

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

Claimant: [name]

Organization: Air Force [district]
U.S. Department of the Air Force
[installation]

Claim: Additional premium pay

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0041

/s/ Linda Kazinetz for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Agency Compliance and Evaluation
Merit System Accountability and Compliance

2/18/14

Date

The claimant is employed as a Supervisory General Engineer, GS-801-14, with the U.S. Department of the Air Force at [installation]. The claimant seeks “\$20,989.40 of premium pay (overtime, night differential and Sunday premium pay) that was deferred in July, August & Sep of 2011 while [he] was deployed in Afghanistan (CENTCOM [U.S. Central Command]).” The U.S. Office of Personnel Management (OPM) received the claim request on April 11, 2013, the agency administrative report (AAR) on July 2, 2013, and the claimant’s comments on the AAR on July 25, 2013. For the reasons discussed herein, the claim is denied.

In his March 29, 2013, claim request, the claimant states the aforementioned premium pay was deferred because he was “approaching the Premium Pay limit which cannot be exceeded in any calendar year” and that:

These deferred funds should have been paid in a lump sum in the beginning of calendar year 2012. When [name] a personnel specialist at [district], at my request, queried DFAS about payment of these deferred funds they came back and stated that the excess funds above the Aggregate limit were forfeited and not deferred. During my deployment when I wasn’t paid for these hours worked, I was advised by the DFAS [Defense Finance and Accounting Service] representative in Kabul, at the time, that the pay was deferred ... I was never advised once either pre or during my deployment that I would not be paid for hours required to be worked.

The claimant asserts the agency erred when, in an email sustaining the denial of his claim, it stated “Premium Pay is not part of the Aggregate limit” and that under section 530.202 of title 5, Code of Federal Regulations (CFR), “aggregate compensation means the total of basic pay, premium pay, allowances, differentials, bonuses, awards, incentives and similar cash payments.” With regard to this assertion, the copy of the January 13, 2013, email from the agency provided by the claimant states: “You mentioned in your memo that you were told that the “aggregate pay would be deferred to the following calendar year” which is true – but premium pay is not “aggregate pay” and this provision does not apply to your situation.”

In its AAR, the agency states the claimant “was denied all overtime pay, night differential and Sunday premium pay for the last 3 pay periods of his deployment,” that his leave and earnings statement “indicated it was due to “Exception pay limit exceeded” and that “[a]pproximately \$24,000 was deferred due to [the claimant] reaching the limit.” The agency states:

Premium pay is added to basic pay. This includes: overtime; holiday premium; Sunday premium; night differential; etc. These are limited by the annual premium limitation (APL)... Pay cutback due to the APL is forfeited and never paid unless the limit is lifted. For the 2011 pay year, the APL for eligible employees in CENTCOM was lifted to \$230,700.

* * * * *

...The aggregate limit did not cutback his overtime pay. The premium limit cutback his overtime pay and, as stated in the law below, premium pay may not exceed the executive level V (the V.P.’s salary of \$230,700). The sections of law governing premium pay

make no reference to deferrals other than 5 CFR 550.106(e) which is immediately countered by (f). [Claimant]'s cutback overtime pay for 2011 was not deferrable.

The law does not expressly say that premium pay will "forfeit", instead it says that premium pay may not "exceed" the prescribed limit, and the law does not authorize payment at a later date. This is the reason that premium pay, such as overtime or night differential, in excess of a prescribed premium pay limit forfeits and is never paid, unless the limit is lifted. While, it has been confirmed that [claimant] actually worked the overtime hours identified, DFAS is strictly prohibited by law from making the premium payment due to the premium pay limitations.

In his response to the AAR, the claimant states the agency's response "still doesn't answer the question of why the Federal Government (DoD) required me to work hours they couldn't pay me for. I was never briefed of the situation nor in any way made aware that I was "volunteering" my services." The claimant asserts his situation is "comparable" to an employee working "on their furlough day being in violation of the anti-deficiency act as unpaid volunteer work." He states he "looked up 31 U.S.C. §§ [sic] 1342, and it says it is a violation of the anti-deficiency act by "accepting voluntary services for the United States, or employing personal services not authorized by law". He requests either "[OPM] or AFDW as the Agency Head report this violation to the President as required by law."

Under 5 U.S.C. § 302, each Federal agency is delegated the authority to manage its employees; i.e., "to take final action on matters pertaining to employment, direction and general administration of personnel..." In exercising this authority, 5 U.S.C. § 6101 et seq. authorizes each Federal agency to establish work schedules which must consist of a "basic administrative workweek of 40 hours for each full-time employee." It is well settled by the courts that payments of money from the Federal Treasury are limited to those authorized by statute. See *OPM v. Richmond*, 496 U.S. 414, 425-526 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Thus, overtime pay for hours of work in excess of 40 hours in a workweek may only be paid as authorized by law and regulation. The claimant asserts he should be paid for the premium pay at issue in this claim based on the "aggregate pay" provisions of 5 U.S.C. § 5307, which work the agency agrees he was ordered to perform. However, the claimant's reliance on 5 U.S.C. § 5307 is misplaced as discussed in Comptroller General Opinion B-27346, July 2, 1996:

Put another way, these are two separate limitations on the amounts of compensation payable. First is section 5547 which places specific limitations on the amount of premium pay that may be paid in a pay period, and it is applied on a pay period by pay period basis.¹ It makes no provision for payment in a lump sum in a future calendar year of any amount withheld because of its provisions. Second is section 5307 which places specific limitations on the aggregate annual compensation an employee may be paid, with the proviso that an amount not paid because of that annual compensation limitation may be paid in a lump sum at the beginning of the next calendar year. While both of these

¹ The claimant was covered by the annual pay cap as provided for under 5 CFR 550.106 rather than the bi-weekly cap under 5 CFR 550.105.

provisions may apply to limit an employee's pay under certain circumstances, the provision applicable to your claim is section 5547. As noted, section 5547 does not authorize the payments you seek, and the provision in section 5307(b) authorizing a lump sum payment in a subsequent year does not apply to the amounts withheld from you by virtue of section 5547.

As discussed in prior decisions, when the biweekly (or annual, if applicable) cap on premium pay is reached, employees may still be ordered to perform overtime work without receiving further compensation. See also Comptroller General Opinions: B-178117, May 1, 1973; B-229089, December 28, 1988; and B-240200, December 20, 1990. Thus, the claimant did not “volunteer” his services in contravention of the Anti-deficiency Act. Rather, he performed work ordered and approved by his employing agency, the compensation for which he is statutorily barred from receiving.

Under 5 CFR 178.105, the burden is upon the claimant to establish the liability of the United States and the claimant’s right to payment. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). As discussed previously, the claimant has failed to do so. Since the agency decision to deny the claim was made in accordance with established law and regulation, there is no basis upon which to reverse the decision.

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.