

Date: September 16, 2002  
Claimant: [name]  
File Number: 02-0025  
OPM Contact: Deborah Y. McKissick

The claimant is a [WS-14], employed with the Department of the Air Force. The Office of Merit Systems Oversight and Effectiveness of the Office of Personnel Management (OPM) received the compensation claim on May 8, 2002, and the agency administrative report on June 12, 2002. The claimant is requesting back pay for incorrect pay setting. For the reasons discussed herein, the claim is denied.

The claimant states that his income was reduced as a result of his promotion from [GS-11] to [WS-14].

The agency administrative report states that the claimant's promotion to the [WS-14] position was effective November 18, 2001. The agency further states that the pay setting process was explained to the claimant after the claimant received his first pay check based on the promotion. The agency offered the claimant the opportunity to return to the [GS-11] position and his former salary.

The claimant was previously a grade 11, step 10, employee under the General Schedule (GS) pay plan prior to the promotion. The claimant's salary at that time was \$56,322 per annum, which included \$52,305 in basic pay and \$4,017 in locality pay on the Salary Table 2001-RUS (Rest of U.S.). The claimant's converted basic hourly rate was \$25.06 per hour on the Salary Table 2001-GS (General Schedule). According to 5 CFR 531.606(b), locality pay is considered basic pay for retirement under chapters 83 or 84 of title 5, United States Code, and life insurance under chapter 87, and premium pay under subchapter V of chapter 55. 5 U.S.C. § 5304(c)(2)(A).

After the promotion to the [WS-14] position, the claimant's basic pay salary was \$26.35 per hour. Section 532.407(a) of title 5, Code of Federal Regulations provides guidance for promotions to a position under the prevailing rate system. It reads, "An employee who is promoted is entitled to be paid at the lowest scheduled rate of the grade to which promoted which exceeds the employee's existing scheduled rate of pay by at least four percent of the representative rate of the grade from which promoted."

The Supreme Court has held that the Government may apply different rules when setting the pay for employees promoted to GS positions from WS positions as compared with the rules used to set the pay for employees who have been promoted from GS positions. *United States v. Clark*, 454 U.S. 555, 556 (1982).

The establishment of an employee's rate of pay under the Wage Schedule is governed by 5 U.S.C. § 5343 and regulations issued by OPM and published in subpart B of part 532 of title 5, Code of Federal Regulations. In accordance with these provisions, each employing agency has discretion to formulate its own policies regarding the application of the highest previous rate rule. See *Donald R. Rutt*, B-247265, June 5, 1992; *Jean M. Drummond*, B-229165, Aug. 8, 1988; and *Carma A. Thomas*, B-212833, June 4, 1984.

The agency explained the methodology used to set the claimant's basic pay at the WS-14 grade level. Accordingly, the Air Force Instruction Manual 36-802, section 1.2.7.3 provides when an employee is promoted from the GS pay system to the FWS pay system, the "pay is set using the appropriate pay setting directives for the pay system the employee is moving to."

Our analysis of the claimant's situation finds the following procedures for determining the pay setting for the claimant:

First Step      Review the Salary Table 2001-GS to determine the employee's highest previous rate of basic hourly pay for the GS-11, step 10, grade level that was in effect at the time of the promotion.

Highest previous rate of basic pay = \$25.06 (without locality pay)

Second Step    Review Salary Table 2001-GS to establish the representative rate for the GS-11 and the AF Schedule Area 140R Norfolk-Portsmouth-Newport News-Hampton Federal Wage Salary Pay Chart (Effective July 15, 2001) to establish the representative rate for the WS-14 position. *5 CFR 532.401 defines representative rate as the fourth rate on the General Schedule (GS) and the second rate on a five-rate regular wage (WG) schedule.*

Representative hourly rate for GS-11, step 4 (without locality pay) = \$21.21

Representative hourly rate for the WS-14, step 2 = \$25.33

FWS representative rate is higher; therefore, the claimant was promoted.

Third Step      Calculate 4 percent of the basic rate for step 4 of GS-11 (the GS representative rate) by 4% and add the increase to the GS-11, step 10 (rate before the promotion). *5 CFR 532.205(c) provides the guidance to use 4% of the representative rate to determine the minimum rate of basic pay for wage employees. FWS employees do not receive General Schedule (GS) locality*

*pay, and agencies must make pay administration actions for FWS employees without regard to GS locality pay. The GS basic schedule is used.*

Multiply  $\$21.21 \times 4\% = \$0.85$

Add  $\$0.85 + \$25.06 = \$25.91$  (employee's new rate in the WS-14 position)

Fourth Step Slot the employee's new rate into the steps of the FWS grade the employee is promoted to. If the rate falls between two steps the employee receives the higher step.

The employee's new rate at \$25.91 is higher than WS-14, step 2 (\$25.33), and lower than WS-14, step 4 (\$27.35). Therefore, the employee is promoted to WS-14, step 3, at \$26.35.

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. When a GS employee moves from a GS position to an FWS position voluntarily (i.e., not as a result of a reclassification or reduction in force), the employee immediately loses entitlement to GS locality pay. The reason for this is that GS locality pay is not basic pay for all purposes (including determination of pay entitlement when an employee moves from a position under the GS to a position not authorized to receive GS locality pay). The law that establishes locality pay for GS employees authorizes its use only for GS employees. GS locality pay cannot be paid to FWS employees. Therefore, agencies are required by law to use the GS basic schedule (excludes locality pay) when promoting employee from a GS position to a Federal Wage System position. Based on the above analysis, we concur with the agency's actions when it placed the claimant in the [WS-14], step 3, position. 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.