

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

Claimant: [name]

Organization: [agency component]
Indian Health Service
Department of Health and Human
Services
[city & State]

Claim: Incorrect step set upon promotion

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0014

/s/ Judith A. Davis for

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

9/26/13

Date

In his December 21, 2011, letter received by the U.S. Office of Personnel Management (OPM) on January 12, 2012, the claimant states his “step was calculated...in error” by his agency and requests OPM direct his agency to correct the setting of his pay from GS-11, step 5, to GS-11, step 10, upon his promotion to the GS-11 grade level in March 2010 and issue him back pay to the effective date of the promotion. We received the agency administrative report (AAR) on April 24, 2012, the claimant’s response to the AAR on May 1, 2012, and additional information from the employing agency at our request on October 18, and 19, 2012. For the reasons discussed herein, the claim is denied.

The claimant states his employing agency erred in calculating his step “using ‘Highest Previous Rate [HPR]’ by using “actual dollar amounts instead of the rate [step]” in their calculation.

The record shows the claimant retired as a GS-11, step 10 (\$57,462), on March 3, 2000. He was reappointed into a reinstatement-career appointment as a GS-9, step 10 (\$51,671), on May 19, 2002, and he resigned on April 11, 2003, at the same grade and step (\$53,279). He was reappointed again on January 22, 2008, at GS-9, step 10 (\$59,700), and was promoted on March 28, 2010, to GS-11, step 5 (\$65,371). The record shows Special Rate Table 0372 for Medical Technologists, GS-644, applies to his positions.

The record shows the agency calculated the claimant’s salary upon promotion to the GS-11 level based on the HHS pay setting HPR policy in HHS Instruction 531-2 (5/20/96), Section 531-2-20, Pay Setting. In keeping with this policy, the agency stated they used his special salary rate derived from Special Rate Table 0372 as his HPR since the claimant was reassigned to a position in the same agency and an agency official determined the claimant’s contributions to the agency program would be greater in the position to which he was reassigned. The agency stated:

In [claimant’s] case...his pay was set as follows:

Your prior salary was a special rate as a GS-644-09/10, \$62,338, which is higher than the salary earned you earned [sic] in 2000. Therefore, your current salary GS-9 step 10, \$62,338 which was earned before your Promotion [sic] was used as HPR of [sic] to set your current salary for the GS-11.”[sic]:

The method for the Promotion [sic] action was the following steps:

1. Take existing rate of pay plus two step increases: $62,338 + 1385 + 1385 = \underline{65,108}$ (highest applicable rate range).
2. Highest applicable rate range is determined by comparing to the special pay rate for the grade GS-11 range.
3. Highest applicable rate range 65,108 falls between step 4 (63695) and step 5 (65371), whichever is the most advantage [sic]; therefore, the step 5 \$65,371 is your new salary for the Promotion on 3/28/2010.”[sic]

The claimant did not submit his own salary calculations in his response to the AAR.

Pay upon promotion in the GS is set under the provisions of section 531.214 of title 5, Code of Federal Regulations (CFR), which implements the promotion rule found in 5 U.S.C. § 5334(b). Because the claimant was covered by the same pay schedules before and after promotion, pay is set under the standard method in 5 CFR 531.214 as follows:

Step A: If applicable, convert the employee's rate and range of basic pay to the geographic location of the new worksite after promotion.

No geographic conversion is applied since the claimant's positions before and after promotion were in the same location.

Step B: Identify the employee's existing GS rate in the grade before promotion, and increase that rate by two GS within-grade increases for that grade.

Prior to the promotion action, the employee was a GS-644-9, step 10. Using the 2010 General Schedule (base) table, increase GS-9, step 10 (\$54,028) by two within-grade increases. Within-grade increases at grade 9 = \$1,385. Multiply this amount by two ($2 \times \$1,385 = \$2,770$) and add this result to the GS-9, step 10 rate. $\$54,028 + \$2,770 = \$56,798$.

Step C: Determine the payable (highest) rate of basic pay for the step determined in Step B by applying any special rate supplement applicable to the given grade, based on the employee's position of record before promotion.

Subtract the GS-9, step 10, underlying rate (\$54,028), from the GS-9, step 10, special rate (\$62,338), to find the special rate supplement. $\$62,338 - \$54,028 = \$8,310$ (special rate supplement). Add the special rate supplement to the rate determined in Step B. $\$56,798 + \$8,310 = \$65,108$ (payable rate used in Step D).

Step D: Identify the highest applicable rate range for the employee's position after promotion and find the lowest step rate in that range that equals or exceeds the rate determined in Step C.

The highest applicable rate range for the GS-11 position after promotion is a hybrid range consisting of special rates at steps 1-6 on Special Rate Table 0372 and locality rates at steps 7-10 on the Rest of U.S. locality pay table.¹ The lowest step in that range that equals or exceeds the payable rate from Step C is GS-11, step 5 (\$65,371). That step rate is the payable rate of basic pay upon promotion.

The standard method for setting pay upon promotion contained in 5 CFR 531.214 derives the lowest payable rate of basic pay; i.e., GS-11, step 5, to which the claimant is entitled. However, an agency may set a higher payable rate of basic pay upon promotion under the maximum payable rate (MPR) rule in 5 CFR 531.221-223. Under 5 CFR 531.221(c), an agency may use a GS employee's special rate as the HPR when being reassigned. Since the action at issue in this

¹ Special Rate Table 0372 provides for special rates only up to step 6 for grades 10 and 11; for steps 7 through 10 at these grades, the otherwise applicable locality pay table must be used.

claim is a promotion and not a reassignment, 5 CFR 531.221(c) is not applicable and the agency's decision to use his special rate as his HPR was not appropriate. Under 5 CFR 531.222(d), an agency must consider a special rate employee's underlying GS rate (i.e., the corresponding rate on the General Schedule (base) table) in determining the employee's HPR when barred from using the special rate under 5 CFR 531.223(g). Therefore, 5 CFR 531.221(b) applies in setting the claimant's pay under the MPR rule.

