

Date: January 15, 2003

Claimant: [name]

File Number: 02-0042

OPM Contact: Deborah Y. McKissick

The claimant is employed with the Portsmouth Naval Shipyard (PNS) in Portsmouth, New Hampshire, as a [position]. The claimant requests premium pay for time worked in excess of the biweekly cap during the period from July 8, 2002, to July 27, 2002. The Office of Personnel Management (OPM) received the compensation claim on September 13, 2002, and the agency administrative report on November 12, 2002. For the reasons discussed herein, the claim is denied.

The claimant declared that he is an Fair Labor Standards Act (FLSA)-exempt employee whose overtime pay is limited as a result of the biweekly premium pay cap. The claimant stated that he worked in excess of the biweekly cap during the period, from July 8, 2002, until July 27, 2002. He believes he should be compensated according to the April 27, 2002, issue of the Federal Register which contains new provisions regarding the annual premium pay cap. The claimant “contends that any work performed in excess of the biweekly cap is mission critical and therefore should be compensated.”

The agency administrative report stated, “Due to the nature of the Shipyard’s mission, personnel are, on occasion, required to work extended hours for extended periods of time. As a result, some of the higher graded exempt employees reach the biweekly earning limitation.”

In the agency administrative report, the activity explained that it believes that it is not appropriate to waive the biweekly earning limitation at this time. The activity noted that the Department of Defense (DoD) and the Department of the Navy (DoN) have not issued regulations or guidance to define work that is critical to the mission of the agency. The activity also noted that the agency has not issued regulations that delegate authority to activity heads to waive the biweekly limitation on premium pay. Hence, the activity believes that it does not have the authority to implement the annual premium pay limitation until DoD or DoN promulgates regulations.

Section 5547(a) of title 5, United States Code (U.S.C.), provides that premium pay may be paid under 5 U.S.C. § 5542, only to the extent that the aggregate of basic pay and premium pay for any pay period does not exceed the greater of (1) the maximum rate payable for GS-15 (including any applicable locality rate or special salary rate), or (2) the rate payable for level V of the Executive Schedule. Section 1114 of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107, December 28, 2001) amended the premium pay cap provisions that apply to General Schedule (GS) employees under 5 U.S.C. § 5547. The amendment provided a new authority to approve the use of an annual cap instead of a biweekly cap when an authorized agency official determines that the work in question is critical to the mission of the agency.

On April 19, 2002, OPM issued interim regulations to implement the provisions of Public Law 107-107. The interim regulations governing the new premium pay cap provisions for GS employees went into effect on the first day of the first pay period beginning on or after April 27, 2002. Under the new regulations at 5 CFR 550.105(a), GS employees may receive certain types of premium pay in a pay period only to the extent that the total of basic pay and premium pay for the pay period does not exceed the greater of the biweekly rate for (1) GS-15, step 10 (including any applicable locality rate of pay or special salary rate), or (2) level V of the Executive Schedule. The claimant's activity is located in the "Rest of United States (RUS)" locality pay area. Effective on the first day of the first pay period beginning on or after April 27, 2002, the 2002 biweekly cap on premium pay for an employee whose duty station is in the RUS locality pay area is \$4,661.60, and the annual amount is \$121,600.

5 CFR 550.106(b)(1) reads, "For any pay period in which the head of an agency (or designee), in his or her sole discretion, determines that an employee is needed to perform work that is critical to the mission of the agency, the agency *may* pay premium pay under the limitations described in paragraph (c) of this section and 5 CFR 550.107 instead of under the biweekly limit described in 5 CFR 550.105(a)." [Emphasis added.]

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, 1998. The statutory and regulatory language is permissive and gives agency heads, or designees, discretion in determining whether to pay premium pay under 5 CFR 550.106(b)(1). Thus, an agency may choose not to authorize the use of an annual premium pay cap instead of the biweekly cap. Accordingly, this claim is denied.

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.