

**U.S. Office of Personnel Management  
Compensation Claim Decision  
Under section 3702 of title 31, United States Code**

**Claimant:** [name]

**Organization:** [agency component]  
Environmental Protection Agency  
[duty station]

**Claim:** Back pay for performing higher  
graded work

**Agency decision:** N/A

**OPM decision:** Denied; Lack of jurisdiction

**OPM file number:** 12-0009

//Judith A. Davis for

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

5/31/2012

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Date

## Introduction

The claimant currently occupies an Information Technology (IT) Specialist, GS-2210-12, position with the Environmental Protection Agency (EPA) in [duty station]. The U.S. Office of Personnel Management's (OPM) Philadelphia Oversight office<sup>1</sup> received the claimant's first request dated February 6, 2012, on February 8, 2012, from an attorney who had not been appointed by the claimant in writing to represent the claimant as required by section 178.103 of title 5, Code of Federal Regulations (CFR). The request was titled "Charges against the Environmental Protection Agency: failure to promote [the claimant] to a GS-13 position and Appropriate Back Pay Thereby." The remedies sought were "(A) a reclassification to a GS-13 position, and (B) back pay as of June 2000 for the position," to include the special salary rate for IT positions effective in January 2001.

Based on the information in the request, OPM's Philadelphia Oversight office sent a letter dated February 15, 2012, to the claimant's attorney and 1) advised of the need for a designation of representation; 2) provided information on the classification appeal process since the underlying issue discernible in the request was the claimant's assertion his position was improperly classified, and 3) advised back pay would not be available for periods of misclassification pursuant to *United States v. Testan*, 424 U.S. 392, 406 (1976).

Claimant's second request dated March 9, 2012, received by OPM on March 12, 2012, contained a written designation of representation and stated OPM's February 15, 2012, letter was "completely silent with regard to [claimant's] claims for reclassification under the Meritorious Claim [sic] Act." The Meritorious Claims Act is codified in section 3702 (d) of title 31, United States Code (U.S.C.). Claimant's representative, relying on "OPM Compensation and Leave Decisions Case #S013620," asserts the claimant's:

**supervisors clearly committed clerical or administrative errors which: (A) prevented [the claimant's] due reclassification as an IT worker as originally intended, (B) deprived the undersigned of rights granted by right or regulation, and (C) this, in turn clearly results in a failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively.**

Based on the assertion claimant's request falls under 31 U.S.C. § 3702(d), the claim was forwarded by OPM's Philadelphia Oversight office to this office for adjudication. We contacted the claimant's servicing human resources office for additional information which we received on March 22, 2012. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

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<sup>1</sup> OPM's Philadelphia Oversight office accepts classification appeals pursuant to 5 U.S.C. § 5112 and 5 CFR part 511, subpart F. OPM's Philadelphia Oversight office does not adjudicate compensation and leave claims under the provisions of 31 U.S.C. 3702(a)(2) and 5 CFR part 178.

## Jurisdiction

Part 178 of title 5, CFR, concerns the adjudication and settlement of claims for compensation and leave by OPM under 31 U.S.C. § 3702(a)(2). OPM has authority to adjudicate compensation and leave claims for many Federal employees under the provisions of 31 U.S.C. § 3702(a)(2). 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 or leave 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).

Information provided by EPA at our request shows the claimant occupies a bargaining unit position. The CBA between the EPA and the American Federation of Government Employees Council [number] in effect during the period of the claim does not specifically exclude compensation and leave issues from the NGP (Article 38) 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.

Although we may not render a decision on this claim, we note the claimant's representative misconstrues the nature and coverage of 31 U.S.C. § 3702(d). As discussed in OPM File # S9802480, the Meritorious Claims Act is not itself a jurisdictional statute:

The claimant has requested that his claim be considered under the Meritorious Claims Act, 31 U.S.C. 3702(d). Under the Meritorious Claims Act, claims which may not otherwise be paid, may be submitted by the Office of Personnel Management (OPM) to Congress with a recommendation in favor of payment by private relief legislation. However, OPM is in agreement with decisions of the Comptroller General which have concluded that such claims must contain such elements of legal liability or equity as to be deserving of the consideration of Congress and that the remedy is an extraordinary one which is limited to extraordinary circumstances. *Robert Garcia*, B-195374, September 14, 1979. Claims that are reported for congressional consideration generally involve equitable circumstances of an unusual nature which are unlikely to constitute a recurring problem; to recommend that Congress enact legislation on behalf of one claimant when similar equities exist or are likely to arise with respect to other claimants would constitute unwarranted preferential treatment. *See Gerald R. Cutler*, B-186639, September 1, 1976. Undoubtedly, other individuals perform duties above their assigned grade levels as a result of the assurances of supervisors that they will receive immediate compensation

only to find that the additional compensation is not immediately forthcoming. OPM finds this claim to be neither unusual nor of a nonrecurring nature, and thus concludes that this claim is not appropriate for submission to Congress under the Meritorious Claims Act.

