

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

Claimant: [name]

Organization: [agency component]
Bureau of Customs and Border
Protection
U.S. Department of Homeland Security
[city & State]

Claim: Correction of grade, back pay and front
pay based on appointment at wrong
grade

Agency decision: Denied

OPM decision: Denied; lack of jurisdiction and lack
of subject-matter jurisdiction

OPM file number: 09-0032

//Judith A. Davis for

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

1/6/2010

Date

The claimant occupies an Import Specialist, GS-1889-9, position in [agency component], Bureau of Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS), in [city & State]. She seeks to file a compensation claim for correction of her grade, back pay, and “front pay” based on her appointment at GS-06 on June 15, 2003, at the “wrong grade” because the claimant asserts her position should have been classified at the GS-7 grade level. The U.S. Office of Personnel Management (OPM) received the claim on April 27, 2009. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

Sections 178.102(a) and (b) of title 5, Code of Federal Regulations (CFR) indicate the claimant’s *employing* agency must already have reviewed a claim and issued an initial decision denying a claim before it is submitted to OPM for adjudication. Information submitted by the claimant does not establish that she has preserved the claim with the agency by filing a written, signed claim as required by statute (section 3702(b)(1) of title 31, United States Code (U.S.C.)) and regulation (5 CFR 178.102(a)). The email from the claimant raising this “issue” with her agency and the agency email response submitted by the claimant do not satisfy these requirements. Therefore, the claimant has not filed a valid claim. Nevertheless, we may render a decision on jurisdictional grounds.

OPM has authority to adjudicate compensation and leave claims for Federal employees under the provisions of section 3702(a)(2) of title 31, United States Code (U.S.C.). 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 CBA’s NGP. The Federal courts have found Congress intended such a grievance procedure 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).

Copies of Notification of Personnel Action, Standard Form 50s, submitted by the claimant show she has occupied a bargaining unit position for the entire period of the claim. Information provided by CPB at our request shows claimant was covered by the CBA between the agency and the National Treasury Employees Union (NTEU) (entered into on October 3, 1996, by NTEU and the former U.S. Customs Service). The CBA’s NGP (Article 31, Dispute Resolution Procedure) does not specifically exclude compensation and leave issues from the NGP covering the claimant. Therefore, any compensation dispute raised by the claimant must be construed as covered by the NGP to which the claimant was subject during the claim period. Accordingly, OPM has no jurisdiction to adjudicate the claimant’s compensation claim.

Although we have no jurisdiction to settle this dispute, we note the claimant’s characterization of her dispute as failure by the agency to place her in a GS-7 grade level position upon her appointment based on Public Law 107-173 (May 14, 2002) is incorrect. Public Law 107-173, Title I, section 101(b), codified at 8 U.S.C. § 1711(b), states:

There are authorized to be appropriated for the Department of Justice [these functions were subsequently transferred to DHS] such sums as may be necessary to provide an increase in the annual rate of basic pay effective October 1, 2002--

(A) for all journeyman Border Patrol agents and inspectors who have completed at least one year's service and are receiving an annual rate of basic pay for positions at GS-9 of the General Schedule under section 5332 of title 5 from the annual rate of basic pay payable for positions at GS-9 of the General Schedule under such section 5332, to an annual rate of basic pay payable for positions at GS-11 of the General Schedule under such section 5332;

(B) for inspections assistants, from the annual rate of basic pay payable for positions at GS-5 of the General Schedule under section 5332 of title 5 to an annual rate of basic pay payable for positions at GS-7 of the General Schedule under such section 5332; and

(C) for the support staff associated with the personnel described in subparagraphs (A) and (B), at the appropriate GS level of the General Schedule under such section 5332.

The claimant's assertion all affected employees were required to be upgraded is contrary to the plain language of the statute which is limited to making funds available, effective October 1, 2002, to pay employees eligible for promotion. The statute does not state all eligible employees had to be placed in higher-grade positions or that the agency was required to create the higher-graded positions by this date.

Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990). This assumes Congress, when it passes a new statute, is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). In addition, it is a cardinal principle of statutory construction that a statute should be construed such that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

Section 1711(b) of 8 U.S.C. does not set aside or modify (1) the requirement in 5 U.S.C. § 5107 that "[e]xcept as otherwise provided by this chapter, each agency shall place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Office of Personnel Management....;" or (2) agency management's authority to assign work to and create the individual positions necessary to accomplish the agency's mission (5 U.S.C. § 5102(a)(2) and 5 U.S.C. § 7106). To read 8 U.S.C. § 1711(b) as requiring the upgrading of all of

the potentially affected positions as the claimant appears to assert would render 5 U.S.C. §§ 5102(a)(2), 5107 and 7106 superfluous or void.¹⁾

The claimant's reliance on the compensation and leave claims settlement authority in 31 U.S.C. § 3702(a)(2) to resolve what at heart is a classification issue (i.e., her assertion that the position to which she was appointed was improperly classified at the GS-6 grade level based on Public Law 107-173) is also misplaced. The authority in section 3702 is narrow and limited to adjudication of compensation and leave claims. Section 3702 does not include any authority to decide position classification or job grading appeals. Therefore, OPM may not rely on 31 U.S.C. 3702(a)(2) as a jurisdictional basis for deciding position classification or job grading appeals, and does not consider such appeals within the context of the claims adjudication function that 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 § 3702(a)(2), 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.

We also note the claimant may not rely on the CBA's NGP to challenge the agency's failure to create the higher grade level positions funded by Congress and promote potentially affected employees in place. Grieving the classification of any position which does not result in the reduction in grade or pay of an employee is prohibited by statute (5 U.S.C. § 7121(c)(5)). It is well established that the Back Pay Act (5 U.S.C. § 5596(b)(3)) and the regulations issued pursuant to 5 U.S.C. § 5115 implementing the General Schedule classification system preclude the payment of back pay for periods of wrongful classification other than to the limited extent provided for in 5 CFR 511.703(b) and (d). Furthermore, a Federal employee is entitled only to the salary of the position to which the employee is appointed, regardless of duties performed. Even though a position is subsequently reclassified to a higher grade consistent with the duties the employee has been performing, such action may not be made retroactively effective. *United States v. Testan*, 424 U.S. 392 (1976).

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.

¹ Congress is well-acquainted with the method and means of classifying positions by statute as indicated in 5 U.S.C. 5109, Positions Classified by Statute, wherein such positions are limited to:

(a) The position held by an employee of the Department of Agriculture while he, under section 450d of title 7, is designated and vested with a delegated regulatory function or part thereof shall be classified in accordance with this chapter, but not lower than GS-14.

(b)(1) The position held by a fully experienced and qualified railroad safety inspector of the Department of Transportation shall be classified in accordance with this chapter, but not lower than GS-12.

(2) The position held by a railroad safety specialist of the Department shall be classified in accordance with this chapter, but not lower than GS-13.