

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

Claimant: [name]

Organization: [agency component]
Tennessee Air National Guard
Memphis, Tennessee

Claim: Pay setting (FWS change to lower grade at employee's request with geographic move to special wage rate area)

Agency decision: Denied

OPM decision: Denied

OPM file number: 08-0112

//Judith A. Davis for

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

8/28/2009

Date

The claimant was employed by the Air National Guard in St. Ann, Missouri, as an [WG-11 position]. He subsequently applied and was selected for the position of [WG-10 position] with the Air National Guard in Memphis, Tennessee, effective October 15, 2006. He believes his pay was set incorrectly in the new position. We received the claim on August 29, 2008, and the agency administrative report on November 19, 2008. For the reasons discussed herein, the claim is denied.

Part 532 of title 5, Code of Federal Regulations (CFR) contains the regulatory basis for the pay administration of positions covered by prevailing rate systems, e.g., Federal Wage System (FWS) positions. Under 5 CFR 532.405(a), when an employee is reemployed, reassigned, transferred, promoted, or changed to a lower grade, the agency may, at its discretion, fix the pay at any rate of the new grade which does not exceed the employee's highest previous rate. If the employee's highest previous rate falls between two step-rates of the new grade, the agency may fix the pay at the higher of the two. 5 CFR 532.401 provides the following definitions:

Highest previous rate means the highest scheduled rate of pay previously paid to a person while employed in any branch of the Federal Government, a mixed-ownership corporation, or the government of the District of Columbia.

Scheduled rate of pay means the rate of pay fixed by law or administrative action, including a retained rate of pay, for the job held by an employee before any deductions and exclusive of additional pay of any kind.

Under the FWS, an employee's highest previous rate may not be based on an FWS special rate. It may only be based on the *scheduled rate of pay* on the FWS *regular* wage rate schedule for the geographic area in which the employee is being employed.

Section 532.405(c) of 5 CFR specifies the highest previous rate, if earned in a wage job, is the current rate of the grade and step-rate of the former job on the *same type of wage schedule* in the wage area in which the employee is being employed, *or* the actual earned rate, whichever is higher. "Current" rate is the rate in effect on the effective date of the personnel or position change precipitating the pay setting action. (See FWS Manual, Subchapter 8-3e.(5)).

Relating these requirements to the claimant's situation, the agency may fix his pay at any rate of the new grade (WG-10) which does not exceed his highest previous rate. Corresponding to the instructions in 5 CFR 532.405(c) above, his highest previous rate is the higher of these two:

- The current rate (i.e., the hourly dollar amount) of the grade and step-rate (WG-11, step 5) of his former job on the *same type of wage schedule* in the wage area in which he is now employed. The claimant's grade and step-rate in his former job in St. Ann, Missouri, were set using the FWS regular wage rate schedule for the St. Louis, Missouri, wage area. Therefore, his highest previous rate would be the current rate of the same grade and step-rate (WG-11, step 5) on the corresponding FWS regular wage rate schedule for the Memphis, Tennessee, wage area, since this is the *same type of wage schedule* as was used for his former job. In both cases, this was the *scheduled rate of pay* fixed by law for these wage areas exclusive of additional pay of any kind, such as special wage rates. As such, the claimant's highest previous rate using this method would be no

higher than the rate for WG-11, step 5, on the applicable FWS regular wage rate schedule for Memphis (effective date December 11, 2005), which was \$25.13.

- His actual earned rate, which was the hourly dollar amount he earned in St. Ann, or \$27.09.

Since the claimant's actual earned rate resulted in the higher dollar amount, his highest previous rate is \$27.09. This is the figure used to fix his pay on the FWS special wage rate schedule for Aircraft Maintenance and Support Positions at the [agency component], Tennessee Air National Guard, in Memphis, Tennessee, which is the special wage schedule applicable to the claimant's new position. His pay must be set at the WG-10 level as that is the authorized grade of the position. Since his highest previous rate of \$27.09 fell between step 2 (\$26.61) and step 3 (\$27.67), the claimant's pay was properly fixed at the higher of the two step-rates, at WG-10, step 3.

The claimant references 5 CFR 531.221, which prescribes the maximum payable rate rule for pay under the General Schedule (GS). This is not applicable to FWS positions. The claimant also references 5 CFR 536.201 and 536.301, which describe the conditions under which mandatory grade and pay retention must be applied to an employee being moved to a lower-graded position. These conditions are limited to reduction-in-force and reclassification; i.e., where movement to the lower-graded position is a result of management action. An employee who moves to a lower-graded position at his or her own request is not eligible for grade or pay retention.

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.