

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

Claimant: [name]

Organization: [directorate]
Edgewood Chemical Biological Center
Research, Development and
Engineering Center
U.S. Army Soldier and Biological
Chemical Command
Department of the Army
Aberdeen Proving Ground, Maryland

Claim: Request to Use Special Salary Rate
for Pay Setting

Agency decision: Denied

OPM decision: Denied; Lack of Jurisdiction

OPM contact: Robert D. Hendler

/s/ for

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

9/8/2006

Date

The claimant requests the special rate of pay she received while duty stationed on Johnston Island (JI) be used for pay-setting purposes upon her relocation to Aberdeen Proving Ground (APG), Maryland, where she is currently employed in a [GS-11] position in the [directorate]; Edgewood Chemical Biological Center (ECBC); Research, Development and Engineering Center, U.S. Army Soldier and Biological Chemical Command (SBCCOM). The Office of Personnel Management (OPM) received her initial claim request on October 19, 2005, which we returned without action because it did not reflect she had received a final agency decision on the matter. As noted in 5 CFR § 178.102, OPM will not docket a claim until an agency-level denial has been issued on the claim. We received evidence of an agency-level denial on December 30, 2005, and we received the agency administrative report (AAR) on April 21, 2006. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

The claimant and the agency agree the claimant served in a series of positions on JI from September 1, 1991, until February 8, 2004, covered by special salary rates under 5 U.S.C. § 5305. In her initial claim request, the claimant states her return rights expired, her current position was then “created,” and she was placed in it. She states her “former rate (\$57,306.00) was supposed to have been used to set my existing rate of basic pay immediately held before being offered the position at ECBC.” She also states:

I requested copies of my personnel action for my new employment with ECBC and CPOC/CPAC advised me there was no need for them to process a personnel action on my behalf under a Change of Duty Station action. CPOC/CPAC then processed a fabricated back-dated personnel action to lower my basic rate of pay and entitled it, “Reassignment”...Furthermore, several Federal Government employees working for the same agency retired from Johnston Island shortly before base closure. Their retirement was based on the Special Rate Schedule. In a meeting with CPOC, I questioned the reasoning [and was told] “it was different” and they were entitled to have their retirement calculated using the special rate.

The agency AAR includes a November 20, 2003, memorandum to the claimant advising her that effective January 11, 2004, her duty station would change from JI to APG with no change in assigned duties, “series, title or grade.” The agency advised this change in duty station constituted a transfer of work out of the commuting area, if she declined the change she would have “no further entitlement to another position,” and the agency would have the right to propose her separation by adverse action for failure to accompany the transfer of work unless she: 1) was able to be placed in a vacancy for which she qualified in another Department of Defense activity under the DoD Priority Placement program (PPP), 2) accepted employment with another Federal agency, or 3) elected to resign. In her November 28, 2003, response to the memorandum included in the AAR, the claimant states:

However, I do not concur [with] your statement that I am no longer entitled to retained pay that equates to my special rate per 5 U.S.C. 5305. Careful review of both the United States Codes and Federal Regulation [sic] indicate this rate should be retained based on the following:...[5 CFR] Sec. 536.104 Coverage and applicability of pay retention., Paragraph (a) Pay retention shall apply to any employee whose rate of basic [sic] would otherwise be reduced: See sub-

paragraph (4) As a result of the placement of an employee into a non-special rate position or into a lower special rate position from a special rate position. . . . Please refer to 5 CFR 531.203(d)(2)(vii), A special rate established under 5 U.S.C. 5305 and part 530 of this chapter, or other legal authority . . . , unless, in a reassignment to another position in the same agency—(A) the special rate is the employees current rate of basic pay. Reassignment is not applicable. Please see attached definition of term reassignment.

The record shows the claimant questioned why reduction-in-force (RIF) procedures were not used to return her to the continental United States from JI as a result of base closure. It appears the claimant viewed the use of RIF rather than reassignment and her eligibility for PPP as supporting her contention that she should have been afforded retained pay based on her JI special salary rate. In her claim request, she states:

I've researched and found that "Reassignment" means a change of an employee, while serving continuously in the same agency, from one position to another without promotion. This does not fit my scenario. I did not return to a former position held before the temporary or term promotion. I was not in a position with temporary or term promotion, nor did I return to a position previously held prior to my employment on Johnston Island.