Thus, in the instant case, only if OPM had jurisdiction to hear this claim under 31 U.S.C. § 3702(a)(2) and determined the claim could not be granted under existing law and/or regulation, would the Meritorious Claims Act potentially come into play. As discussed later in this decision, no such relief would be available based on the facts presented by the claimant's representative.

### **Reclassification**

The representative asserts that EPA did not reclassify the claimant's position despite the claimant's efforts to do so since 2000. Even though 5 U.S.C. § 5112 authorizes OPM to decide position classification 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. 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 § 3702. *Cf.* OPM File Number 01-0034, October 30, 2001; OPM File Number 01-0016, April 19, 2001; OPM File Number 01-0045, January 7, 2002; *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).

The representative's assertion that failure on the part of the claimant's supervisors to promote him "involves equitable circumstances of an unusual nature which are unlikely to constitute a recurring problem" is meritless given the statutory classification appeals process provided for in 5 U.S.C. § 5112. The CBA's Article 33, Position Classification, further undermines the representative's assertions in that it describes the process by which a General Schedule employee may take action to correct the classification of his or her position if, like the claimant, he or she believes the position is misclassified:

Section 3: An employee dissatisfied with the classification of his/her position should first discuss the classification with his/her supervisor. If the supervisor is unable to resolve the issue to the employee's satisfaction, **at the employee's request** (*emphasis added*) the appropriate human resources official will explain the basis for the classification/job grading.

Section 4: A General Schedule employee who still believes his/her position is improperly classified may:

- A. Request a desk audit at the local level (i.e., the HR office servicing that region, lab, or headquarters component) by submitting a written request to the human resources office, with a copy to his/her supervisor. This step must happen before selecting any other options provided in this section, since an "appeal" is an appeal

of the decision made at the local level. At the employee's request a Union representative may participate in the desk audit as a silent observer.

- B. File an appeal at the Agency level to the Director, Office of Human Resources, who is the Agency Appellate Authority; or
- C. If dissatisfied with the Agency's decision, the employee may file a subsequent appeal, with the Office of Personnel Management through the Agency; or
- D. File an appeal directly with the Office of Personnel Management.

That the claimant failed to exercise his statutory appeal rights to seek reclassification of his position does not turn what is a classification dispute into a matter subject to resolution under 31 U.S.C. § 3702(a)(2) or provide potential coverage under the Meritorious Claims Act.

### **Failure to Promote**

The effort of the claimant's representative to characterize the nature of the claim as a failure to promote due to administrative or clerical error as discussed in OPM File #S013620 is misplaced. As OPM File Number 01-0020, March 19, 2001, makes clear, EPA's failure to take action to reclassify the claimant's position does not constitute either a clerical or an administrative error:

The Civilian Personnel Law Manual states that:

in cases involving approval of retroactive promotions on the ground of administrative or clerical error, it is necessary that the official having delegated authority to approve the promotion has done so. Thus, a distinction is drawn between those errors that occur prior to approval of the promotion by the properly authorized officials and those that occur after such approval but before the acts necessary to effectuate the promotion have been fully carried out. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request. Where the error or omission occurs before he exercises that discretion, administrative intent to promote at any particular time cannot be established.

*B-190408, December 21, 1977.*

According to the agency, the Director of the Civilian Personnel Office of the [name] is the agency's "authorized approving official" for this installation; not the employee's supervisor. Because promotion appointment authority is discretionary with the agency official granted such authority, an employee is not entitled to a promotion until such appointment authority has been exercised. Inasmuch as the official who was delegated authority to approve such promotions had not done so prior to April 9, 2000, there is no statutory authority under which a retroactive promotion and back pay can be awarded.

*B-183969, B-183985, July 12, 1975.*

The Notification of Personnel Action, Standard Form 50 (SF-50), provided by the claimant's representative, shows the claimant was reassigned effective May 22, 2011, from an Environmental Engineer, GS-819-12, position to an IT Specialist, GS-2210-12, position as the result of a position review. As is clear on the SF-50, the Human Resources Officer is the agency's "authorized approving official" for the activity. Thus, any delay in the agency's review of the classification of the claimant's position does not support the representative's assertion that the claimant should be afforded a retroactive reclassification due to administrative or clerical error. Since the agency found an upgrade to be unwarranted, no GS-13 position has been established for which a promotion action may be effected.

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." (citing *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. Should the claimant exercise his classification appeal rights and his position be subsequently upgraded to the GS-13 grade level, he may only receive pay at the GS-13 grade level once he is placed in the upgraded position.

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.