

Date: April 14, 2004
Claimant: [name]
File Number: 03-0011
OPM Contact: Deborah Y. McKissick

The claimant is employed as a Computer Engineer, GS-0854, with the [agency component], Department of the Air Force. The claimant disagrees with his agency's pay setting decision when he was promoted from GS-0854-9 to GS-0854-11. The Office of Personnel Management (OPM) received the compensation claim on November 22, 2002, the agency administrative report on January 29, 2002, and the claimant's response to the agency administrative report was received on March 26, 2003. On September 12, 2003, the additional information that OPM requested was received from the agency. For the reasons discussed herein, the claim is denied.

The claimant was employed as an Aerospace Engineer, GS-0861-12, step 7, when [installation] was closed by the Base Realignment Committee. The claimant accepted a Palace Acquire Internship with the Communication & Information Career Program (CICP) after receiving a Masters degree in Computer Engineering. In September 2000, the claimant was placed on pay retention when he began an internship as a Computer Engineer, GS-0854-07. On September 6, 2000, the claimant signed a change-to-lower grade position offer, which included an explanation of the conditions that would terminate the claimant's pay retention. On June 2, 2002, the claimant's pay retention was terminated when he was promoted from a GS-0854-09 to a GS-0854-11. Upon promotion, the employee's total pay was reduced from \$66,542 to \$62,299.

The claimant believes that the reduction of his total pay upon promotion to GS-11 was a violation of the September 6, 2000, change-to-lower grade position offer. The claimant does not question the regulations used to determine his salary, but questions the "cumulative effects of the regulations that govern being on retain pay, and the loss that occurs when transferring from a locality pay table to a special pay table."

The agency administrative report stated that the claimant's pay retention was terminated and his salary reduced from \$66,542 to \$62,299 following a career promotion from GS-0854-9 to GS-0854-11. The agency conducted a complete audit of the claimant's pay actions from September 10, 2000, to June 2, 2002. The agency provided the following step by step account of the pay action for the promotion from GS-0854-9 to GS-0854-11.

On June 2, 2002, the claimant was promoted to a Computer Engineer GS-0854-11 and his pay was set in accordance with section 5334(b) of title 5, United States Code (U.S.C.). 5 U.S.C. 5334(b) provides that a General Schedule (GS) employee receiving a retained rate is entitled to the higher of the rate of basic pay in the higher grade that is two steps above the step 10 rate of basic pay for the grade of the employee's position prior to the promotion, or his or her existing retained rate of basic pay. Locality pay is not considered a "rate of basic pay" for purposes of setting pay upon promotion. (See 5 U.S.C. 5304(c)(2) and 5 CFR 531.606(b).)

Under 5 U.S.C. 5334(b), the claimant's basic pay entitlement upon promotion was the rate of basic pay that exceeded GS-0854-9 step 10 by not less than 2 steps, \$61,202, or his existing retained rate of basic pay, \$61,250, whichever was greater. Since the claimant's existing retained rate of basic pay of \$61,250 exceeded the 2-step promotion entitlement, that rate was used to set his pay at GS-11.

The agency stated that the claimant's retained rate of basic pay of \$61,250 fell within the Special Salary Rate Table for Certain Information Technology Employees (ITSSRT) between GS-11, step 8, and GS-11 step 9. The agency applied 5 CFR 536.205(b) and set the claimant's new rate of basic pay at GS-11, step 9, with a salary of \$62,299. 5 CFR 536.205(b) requires an agency to compare the employee's retained rate of basic pay to the range of basic rates applicable to the grade of the employee's new position. For this purpose, the retained rate of basic pay excludes locality pay under 5 U.S.C. 5304 or additional pay of any other kind. (See definition of "rate of basic pay" at 5 CFR 536.102.) Locality pay is not part of protected basic pay under statutory pay retention rules at 5 U.S.C. 5363 and, therefore, was not used to set the employee's pay in the higher grade.

The agency referenced section 536.209(a)(2) of title 5, Code of Federal Regulations (CFR) to support the decision to terminate the claimant's pay retention. 5 CFR 536.209(a) provides that loss of eligibility for, or termination of, pay retention occurs when: (1) a break in service of 1 workday or more; or (2) the employee becomes entitled to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under pay retention; or (3) the employee is demoted for personal cause or at the employee's request. In this case, the employee was entitled to a rate of basic pay that was equal to or higher than his retained rate of basic pay.

The claimant was not entitled to locality pay upon promotion to GS-11 since he was no longer on pay retention and his GS-11, step 9, special salary rate exceeded the locality rate of pay for that grade and step. A special rate employee is entitled to the greater of the locality rate of pay or special salary rate for his or her grade and step. See 5 CFR 531.606(a)

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Moreover, the burden of proof is on the claimant to prove the liability of the government and his or her right to payment. 5 CFR 178.105; *Matter of Jones and Short*, B-205282, June 15, 1982. Thus, where the written record presents an irreconcilable dispute of

fact between a government agency and an individual claimant, the factual dispute is settled in favor of the agency, absent clear and convincing evidence to the contrary. 5 CFR 178.105; *Matter of Staff Sergeant Eugene K. Krampotich*, B-249027, November 5, 1992; *Matter of Elias S. Frey*, B-208911, March 6, 1984; *Matter of Charles F. Callis*, B-205118, March 8, 1982., The agency properly terminated the claimant's pay retention and correctly set the claimant's pay when he was promoted from Computer Engineer, GS-0854-09 to Computer Engineer, GS-0854-11. Hence, the claim is denied.

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