

Date: June 17, 2003
Claimant: [name]
File Number: 03-0007
OPM Contact: Deborah Y. McKissick

The claimant currently was hired as a Correctional Institution Administrator, GS-006-14, step 8 with the Bureau of Prisons, [region], of the United States Department of Justice. The Office of Personnel Management (OPM) received the compensation claim on November 8, 2002, the agency administrative report on January 9, 2003, and the claimant's response to the agency administrative report on April 3, 2003. The claimant is requesting back pay for incorrect pay setting. For the reasons discussed herein, the claim is denied.

The claimant previously worked for the Washington, D.C. Department of Corrections, in a DS-15, step 5, position with a service computation date of July 22, 1974. The claimant and the agency agree that the claimant was offered and accepted a Correctional Institution Administrator, GS-0006-14, position, step 8, effective February 13, 2000. The organizational title for the position is Associate Warden. However, the claimant disagrees with the agency's pay setting decision and the assigned step that she received when reinstated in the Federal government. Using the highest previous rate rule, the claimant believes that the agency should have set her pay at GS-14, step 10.

The claimant and the agency also agree that the agency has discretion whether to use the highest previous rate when setting an employee's pay in reinstatement actions. The agency administrative report states that the agency's pay manual directs the use of an employee's highest previous rate, in normal circumstances, when it is to the advantage of the employee. The report indicates that the pay manual states, "...the use of HPR [highest previous rate] is discretionary and consideration should be given to the selection of a rate which will not place the employee at a pay level substantially higher than that of other employees of equal or superior proficiency or qualifications serving in identical or similar positions in the organization." The Assistant Director of the Human Resource Management Division decided to set the claimant's pay at step 8, a slightly higher rate than her previous salary, to provide pay equity with the other Associate Wardens within the agency.

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. We are required to settle claims only in accordance with the applicable laws and regulations, and we cannot waive or modify their provisions in individual cases. The establishment of an employee's rate of pay under the General Schedule is governed by section 5334 of title 5 of the United States Code (U.S.C.). Under 5 U.S.C. § 5334, an agency may pay an employee at any rate of his or her grade that does not exceed his or her highest previous rate when the employee is reemployed, reassigned, transferred, or demoted. The claimant has no vested right to receive the highest salary rate previously paid her. In accordance with regulations issued by the Office of Personnel Management and published in Subpart B, Part 531 of title 5, Code of Federal Regulations (CFR), 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 claimant has no vested right to receive the highest salary rate previously paid her.

OPM concludes that the claimant's pay has been lawfully set and that the "highest previous rate" rule does not mandate that the claimant's pay be set at a higher step. It is, moreover, well established that the "highest previous rate" rule is not an entitlement. *Milton Morvitz*, B-192562, June 11, 1979. An employee has no vested right to receive the highest salary rate previously paid to him or her; an agency may exercise its discretion not to set an employee's salary at the employee's highest previous rate. See 5 C.F.R. § 531.203(c); *Doris M. Arehart-Zuidema*, B-223356, August 21, 1987. We find no evidence that there was an abuse of administrative discretion when the agency set the claimant's pay at GS-14, step 8. See *Rutt*, supra, and *Morvitz*, supra.

We reviewed the agency's decision under the statutory standard to determine if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; procedurally defective; or unsupported by substantial evidence. In view of the permissive rather than mandatory language in the applicable statutes and regulations, as noted above, the degree of discretion that heads of agencies have in setting pay for reinstatement personnel actions, and the facts of this claim, we cannot say the agency's application of the Department of Justice regulations in this case was arbitrary or capricious. We find that the claimant is not entitled to have her pay set at a higher rate. Accordingly, 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.