

Date: March 22, 2006
Claimant: [name]
File Number: 05-0023
OPM Contact: Robert D. Hendler

The claimant is employed in an Archeological Technician, GS-102-7, position at the [agency component], U.S. Forest Service, U.S. Department of Agriculture, [city & State]. Although his position is classified at the GS-7 level, he believes from December 1997 until March 2005 he functioned as an Archeologist, GS-193-9, because the position of Zone Archaeologist was vacant during that period. His union representative has requested the Office of Personnel Management (OPM) direct the claimant's agency to retroactively award the claimant back pay at the GS-9 grade level for the period of the claim. For the reasons discussed herein, the claim is denied.

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 that Congress intended that 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, 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 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 and continues to occupy a bargaining unit position covered by a CBA between the National Federation of Federal Employees (NFFE) and the U.S. Forest Service. Because compensation and leave issues are not specifically excluded from the NGP 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 any compensation claim potentially flowing from his request.

We note that the claimant appears to be seeking back pay due to performing work outside his position of record. The Supreme Court in *United States v. Testan*, 424 U.S. 372 (1976), specifically held that neither the Classification Act, 5 U.S.C. §§ 5101 - 5115, nor the Back Pay Act, 5 U.S.C. § 5596, creates a substantive right to back pay for periods of wrongful classification. B-190695, July 7, 1978; and B-191360, May 10, 1978. Employees of the Federal Government are entitled only to the salaries of the positions to which they are actually appointed regardless of the duties they perform. When an employee performs duties at a grade level higher than that in which his position is classified and is successful in obtaining reclassification of his position and promotion, no entitlement exists for compensation at the higher grade level prior to the date the necessary administrative actions are taken to effect the promotion. 52 Comp. Gen. 631 (1973) and 39 Comp. Gen. 583 (1960). See also B-204769, April 13, 1982; and B-207889, August 31, 1982. When an employee performs duties normally performed by one in a grade level higher than the one he holds, no entitlement to the salary of the higher level position exists until such time as the individual is actually promoted to that level. See also B-192560, December 14, 1978. Therefore, assuming the claimant performed work higher than the GS-7 grade level, he is precluded from being compensated for the work at a higher salary than the official position he occupied.

The claimant also appears to be using the back pay claims process to challenge the classification of his position. Even though 5 U.S.C. 5112 and 5346 (c) authorize OPM to decide position classification and job grading appeals, respectively, OPM's authority to adjudicate compensation and leave claims flows from a different law – 31 U.S.C. 3702. The authority in § 3702 is narrow and limited to adjudications 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 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 § 3702. Cf. *Eldon D. Praiswater*, B-198758, December 1, 1980 (Comptroller General, formerly authorized to adjudicate compensation and leave claims under § 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).

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