

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

Claimant: [name]

Organization: [agency component]
Department of the Army
[city & State]

Claim: Back pay for performing higher
graded work

Agency decision: N/A

OPM decision: Denied; Lack of jurisdiction

OPM file number: 10-0042

//Judith A. Davis for

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

11/3/2010

Date

The claimant currently occupies a Quality Assurance Evaluator, GS-1101-9, position in the [agency component], Department of the Army, in [city & State]. She seeks back pay from on or about May 2004 until May 24, 2010, for “performing supervisory duties not within my job responsibility and grade.” She states that her “position, tasks, and assigned job duties have been for the last 6 years, that of a GS-1101-11, Supervisory COR.” The U.S. Office of Personnel Management (OPM) received the request on July 13, 2010, information from the employing activity on July 14, 2010, and additional information from the claimant on July 21, 2010. 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.). OPM has authority to adjudicate compensation and leave claims for most Federal employees under the provisions of 31 U.S.C. § 3702(a)(2). However, 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 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).

Information provided by her employing activity at our request shows the claimant occupies a bargaining unit position. The CBA between the [agency component] and the American Federation of Government Employees Locals [number] in effect during the period of the claim does not specifically exclude compensation and leave issues from the NGP (Article 48) covering the claimant. Therefore, the claimant’s back pay request 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 claim.

Even though 5 U.S.C. § 5112 authorizes OPM to decide position classification and job grading appeals, OPM’s authority to adjudicate compensation and leave claims arises from a different law -- 31 U.S.C. § 3702. OPM’s authority under 31 U.S.C. § 3702 is narrow and does not include any authority to decide position classification or job grading appeals. Therefore, OPM may not rely on 31 U.S.C. § 3702 as a jurisdictional basis for deciding position classification appeals and does not consider such appeals within the context of the claims adjudication function it performs under section 3702. *Cf. Eldon D. Praiswater*, B-198758, December 1, 1980 (Comptroller General, formerly authorized to adjudicate compensation and leave claims under section 3702, did not have jurisdiction to consider alleged improper job grading); *Connon R. Odom*, B-196824, May 12, 1980 (Comptroller General did not have jurisdiction to consider alleged improper position classification); OPM File Number 01-0016, April 19, 2001; OPM File Number 01-0045, January 7, 2002. Only the classification of a position which results in the reduction in grade or pay of an employee may be grieved (see 5 U.S.C. § 7121(c)(5)).

The clear and unambiguous language of 5 U.S.C. 5112(b) requires OPM to adjudicate appeals under the provisions of subsection (a). This subsection requires OPM “ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position.” This statutory requirement is reiterated in section 5 CFR 511.607(a)(1) and cannot be met if the requesting employee no longer performs the work of the position he or she wishes to appeal. Therefore, the claimant’s apparent request to file a classification appeal with OPM on a position she never officially occupied; i.e., “GS-1101-11, Supervisory COR,” and on work she no longer performs is barred by controlling statute and regulations.

Even assuming, *arguendo*, a favorable classification action had resulted from a classification appeal, the claimant may not be awarded back pay. Back pay for periods of misclassification is statutorily barred (5 U.S.C. 5596(b)(3)). As stated in *United States v. Testan*, 424, U.S. 392 (1976): “The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. *United States v. McClean*, 95 U.S. 750 (1878); *Ganse v. United States*, 180 Ct. Cl. 183, 186, 376 F.2d 900, 902 (1967).” See also B-19065, July 7, 1978, and B-191360, May 10, 1978.

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.