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

Claimant: [name]

Organization: [agency component]

Air Force Material Command Department of the Air Force

[installation & State]

Claim: Retroactive application of special rate

Agency decision: Denied

OPM decision: Denied

OPM decision number: 11-0034

/s/ Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Agency Compliance and Evaluation
Merit System Accountability and Compliance

9/26/13

Date

The claimant occupies an Electrical Engineer, GS-850-12, position at the U.S. Air Force Material Command, [installation & State]. He asserts Air Force erroneously set his pay upon his reassignment to [installation], Germany, when it failed to include a special rate. In addition, the claimant states he suffered a reduction in pay as a result of his conversion out of the National Security Personnel System (NSPS) and into the General Schedule (GS). OPM received the claim on July 21, 2011, and additional information from the agency on November 15, 2011. For the reasons discussed herein, the claim is denied.

On June 5, 2008, the claimant voluntarily transferred from his nonsupervisory (Electrical Engineer, YD-850-02) position at [installation in U.S.] to the position of Supervisory Electrical Engineer, YF-850-02, at [installation in Germany]. Both of these positions were under the NSPS. When the claimant transferred from [installation in U.S.] to [installation in Germany], his adjusted base pay of \$83,396 (\$73,684 basic pay with \$9,712 locality adjustment) was reduced to \$73,684 (\$73,684.00 with no locality adjustment).

The claimant asserts he was entitled to receive a special rate upon his reassignment to [installation in Germany] and the intent of section 5305 of title 5, United States Code (U.S.C.), which authorizes the payment of special rates, was not followed upon his reassignment. He asserts a special rate should be added retroactively to his base pay for the time he worked at.

The agency does not support the claimant's assertion of an entitlement to a special rate upon his reassignment to [installation in Germany]. In its administrative report to OPM, the agency states: "The claimant was not entitled to [a special rate] while covered under NSPS" and cites section 530.301(b) of title 5, Code of Federal Regulations (CFR) as its supporting regulation.

Section 530.301(b) of title 5, CFR, which implements 5 U.S.C. § 5305, states: "Except as explained in section 530.303(a), this subpart applies only to GS [General Schedule] employees." Because the claimant was covered under the NSPS pay plan when his pay was set upon reassignment to [installation in Germany], he was not a GS employee subject to the provisions of 5 U.S.C. § 5305, and therefore was not eligible for, nor entitled to, a special rate.

On October 28, 2009, the President signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2010, Public Law (P.L.) 111-84, which repealed the statutory authority for NSPS and required the Department of Defense (DoD) to convert DoD civilian employees and positions to non-NSPS personnel and pay systems before January 1, 2012. The claimant was consequently converted from Supervisory Electrical Engineer, YF-850-02, to Supervisory Electrical Engineer, GS-850-12, on September 12, 2010.

The claimant asserts the agency erroneously set his pay upon conversion from the NSPS pay plan to the GS pay plan. He states: "The special salary supplement or rate (SSR) has never been added to the [claimant's] basic pay...when the [claimant] was converted from NSPS to GS." To validate his assertion, the claimant references his Standard Form 50-B, dated September 12, 2010, in which the NSPS to GS pay adjustment is documented. In this document, the claimant's basic pay of \$79,371, earned under the NSPS pay plan, is reduced to \$74,337 under the GS pay plan before a \$6,027 locality adjustment is added, for an adjusted basic pay of \$80,364. The claimant goes on to state: "As per 5 CFR 530.322 (a) previously referenced the appellant's pay

must first be compared to the standard GS pay table to determine step level and basic pay and then a supplemental special salary rate shall be added to the basic pay...This clearly did not occur and must be corrected."

The agency does not support the claimant's assertions and maintains that the pay setting action was done in accordance with the NSPS to GS Transition Guide and controlling regulations.

The NSPS to GS Transition Guide, Chapter 3, issued March 5, 2010, provides the following process for setting pay upon transitioning employees from NSPS to GS:

1. When an employee's adjusted salary falls within the applicable rate range for the GS grade assigned to the employee's permanent position, his or her GS rate of basic pay will be set at the lowest step of the applicable locality rate, special rate, or GS base pay range for that grade that equals or exceeds his or her adjusted NSPS salary...

"Adjusted salary" in the Transition Guide has the meaning given in 5 CFR 9901.304; i.e., "an employee's base salary plus any local market supplement paid to that employee."

5 CFR 531.608, Relationships of locality rates to other pay rates, states:

- (a) An employee must receive the greatest of the following rates of pay, as applicable -
- (1) The scheduled annual rate of pay payable to the employee;
- (2) A locality rate under this subpart;
- (3) A special rate under 5 CFR part 530, subpart C, or a similar rate under other legal authority...or;
- (4) A retained rate under 5 CFR part 536 or a similar rate under other legal authority;

The agency states that, to set pay upon the claimant's transition out of the NSPS while maintaining compliance with 5 CFR 531.608, they compared GS-12 rates of pay on the 2010 GS Base Pay Table (Table 1) with the 2010 Special Rate Table for Electrical Engineers-Foreign Areas (Table 2) and set his pay at the greater allowable amount.