As provided in 5 CFR 531.222(a)(1), the HPR used in applying the MPR rule is (1) the highest rate of basic pay previously received by an individual while employed in a civilian position in any part of the Federal Government, without regard to whether the position was in the GS pay system, or (2) the highest rate of basic pay in effect when a GS employee held his or her highest GS grade and highest step within that grade. The highest rate of basic pay previously received by the claimant was his underlying GS rate before promotion (\$54,028). The highest rate of basic pay in effect when the claimant held his highest grade and highest step within that grade was his underlying GS-11, step 10, rate from 2000 (\$50,932). Thus, there are two rates that could be used as his HPR. The agency could use each of these rates when applying the MPR rule in 5 CFR 531.221(b). Using the employee's rate before promotion as his HPR would result in a rate that is less than his promotion entitlement because upon promotion an employee is entitled to basic pay at the lowest rate of the higher grade that exceeds his or her existing rate of basic pay by not less than two step increases of the grade from which promoted. Using the employee's 2000 HPR, an agency would apply the MPR rule as follows:

Step 1: Compare the employee's HPR (\$50,932) with the GS rates for the grade in which pay is currently being set using the schedule of GS rates (excluding any locality payment or additional pay of any kind) in effect at the time the HPR was earned (i.e., the 2000 rates for GS-11).

Step 2: Identify the lowest step rate in that range that was equal to or higher than the HPR (or the step 10 rate if the HPR exceeds the range maximum).

The lowest step is 10 (which equals the claimant's HPR at the GS-11, step 10 level).

Step 3: Convert the step rate identified in step 2 to the corresponding step on the current highest applicable rate range for the employee's current GS position of record. That rate is the employee's MPR of basic pay the agency may pay the employee.

The maximum payable GS rate the agency may pay the claimant using the 2010 GS pay table = GS-11, step 10 (\$65,371).

Step 4: After setting the employee's GS rate within the rate range for the grade, not to exceed the maximum payable rate identified in Step 3, the agency must determine the employee's payable rate of pay based on the employee's GS base rate.

Accordingly, the agency had the discretion to set the claimant's pay upon his promotion between GS-11, step 5, as provided for under 5 CFR 531.214, and GS-11, step 10, as permitted under 5 CFR 531.221(b).

An administrative change in salary may not be made retroactively effective in the absence of a statute or nondiscretionary agency policy so providing. *See* B-64489, March 4, 1947; B-141771, February 11, 1960; B-144022, October 11, 1960; B-180313, June 5, 1974. An exception to the general rule may apply to allow retroactive salary adjustments where administrative errors or unjustified or unwarranted personnel actions deprived an employee of a right granted by statute or regulation or resulted in a failure to carry out nondiscretionary administrative regulations or policies. *See* B-20925, October 27, 1941; B-122529, February 15, 1955.

Although agencies may choose to exercise their authority to set pay for employees being promoted using their HPR, it is well-established that employees have no legal entitlement to the use of HPR. When an agency has not relinquished its discretion through adoption of a mandatory policy or administrative regulation, the agency is under no obligation to set an employee's pay using his/her HPR. *See* OPM File Numbers S9701098 and S9701099.2; B-247265, June 5, 1992, and B-192562, June 11, 1979.

HHS Instruction 531-2 (5/20/96), Section 531-2-20, Pay Setting, states, in pertinent part:

When the use of the highest previous rate (HPR) is optional under Government-wide regulations, the Department's policy is that the manager who approves a Request for Personnel Action is authorized (unless otherwise provided) to approve the employee's rate of pay after consultation with the personnel officer or his/her designee. The rate of pay may be any rate between the basic rate of the position and the HPR, subject to the restriction in 531-2-20B below². In this situation, the employee has no entitlement to a particular rate of pay.

In its October 18, 2012, email response to our request to clarify how the claimant's pay at issue in this claim was set, the agency stated, in pertinent part:

...the choice is given to the manager to either pay the entitled pay or the higher calculated salary per HHS pay setting policy -<http://www.hhs.gov/ohr/manual/9611.pdf>. Managers typically select the higher rate. Here is the worksheet I prepared on George Robinson. The selecting official wanted to pay the higher rate but the lower pay rate was selected by Portland HR.

Thus, the consultation process conducted within the confines of the agency's pay setting policy resulted in setting the claimant's pay at GS-11, step 5.

In his claim rationale, the claimant states it is not possible to pay bills in 2010 dollars when being paid in 1990 dollars without "aging" them in a way done by "other agencies." He further states setting the pay of returning Federal employees based on dollar amounts earned years ago will increase problems with recruiting and retaining qualified employees. OPM adjudicates compensation claims by determining whether controlling statute, regulations, policy, and other written guidance were correctly applied to the facts of the case. Therefore, the claimant's assertions regarding the "aging" of dollars and his observations regarding recruiting and

² Not applicable to the claimant's situation.

retaining qualified employees has neither merit nor applicability to our claim determination and will not be considered or addressed further.

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. Where the record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. 5 CFR 178.105; *Jones and Short*, B-205282, June 15, 1982. Where the agency's determination is reasonable, we will not substitute our judgment for that of the agency. *See, e.g., Jimmie D. Brewer*, B-205452, March 15, 1982, as cited in *Philip M. Brey*, B-261517, December 26, 1995. The claimant has failed to establish that the agency acted in an unlawful manner when HHS failed to set his rate of pay at GS-11, step 10, upon his promotion. Therefore, the claim is denied.

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.