

Compensation Claim Decision
Under section 3102 of title 31, United States Code

Claimant: [name]

Organization: 45th Space Communications Squadron
Patrick Air Force Base, Florida

Claim: Pay setting

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 06-0005

/s/ for

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

9/12/2006

Date

The claimant is employed in a [GS-12] position with the 45th Space Communications Squadron at Patrick Air Force Base, Florida. He requests the Office of Personnel Management (OPM) review his agency's decision to adjust his salary under new pay setting regulations issued by OPM on May 31, 2005, and effective May 1, 2005. We received the claim on November 30, 2005, and the agency administrative report on April 5, 2006.

The claimant was previously employed as a [WS-11]. In March 2005, all of the Federal Wage System (FWS) jobs in his unit were reclassified and announced competitively as General Schedule (GS) positions. The existing staff was given the opportunity to apply for the new positions, and all employees with the exception of the claimant were selected for and assigned to the GS positions on or about April 17, 2005. The agency did not rate the claimant as qualified for the new GS position because his skill codes as an FWS supervisor were not directly creditable to a GS supervisory position. He was therefore detailed into the new position not to exceed 120 days while his manager validated his experience and his career brief was updated. He was promoted to [GS-12], step 7, effective July 10, 2005.

On September 6, 2005, the claimant received written notification from his agency that he had been overpaid as a result of retroactive application of the new pay-setting regulations issued by OPM. The new regulations implement Section 301 of the Federal Workforce Flexibility Act of 2004 (Public Law 108-411, October 30, 2004) and significantly change how pay actions involving locality pay are calculated. As a result, the claimant's rate of basic pay, including locality pay, was changed from GS-12, step 7, at \$72,688 per annum, to GS-12, step 3, at \$64,613 per annum. The claimant does not allege that his pay was set incorrectly under these regulations. Rather, he requests that his rate of basic pay be restored to the original rate (GS-12, step 7) that was set on the effective date of his promotion, either by grandfathering the personnel action or by changing its effective date to April 17, 2005, when the other employees in the unit were assigned to the new positions. He states that the pay adjustment has caused financial hardship and OPM should have taken action to extend the effective date of the new regulations.

The statutory requirements of Public Law 108-411, which resulted in a change in OPM's pay-setting regulations at 5 CFR part 531, subpart B, and the consequent change in the claimant's rate of basic pay, may not be waived or otherwise modified. Section 301(d) of the Act stipulated that its provisions "shall take effect on the first day of the first applicable pay period beginning on or after the 180th day after the date of the enactment of this Act;" i.e., May 1, 2005. While OPM did not publish interim regulations until May 31, 2005 (see Federal Register, Volume 70, No. 103, Tuesday, May 31, 2005, 32178-31315), the regulations were effective May 1, 2005, as mandated by the Act. OPM had no authority to extend this effective date or to grandfather individual cases to avoid applying the regulations. Payments of money from the Federal Treasury are limited to those authorized by law, even where this may cause hardship in individual cases. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). Further, there is no authority to effect a personnel action retroactively so as to increase the right of an employee to compensation where the processing of the personnel action is delayed by events prior to its approval by the properly authorized official. *Carol A. Barraza*, B-219221, September 6, 1985; OPM File Number S9802480, March 31, 1999.

Under the maximum payable rate (MPR) rule in effect before May 1, 2005, when an employee moved from an FWS position to a GS position, his or her FWS rate was first compared to the GS base rate range for the employee's grade, *excluding locality pay*. The MPR was set at the lowest step in the underlying GS rate range that equaled or exceeded the employee's FWS rate. The applicable GS locality payment was then computed as a percentage of that step, and that amount was added to the rate for the step.

In the claimant's case, his FWS rate of \$64,530 (his hourly rate of \$30.92 X 2087 hours/year) was initially compared to the GS-12 rate range on the 2005 General Schedule, excluding any locality pay. The lowest step that equaled or exceeded \$64,530 was GS-12, step 7 (\$65,063) and his pay was set at that rate. The 2005 locality payment applicable in the Rest of United States (RUS) locality pay area of 11.72 percent was then computed based on that rate. The resulting \$7,625 locality payment ($\$65,063 \times .1172$) was added to the GS-12, step 7, rate (\$65,063). The resulting amount of \$72,688 equaled the GS-12, step 7, rate on the 2005 RUS locality pay table.

Under the new GS MPR rule at 5 CFR 531.221(d)(1) in effect on and after May 1, 2005, when an employee moves from an FWS position to a GS position at the same geographic location, his or her FWS rate is compared to the highest applicable GS rate range for the employee's grade, *including locality pay*. The MPR is set at the lowest step in the locality rate range that equals or exceeds the highest previous rate. In the claimant's case, his FWS rate of \$64,530 was compared to the GS-12 rate range on the 2005 RUS locality pay table. The lowest step that equaled or exceeded \$64,530 was GS-12, step 3 (\$64,613), and his pay was set at that rate.

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