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 that 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 (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 that the 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 agency at our request shows that the claimant was in and continues to occupy a bargaining unit position covered by a CBA between SBCCOM and the International Association of Machinists and Aerospace Workers, National Federation of Federal Employees, Federal District 1, Local 178, during the period of her claim. Because compensation issues are not specifically excluded from the NGP (Article 25) covering the claimant, they must be construed as covered by the NGP that the claimant was subject to during the claim period. Therefore, OPM has no jurisdiction to adjudicate her compensation claim.

However, we note the claimant's rationale misconstrues the regulatory requirements pertinent to her case. Like laws, regulations *in pari materia*, or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. The claimant's rationale would have us apply 5 CFR 536.104(b)(4) [2004] without regard to the directly related 5 CFR 536.105 (b) [2004]. As made clear in the implementing regulations in force at the time of

the pay action that moved her to APG in 2004 (5 CFR 536.105(b)): “an employee serving under a temporary promotion or temporary reassignment may not retain a grade or rate of basic pay held during a temporary promotion or temporary reassignment.” As stated in 5 CFR 536.102 [2004]:

For the purpose of this part [grade and pay retention]... *Temporary reassignment* means a reassignment with a definite time limitation and one which the individual is informed in advance is temporary and would **normally** [emphasis added] require that the individual return to his or her permanent position at the expiration of that reassignment.

The record shows, and the claimant acknowledges, her assignment to JI was an overseas assignment which initially provided her return rights to her former permanent position. Her return rights subsequently expired. She continued employment on JI based on a series of overseas tour extensions that ended upon her placement at APG.

As defined in 10 U.S.C., overseas assignments are, by statute, intended to be temporary in nature:

Sec. 1586. Rotation of career-conditional and career employees assigned to duty outside the United States.... The term “rotation” means the assignment of civilian employees referred to in subsection (b) to duty outside the United States and the return of such employees to duty within the United States.

The initial agreement the claimant signed on August 1, 1991, acknowledged her assignment to JI was under the authority of 10 U.S.C. § 1586 and, therefore, by statute, must be considered temporary in nature. The fact the claimant was returned, by reassignment, to a position different from the permanent position she occupied prior to her initial overseas tour does alter or otherwise change the fact her initial overseas tour and all subsequent extensions were temporary assignments for purposes of both 10 U.S.C. § 1586 and 5 U.S.C. §§ 5361-5366.

Contrary to her assertions, “reassignment” covers the claimant’s placement at APG. Under 5 CFR 210.102, “reassignment” means a change of an employee, while serving continuously in the same agency, from one position to another without promotion or demotion. In the instant case, the claimant was reassigned from a GS-11 position on JI to a GS-11 position at APG. The term “temporary reassignment” is not found in the Guide to Processing Personnel Actions, as addressed by the claimant in her rationale. “Temporary reassignment” pertains only to grade and pay retention under 5 CFR 536.105 [2004] and is not used for staffing or personnel processing purposes.

OPM does not conduct investigations or preside over adversary hearings in adjudicating claims but relies on the written record submitted by the parties. *See Frank A. Barone*, B-229439, May 25, 1988. Where the record presents a factual dispute, the burden of proof is on the claimant to establish the liability of the United States, and where the agency's determination is reasonable, OPM will not substitute its judgment for that of the agency. *See, e.g., Jimmie D. Brewer*, B-205452, March 15, 1982, as cited in *Philip M. Brey*, B-261517, December 26, 1995.

Although we may not assert jurisdiction over this claim, we also note the claimant's rationale does not distinguish between the mandatory nature of grade or pay retention under certain circumstances and the discretionary nature of the maximum payable rate rule in 5 CFR 531.203(c)-(d) [2004]. In the instant case, the agency has articulated reasons for not setting the claimant's pay using maximum payable rate rule that we would find are not arbitrary, capricious, or unreasonable given the facts of the case.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States Court.