



United States
**Office of
Personnel Management**

Washington, DC 20415

**Compensation Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name, et al.]

Organization: Navy Exchange Service Command
Department of the Navy
U.S. Department of Defense
Virginia Beach, Virginia

Claim: Request for Back Pay

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 05-0033

/s/ for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability
Human Capital Leadership
and Merit System Accountability

6/5/2006

Date

The claimants are employed in [jobs] with the Navy Exchange Service Command (NEXCOM), Department of the Navy, U.S. Department of Defense (DoD), in Virginia Beach, Virginia. Their representative requests back pay with interest for them from May 23, 1999, to September 12, 2004, and payment of reasonable attorney fees as provided by the Back Pay Act. The Office of Personnel Management (OPM) received the compensation claim on June 7, 2005, and the agency administrative report (AAR) on September 26, 2005. For reasons discussed herein, the claim is denied.

The claimants assert their agency did not properly conduct wage surveys from 1996 to 2004, because it did not include electrician and other skilled trades' job as required by OPM regulations and gave employees in these jobs cost of living increases rather than seeking a way to gain sufficient information on which to properly base their wages for these employees. The claimants' representative states the failure to conduct a proper wage survey resulted in a substantial loss of pay for them. She indicates the September 2004 pay rate increases corrected their pay situation but did not correct the loss of pay prior to that time.

The record shows the Navy Exchange System is a DoD Nonappropriated fund (NAF) Instrumentality and the claimants are NAF employees paid under a prevailing rate system, as defined in subchapter IV of title 5, United States Code (U.S.C.). It has the largest number of NAF employees in the Norfolk, Portsmouth, Virginia Beach, Virginia, NAF wage area and is designated by the DoD Wage Fixing Authority, delegated with this authority in DoD Directive, Number 5120.42, May 19, 1977 (Incorporating Change 1, November 16, 1994), to lead the local wage survey committee in conducting the wage survey for the area.

In the AAR, the agency states the Navy Exchange System conducted annual NAF wage surveys which were compliant with title 5 U.S.C. and OPM governing regulations and guidance and always included all required jobs in the survey. The record shows surveys attempted to collect wage information on the jobs at issue. However, surveys collected very little wage information on the skilled trades' jobs because the amount of information collected was contingent on the wholesale, retail, and services and recreational industries, required by guidelines to be surveyed, having jobs similar to the specified NAF survey jobs. The DoD Chief of NAF Pay Systems certified the surveys were adequate as specified in Subchapter S5-10 of the OPM Operating Manual for the Federal Wage System-NAF (Operating Manual) and the survey results were considered and approved by the DoD Wage Committee as prescribed in S3-2b(2)(b) of the Operating Manual.

In December 2003, NEXCOM identified a pay disparity for certain jobs and requested DoD to establish special wage schedules for NAF skilled trades jobs for the Norfolk-Portsmouth-Virginia Beach wage area and to survey businesses outside the wholesale, retail, and services and recreational industries. It stated some skilled workers, e.g., painters, plumbers, carpenters, and electricians, are not commonly employed by businesses operating within those industries; and this was reinforced by the 2002 wage survey conducted for the wage area which did not collect any wage data for painters, electricians, and carpenters. As a result, the regular wage schedule rates were not based on position specific data and did not accurately reflect prevailing wages in the survey locality. The request was subsequently approved by OPM, and in 2004 the regular Wage Schedule for the survey area was amended to authorize special rate ranges for certain skilled trades' jobs, including those of the claimants.

In denying the back pay for the claimants, the agency stated the Navy Exchange System as a DoD NAF Instrumentality, is not subject to the Back Pay Act and its NAF employees are not “employees” under 5 U.S.C. 2105(c)(1), a requirement for coverage. In supporting its decision, the agency referenced *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728 (1982) which held, “The Back Pay Act, which permits an employee to recover lost wages due to ‘an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part’ of the compensation to which he was otherwise entitled... expressly denies that cause of action to Army and Air Force Exchange Service (AAFES) personnel...” The agency also stated there was no back pay entitlement prior to the implementation of the special wage schedule on September 12, 2004, because the special wage schedule for NA-8 and above jobs did not exist until that date.

