

**U.S. Office of Personnel Management
Compensation and Leave Claim Decision
Under section 3702 of title 31, United States Code and
FLSA Claim Decision Under section 204(f) of title 29,
United States Code**

Claimant: [name]

Organization: [agency component]
U.S. Army Corps of Engineers
[city & State]

Claim: Back pay for performing higher graded
duties

Agency decision: N/A

OPM decision: Denied; lack of jurisdiction

OPM decision number: 11-0030

//Judith A. Davis for

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

11/15/2011

Date

The claimant occupies a Maintenance Worker, WG-4749-8, position with the U.S. Army Corps of Engineers, in [city & State]. He seeks to file a claim for back pay and states: “I have been performing Journeyman Electrician duties which are now job related activities as of 15 September 2008 to present and I believe that I’m initialed [sic] to back pay under 5 U.S.C. 5596.” The U.S. Office of Personnel Management (OPM) received the claim on May 2, 2011. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

The subject line of the claim reads “FLSA claim against the US Army Corps of Engineers.” Congress vested OPM with the authority to administer the provisions of the FLSA with respect to certain Federal civilian employees. *See* 29 U.S.C. § 204(f). OPM adjudicates FLSA minimum wage and overtime claims for covered Federal employees under the provisions of 5 CFR part 551 subpart G. The FLSA claims process provides a means of redress to Federal employees who dispute whether they have been paid properly for all hours of work due under the FLSA. The FLSA claims process does not cover disputes as to whether an employee is being compensated at the correct grade level of pay.

Separately, under the provisions of section 3702 of title 31, United States Code (U.S.C.), Congress has vested OPM with the authority to adjudicate compensation and leave claims for many Federal employees. OPM’s adjudication authority is an administrative remedy, not a judicial remedy. *See* 5 CFR part 178. This compensation and leave claim procedure does not apply to claims under the FLSA. 5 CFR 178.101(b).

It is unclear from the record whether the claimant intended to submit a claim under the FLSA or a compensation and leave claim under the provisions of 31 U.S.C. §3702(a)(2). As such, while these claims are separate and distinct from one another, we have consolidated our analysis of this claim under both authorities.

Section 7121(a)(1) of 5 U.S.C. directs that except as provided elsewhere in the statute, the grievance procedures in a negotiated collective bargaining agreement (CBA) shall be the exclusive administrative remedy for resolving matters that fall within the coverage of the CBA. The Court of Appeals for the Federal Circuit has found the plain language of 5 U.S.C. § 7121(a)(1) to be clear, and as such, limits the administrative resolution of a Federal employee’s grievance to the negotiated procedures set forth in the CBA. *Mudge v. United States*, 308 F.3d 1220, 1228 (Fed. Cir. 2002). Further, the Federal Circuit also found that all matters not specifically excluded from the grievance process by the CBA fall within the coverage of the CBA. *Id.* at 1231. As such, OPM cannot assert jurisdiction over the compensation and leave or FLSA claims of Federal employees who are or were subject to a negotiated grievance procedure (NGP) under a 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. *See* 5 CFR 178.101(b) and 5 CFR 551.703(a).

The claimant acknowledges he is in a bargaining unit position, but states his claim “is not in the scope of the negotiated grievance procedure.” We disagree. Information provided by the claimant’s employing activity at our request shows the CBA between the U.S. Army Corps of Engineers, [agency component], and American Federation of Government Employees Local [number], covering the claimant and in effect during the period of the claim, does not

specifically exclude compensation or FLSA pay issues from the NGP (Article 25) covering the claimant. Therefore, assuming the claimant's compensation dispute fell under the subject-matter coverage of 31 U.S.C. § 3702 or the FLSA, it must be construed as covered by the NGP the claimant was subject to during the claim period. Accordingly, OPM lacks jurisdiction to adjudicate this claim.

Although we may not render a decision on this claim, we note the underlying issue raised by the claimant is not reviewable under 31 U.S.C. § 3702 or the FLSA even if the claimant was not subject to a CBA. The claimant seeks back pay for performing higher-graded work: "As a WG-4749-08 I have been performing Journeyman Electrician duties and only receiving pay & benefits of a [sic] Apprentice/Worker." He also states:

I have been performing Journeyman Electrician duties which are now job-related activities as of 15 September 2008 to present I believe that I'm initialed [sic] to back pay under 5 U.S.C. 5596.

I have been performing journeyman Electrician duties that are about 20% of my Major Duties assigned and as the District Policy on Electrical Work and shows a significant change in duties, responsibilities, and working conditions and this [sic] required duties should be upgraded in my Job Description and performance ratings past and future.

Thus, the underlying issue raised by the claimant is that his job is undergraded. Even though 5 U.S.C. § 5346(c) authorizes OPM to decide job grading appeals, OPM's authority to adjudicate compensation and leave as well as FLSA claims flows from different laws. The authority in 31 U.S.C. § 3702 is narrow and limited to adjudication of compensation and leave claims. The authority of the FLSA is limited to providing minimum standards for both wages and overtime entitlements, and administrative procedures by which covered worktime must be compensated. Neither 31 U.S.C. § 3702 nor the FLSA includes any authority to decide position classification or job grading appeals. Therefore, OPM may not rely on 31 U.S.C. § 3702 or the FLSA as a jurisdictional basis for deciding job grading appeals, and does not consider such appeals within the context of the claims adjudication function that it performs under section 3702 or the FLSA. *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 has rendered a final and binding decision on the proper grading of the claimant's job (OPM decision C-4749-08-02, March 18, 2009) which found the claimant's work to be grade 8. Thus, the claimant's misguided effort to challenge the proper grading of his job through the aforementioned claims processes must also be rejected as contrary to statute. *See* 5 U.S.C. § 5346(c).

Further, the claimant's efforts to receive back pay under the job grading appeal process were addressed in the previously cited appeal decision:

The appellant requested back pay, if justified. The U.S. Comptroller General states an “...employee is entitled only to the salary of the position to which he is actually appointed, regardless of the duties performed. When an employee performs the duties of a higher grade level, no entitlement to the salary of the higher grade exists until such time as the individual is actually promoted...Consequently, back pay is not available as a remedy for misassignments to higher level duties or improper classifications (Decision Number B-232695, December 15, 1989).” Reaffirmed by the U.S. Supreme Court in *United States v. Testan* (424 U.S. 372 (1976)), the Court stated, “...the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claim that he should have been placed in a higher grade.”

We also note 5 U.S.C. § 5596(b)(3) prohibits back pay for periods of misgrading or misclassification.

As provided in 5 CFR 551.708, this decision is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which OPM administers the FLSA. There is no further right of administrative appeal. This decision is subject to discretionary review only under conditions specified in 5 CFR 551.708.

Those aspects of this decision reviewed under the authority of 31 U.S.C. § 3702 and 5 CFR part 178 are not subject to further administrative review within OPM. Nothing in this settlement limits the claimant’s right to bring an action in an appropriate United States court.