

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

Claimant: [name]

Organization: Federal Emergency Management Agency
Department of Homeland Security
[city & State]

Claim: Back pay using “highest previous rate”
rule

Agency decision: Denied

OPM decision: Denied/Corrective action required

OPM file number: 11-0019

//Ana A. Mazzi

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Deputy Associate Director
Merit System Audit and Compliance

1/24/11

Date

The claimant is employed as a [GS-9 position] with the Federal Emergency Management Agency (FEMA), at the [agency component] in [city & State]. The claimant requests the U.S. Office of Personnel Management (OPM) require his employing agency to abide by the “highest previous rate” (HPR) rule and grant him back pay retroactive to his entry on duty (EOD) date of September 12, 2004. OPM received the claim on April 29, 2011, and additional information from FEMA on July 5 and October 13, 2011. For the reasons discussed herein, the claim is denied.

Prior to his employment with FEMA, the claimant worked as a Computer Specialist (Programming Analyst), GS-334-12, with the Internal Revenue Service (IRS). He resigned from his IRS position on December 7, 2001, and had a break in Federal service until he began his employment with FEMA on September 12, 2004, in an administratively determined (AD) position. FEMA converted him to a General Schedule (GS) position in May 2006. He states: “I presented my SF-50 to my HR specialist...shortly after my arrival at FEMA...and they repeatedly ignored or delayed my request concerning the highest pay rate until after the CORE conversion action in May 2006...” He further states:

In August of 2006, I was able to finally get FEMA to recognize my previous service as a career conditional federal employee and adjust my pay accordingly. FEMA agreed to adjust my pay to the proper level but only adjusted the pay back to the CORE conversion date of 05/28/06...I have learned that my pay should have been adjusted back to the start date of September 2004.

An agency with an independent authority to administratively determine the rates of pay for any group or category of employees must follow its own unique statutory pay authority when setting and adjusting pay under an AD pay system. However, 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.

The authority to use an employee’s highest previous rate of pay to set GS basic pay under the maximum payable rate rule is contained in section 5334(a) of title 5, United States Code (U.S.C.) and sections 531.221-223 of title 5, Code of Federal Regulations (CFR). Generally, these regulations on using a HPR under the maximum payable rate rule provide that an agency may apply the maximum payable rate rule to determine an employee’s payable rate of basic pay under the GS pay system at a rate higher than the otherwise applicable rate upon reemployment, transfer, reassignment, promotion, demotion, change in type of appointment, or certain other actions, so long as the rate of pay does not exceed the employee’s highest rate of pay previously received. This rule does not apply to positions that are not under the General Schedule. *See* B-196053, February 29, 1980. However, an agency with an independent authority to administratively determine the rates of pay for a group of employees may establish a similar pay setting policy as permitted under its own unique statutory authority.

Agency authority under the GS maximum payable rate rule is permissive and the above provisions give each agency the discretion to formulate its own policy regarding the application of the rule. *See* OPM File Number S9701098, January 14, 1998; OPM File Number: S9701099.2, February 25, 1998; B-229165, Aug. 8, 1988; B-212833, June 4, 1984; and B-195032, July 25, 1979.

Although agencies may choose to exercise their authority to set pay for reemployed personnel using their highest previous rate, it is well-established that employees have no legal entitlement to the use of highest previous rate. 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 highest previous rate. *See* OPM File Numbers S9701098 and S9701099.2, *Supra*; B-247265, June 5, 1992, and B-192562, June 11, 1979.

The claimant asserts that he raised the issue of setting his pay at the highest previous rate in 2004 when he was hired into his AD position. However, as noted in a March 8, 2010, internal FEMA memorandum on the claimant's back pay request, the claimant has not provided any supporting documentation to substantiate this assertion. 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. The burden of proof is on the claimant to prove the liability of the government and his or her right to payment. 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. *See* 5 CFR 178.105; B-249027, November 5, 1992; B-208911, March 6, 1984; and B-205118, March 8, 1982.

FEMA's previously cited March 8, 2010, memorandum states the agency retroactively adjusted the claimant's basic rate of pay to his most recent conversion from an AD position to a GS position effective May 28, 2006, quoting an August 3, 2006, email to the claimant from his servicing human resources specialist:

In Judy's email to [claimant] on August 3, 2006, she stated that she had received this email from Lisa Ganse. "I (Lisa) just spoke to my Supervisor Shelley Miller and we will adjust his pay back to his most current conversion, which is the CORE conversion effective 5/28/06. That will take him to the GS 7/10 - \$47,669.00....We will try to make the correction to his pay effective PP 15 or 16." As you can see from Fran's summary in the email dated 12/14/2009, this occurred in PP 17 of 2006 [8/20/06 to 9/2/06].

In response to a request for clarification, the Office of the Chief Component Human Capital Officer at FEMA advised OPM in its October 13, 2011, email:

FEMA does not have a policy on Highest Previous Rate. Agency practice is to use an employee's Highest Previous Rate when it is documented by an SF-50. The only departure from that practice occurred with the excepted service CORE employees that the agency hires on temporary appointments under the authority of the Robert T. Stafford Act. When a CORE employee provided an SF-50 after their initial appointment the

highest previous rate salary was retroactive to the most recent appointment or extension of appointment recorded in the personnel database.

Under the provisions of 5 CFR 531.221(a), "...A payable rate set under this section must take effect on the effective date of the action involved. This section may not be used to set an employee's rate of basic pay retroactively unless a retroactive action is required to comply with a nondiscretionary agency policy." FEMA lacks a standard, nondiscretionary practice using HPR since the record fails to show that all selectees are advised of and required to submit an SF-50 documenting HPR for a pay setting determination prior to appointment. Applying HPR only on those occasions when a selectee proactively submits an SF-50 does not constitute a standard, nondiscretionary practice. We find FEMA's retroactive change in the claimant's rate of basic pay upon conversion to the GS position effective May 28, 2006, is contrary to provisions of 5 CFR 531.221(a) and must be reversed. Therefore, the claim is denied and corrective action is required.

The claimant also believes he is not being treated fairly compared with the "highest previous rate" policy of other Federal agencies, and compared to other employees who have experienced the same issue. He references specific employees in his agency whom he believes have received pay adjustments to include highest previous rate. However, OPM's authority under 31 U.S.C. § 3702(a)(2) to settle Federal civilian employee compensation claims is limited to consideration of legal and regulatory liability. Therefore, OPM has no authority to authorize payments based on consideration of equity by case-to-case comparison.

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.