The record shows the agency followed established procedures in conducting NAF wage surveys. NAF wage survey requirements are covered in part 532 of title 5, Code of Federal Regulations (CFR) and the OPM Operating Manual Federal Wage System, Nonappropriated Fund. These regulations specify that regular schedule wage rates are established for each NAF wage area and, unless specifically excluded by OPM under special criteria, all NAF prevailing rate employees within a wage area are paid rates from the appropriate NAF regular wage schedules. The regulations authorize the head of DoD to fix and administer rates of pay for DoD NAF wage employees within the policies and practices of the Federal NAF Wage System and DoD delegations of this authority are established in DoD Directive Number 5120.42.

The law, CFR, and OPM Operating Manual prescribe uniform practices and procedures for establishing NAF pay schedules in accordance with local prevailing rates; time schedules, and administration of wage surveys; criteria for establishing NAF wage and survey areas; the required and optional jobs for inclusion in surveys; and guidelines for determining adequacy of wage survey data. Regular NAF wage surveys must cover a cross-representation of the industries to which the regular NAF schedule employees are oriented and specify use of defined industry classes within the wholesale, retail, and services and recreation industry divisions. An agency may recommend to OPM, with a supporting statement and information, changes in the required industry, establishment, and job survey coverage and need for special rate schedules.

Regular NAF wage schedules provide a wage-rate structure which reflects the overall pattern and level of wage rates prevailing in the wage area. Annual wage surveys are used to collect the data used to determine wage schedules. The lead agency is responsible, under 5 CFR 532.239(b), for determining whether the usable data collected in each wage survey are adequate for computing paylines. The CFR and OPM Operating Manual identify guidelines for determining adequacy of wage survey data. Wage survey data are adequate when the results include data for:

(a) at least two-survey jobs providing at least 10 samples each and one survey job providing at least five samples each in the grade range 1 through 4 and at least three survey jobs providing at least five samples each in the grade range 5 and above before establishment weights are applied; and

(b) at least two other survey jobs providing at least five samples each before establishments weights are applied; and

(c) at least 100 unweighted samples used in the final pay line for all survey jobs combined.

The Back Pay Act, at 5 U.S.C. 5596(b), provides for back pay to employees due to unjustified personnel actions. However, the definition of employee for purposes of entitlement does not include employees paid from NAF activities, including AAFES, Navy exchanges, and other such instrumentalities of the United States. Under 5 U.S.C. 2105(c), unless specifically provided in this title and in the limited specific situations identified (i.e., matters pertaining to discrimination, the Fair Labor Standards Act, certain interchange agreement involving movement of employees, benefit programs, and insurance), NAF employees are not employees for purposes of laws administered by OPM. Case law is clear on this issue. See *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728 (1982).

Furthermore, retroactive pay is not authorized for the claimants for the period prior to the August 23, 2004, effective date for the NAF Special Wage Rate Ranges for their wage area. "Subject to limited exceptions, an increase in compensation authorized by a Wage Board or other wage-fixing authority for employees under the prevailing rate system may not be made effective prior to the date of final action by that wage-fixing authority." B-174278, December 23, 1971. Retroactive pay is payable only when one of the two statutory provisions in title 5 U.S.C. §5344(a) is met:

(1) the individual is in the service of the Government of the United States, including service in the armed forces, or the government of the District of Columbia on the date of the issuance of the order granting the increase; or

(2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase, and only for services performed during that period.

Where the agency's factual 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. The claimants' pay rates from 1999 to 2004 were determined using a certified and approved NAF pay schedule and the claimants do not meet any statutory basis for retroactive pay. The agency decisions of April 25 and 28, 2005, regarding the claimants' eligibility for back pay and payment of reasonable attorney fees is not arbitrary, capricious, or unreasonable. Accordingly, the claim is denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employees' rights to bring an action in an appropriate United States Court.