

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

**Claimant:** [name]

**Organization:** National Fair Housing Training Academy  
U.S. Department of Housing and Urban  
Development  
[city & State]

**Claim:** Promotion, full benefits (i.e., health insurance, 401K pension plan, accrual of sick and annual leave), cost-of-living and merit raises

**Agency decision:** N/A

**OPM decision:** Denied

**OPM file number:** 09-0042

//Judith A. Davis for

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

11/16/2009

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Date

On July 24, 2009, the U.S. Office of Personnel Management (OPM) received a copy of an April 27, 2009, letter to the Director, OPM, labeled "RE: Reconsideration of Tort Claim," the original of which we have no record of receipt. In this letter, the claimant states she awaits a final determination in writing on a "notice of tort claim against the U.S. Department of Housing & Urban Development (Ex. A). The U.S. Department of Labor notified me on January 18<sup>th</sup>, 2008 that my tort claim was allegedly forwarded to the Office of Personnel Management." Our August 5, 2009, letter to the claimant advised her OPM was unable to locate the U.S. Department of Labor (DoL) referral letter and stated:

We would appreciate receiving clarifying information from you so that we may respond properly to your request. This includes clarification as to whether you were appointed to a Federal position by HUD, or whether you were employed in a contractor capacity, along with pertinent supporting documentation clarifying your employment status for the entire period of your claim. Please clarify what "losses" you believe you suffered and what benefits you are due, citing pertinent statutes and regulations in support of your claim. Please clarify whether you have filed a claim on this matter with "USDA" or HUD and, if so, provide a copy of their response to your claim.

In her August 25, 2009, letter to OPM, received on August 27, 2009, the claimant states:

The U.S. Department of Housing and Urban Development (HUD) issued an RFP (R-OC-23112) to manage the National Fair Housing Training Academy (NFHTA), its educational arm for fair housing. The U.S. Department of Agriculture Graduate School (USDA Grad School) used me to win this contract and then denied its promises: promotion, pay raise, federal status, and benefits. When I asked for the compensation promised, I was told that HUD requested that NFHTA fire me. Before I could be fired, I was reassigned to work from home under workers' compensation for another year due to an injury sustained on the job

Since HUD requested that NFHTA fire me, I was forced to file my claim with the Department of Labor, who then forwarded it to the Office of Personnel Management.

The claimant's request was referred to OPM's Center for Merit System Accountability which settles Federal civilian employee compensation and leave claims under the provisions of 31 U.S.C. § 3702(a)(2). DoL's referral letter states:

This is in response to your correspondence concerning your employer, U.S. Department of Housing and Urban Development, denying you holiday pay, benefits, a promotion and a raise.

Although the FLSA provides many labor standards, it does not regulate personnel issues involving federal employees...The Office of Personnel Management and the Merit Systems Protection Board are responsible for the federal workforce. Therefore, we are forwarding your correspondence to the Office of Personnel Management...for review and appropriate action.

DoL's letter misstates the claimant's employment status. The claimant states in her "Tort Claim Notice":

That, in December of 2004 Ross Professionals assigned [claimant] to HUD's National Fair Housing Training Academy as an Executive Assistant.

That, USDA Grad School assumed program management of the HUD initiative in February of 2006.

That, in November 2006, in good faith, I assumed the duties of Deputy Administrator, without a formal promotion or pay raise.

That, in November of 2006, the USDA Grad School bought my contract from Ross Professionals; and induced me to continue as the Deputy Administrator.

Thus, it is clear from the claimant's own statements the claimant was not a HUD employee during the period of the claim. Instead, the claimant states she was employed by Ross Professionals and, subsequently, by the USDA Graduate School (USDAGS). Publicly available information appears to show "Ross Professionals" is the private sector firm of Ross Professional Services, LLC (RPS), described on its Web site as "a Staffing and Consulting firm with over 20 years of combined experience in the area of Professional Office Support Services." (<http://www.rpservices.net/>). Therefore, the claimant does not assert and the record supports the conclusion that the claimant was not a Federal employee when employed by "Ross Professionals."

OPM must adhere to the statutory definition of "employee" in 5 U.S.C. § 2105(a) for determining whether a claimant is a Federal employee covered by the compensation and leave claim provisions of 31 § U.S.C. 3702(a)(2). Section 2105(a) of title 5 provides:

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--

(1) appointed in the civil service by one of the following acting in an official capacity--

- (A) the President;
- (B) a Member or Members of Congress, or the Congress;
- (C) a member of a uniformed service;
- (D) an individual who is an employee under this section;
- (E) the head of a Government controlled corporation; or
- (F) an adjutant general designated by the Secretary

concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

Not all persons employed by the Federal Government are Federal employees under civil service law. An individual must satisfy all three provisions of 5 U.S.C. § 2105(a) in order to be deemed an employee within the meaning of the civil service laws. See Horner v. Acosta, 803 F.2d 687 (Fed. Cir. 1986).

During the period of the claim, USDAGS operated as a nonappropriated fund instrumentality under the provisions of 7 U.S.C. § 2279b(f), which indicates USDAGS employees are not Federal employees:

Employees of the Graduate School are employees of a nonappropriated fund instrumentality and shall not be considered to be Federal employees.

We note the USDAGS November 22, 2006, letter to the claimant welcoming her as an *employee* (emphasis added) states:

The Graduate School, USDA, is a Non-Appropriated Fund Instrumentality of the United States Department of Agriculture. As an employee of the School you are not in the federal Civil Service System. You are not subject to corresponding procedures nor are you eligible for federal Civil Service retirement benefits. The School currently follows the federal *General Schedule* pay scale as an administrative convenience...

OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. See Frank A. Barone, B-229439, May 25, 1988. Therefore, we find the claimant was not a Federal employee covered by the compensation and leave claim provisions of 31 U.S.C. 3702(a)(2) during the period of the claim. Accordingly, OPM does not have jurisdiction to settle this claim.

The claimant has attempted to pursue this claim through the tort claim process. Under 28 U.S.C. 2675, tort claims are to first be presented to the Federal Agency whose employee is asserted to have committed the tortious act. Therefore, it is unclear why the claimant sent her original "Tort Claim Notice" to DoL or why DoL forwarded the notice to OPM when the entities cited by the claimant in her notice were HUD and USDAGS. We also note 7 U.S.C. § 2279b(g) excludes USDAGS from coverage under the tort claims procedures in 28 U.S.C., Chapter 171.

This OPM settlement of the claim 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.