known of that matter that gave rise to the grievance. (Exhibit 10, CBA Article 51.11) Pay was not specifically excluded from the grievance procedures of the CBA. (Exhibit 10, CBA Article 51.5) Therefore, a bargaining unit employee must pursue a claim for pay through the process provided in the CBA.

Relying on *Carter* and *Mudge* as previously discussed in this decision, the AAR concludes OPM does not have authority to adjudicate this claim because it was covered by the CBA.

It is unclear why the claimant refers to his bargaining unit status while he was employed by Department of the Navy since the pay setting issue he wishes to challenge occurred during his employment by NRC. Based on our review of the CBA between NRC and National Treasury Employees Union Chapter [number] in effect during the period of the claim, we find it does not specifically exclude compensation issues from the NGP (Article 51) covering the claimant. Therefore, the claimant's pay setting dispute must be construed as covered by the NGP the claimant was subject to during the claim period. The fact the claimant is no longer employed by NRC does not alter the fact the claim is subject to the dispute resolution processes of the CBA in effect when his claim arose. *Muniz v. United States*, 972 F.2d 1304 (Fed. Cir. 1992). Accordingly, OPM has no jurisdiction to adjudicate the claimant's pay setting claim. OPM File Number 09-0041, December 18, 2009.

Although we have no authority to adjudicate this claim, we note that the claimant, in addition to essentially rearguing the points he previously presented in support of his claim, raised additional issues in his January 24, 2010, comments on the AAR which we received on February 18, 2010. The claimant repeatedly asserts he was subjected to NRC's "continuous mistreatment and discrimination" which "[c]reated an environment that was full of threats, hostility, jealousy, slander, backbiting, undercutting of pay and default on promises thus it was made impossible to get the same pay as others," and disagrees with NRC's description of events concerning how he left the employ of the agency. He further asserts NRC engaged in a "conspiracy to conceal the truth," confiscated records and destroyed evidence that would have supported his claim. The claimant refers to his responses to OPM surveys conducted in 2007 and 2008 which he states support his "allegations" and that NRC's "actions may have been retaliations [sic] to [his] answers of the survey questions." The claimant states he "had to leave for safety while all [his] records were confiscated, [sic] to prevent [him] from challenging conspirators for their criminal activities." The claimant also asserts "waste fraud and abuse" by the [agency component]," and provided copies of a discrimination complaint he filed against NRC and a complaint he filed with the NRC Office of the Inspector General regarding that his "separation was unlawful. It was coerced, and was based upon misrepresentation and was thus fraudulent."

In his January 24, 2010, letter the claimant seeks lost wages of approximately \$283,000; compensation for “the hardships and setbacks suffered during all these times of [his] employment and after 10/16/2008;” the “promised employment and designation as promised in the interview [employment and pay at the GG-15 level] be fulfilled; and compensation as detailed in his claim. The claimant states his “suffering, unjust treatment, unpaid and underpaid salaries shall be compensated.”

OPM’s authority under 31 U.S.C. § 3702 for claims under its jurisdiction is narrow and restricted to adjudicating compensation and leave claims. This authority does not extend to ordering agencies to take employment actions or dealing with charges of criminal behavior. OPM is limited to settling claims based on statute; it is without authority to settle claims on the basis of equitable or moral consideration (See B-141281, February 5, 1960). The Back Pay Act does not permit payment for compensatory or consequential damages (See B-206931, August 30, 1982; and *Jack M. Haining*, 63 Comp. Gen. 170 (1984)).

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.