2010 GS-12 Base Pay (**Table 1**)

Grade	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10
12	60274	62283	64292	66301	68310	70319	72328	74337	76346	78355

2010 GS-12 Special Rate – Table Number 422F (Table 2)

Grade	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10
12	66301	68310	70319	72328	74337	76346	78355	80364	82373	84382

The claimant's basic pay at the time of conversion was \$79,371. Since there was no locality adjustment added, his adjusted basic pay was the same. This rate is above the step 10 rate on the GS Base Pay Table. When comparing this rate to the Special Rate Table for Electrical Engineers-Foreign Areas, the claimant's rate fell between GS-12 Step 7 and Step 8. Therefore, the agency correctly set the claimant's pay at the GS-12 Step 8 rate of \$80,364 since the Special Rate table yielded the greater annual rate.

The claimant's assertion that the agency should have set his special rate in accordance with 5 CFR 530.322 is misplaced. Section 530.322, "Setting pay when a special rate schedule is newly established or increased," only applies to an employee holding a position that becomes covered by a newly established rate schedule (including a schedule for which coverage is expanded) or increased special rate schedule. The record shows the special rate used to set the claimant's pay upon conversion out of the NSPS pay plan was already in existence at the time of transition.

The claimant also asserts that when his pay plan was converted the agency failed to comply with the Workforce Flexibility Act of 2004. He states "...the rate of pay did not adhere to Title III sections G and H."

Public Law 108-411, commonly known as the Federal Workforce Flexibility Act of 2004, provided for reforms related to Federal employment. Title III of the Act made several significant changes in the law governing pay administration. Title III, section (a)(2)(G), codified at 5 U.S.C. 5305(h), which the claimant specifically cites, states:

(h) An employee shall not for any purpose be considered to be entitled to a rate of pay established under this section with respect to any period for which such employee is entitled to a higher rate of basic pay under any other provision of law. For purposes of this subsection, the term 'basic pay' includes any applicable locality-based comparability payment under section 5304 or similar provision of law.

As stated above, the agency compared rates of pay on the GS Base Pay Table against rates on the Special Rate Table for Electrical Engineers-Foreign Areas. Since the Special Rate Table yielded the greater annual rate, the agency, in compliance with 5 U.S.C. 5305(h), set the claimant's pay in accordance with the Special Rate Table.

Title III, section (a)(2)(H), codified at 5 U.S.C. 5305(i), in pertinent part states:

(i) If an employee who is receiving a rate of pay under this section becomes subject, by virtue of moving to a new official duty station, to a different pay schedule, such employee's new rate of pay shall be initially established under conversion rules prescribed by the Office of Personnel Management.

Section 5305(i) of title 5, U.S.C. does not apply to the claimant's situation as his pay changed as a result of converting from NSPS to GS, not by virtue of moving to a new official duty station.

On July 24, 2011 the claimant transferred from [installation in Germany] back to [installation in U.S.]. The claimant originally asserted in his claim that "[t]he pay now offered by [installation in U.S.] is subsequently less than that dictated by the proper application of 5 CFR 530.304" and that he has suffered a loss in pay. However, subsequent to his original assertion, in an email to OPM dated December 20, 2011, the claimant states:

...my pay at [installation in U.S.] has been corrected...and retroactive pay has been provided...Now the only pay dispute for me is the pay setting that occurred at [installation in Germany]... Either special salary rate supplement (SSR) should have been added under NSPS upon reassignment to [installation in Germany] or SSR should have been provided during the transition from NSPS to GS...My pay upon transitioning from NSPS to GS should have been 79,371 basic pay + 6,027 locality adjustment = 85,398. If an employee is placed on a special pay table, then pay is to be added to the original amount, that is the method dictated in 5 CFR.

The appellant asserts the setting of his pay upon his conversion from NSPS to GS "constitutes a pay loss because the pay provided upon transitioning from NSPS to GS did not equal the original pay plus the supplemental amount added to it, which is dictated by 5 CFR." However, the record shows the claimant's salary was increased from \$79,371 to \$80,364 with his conversion to the GS system. The claimant's adjusted base pay increased after the conversion; therefore he did not suffer a reduction in pay.

The claimant further states:

My permanent pay has been fixed but I am still pursuing this claim for two main reasons which would naturally follow if my pay were completely corrected: 1. I would like this problem corrected for all those (underpaid) who had SSR removed from their basic pay upon transitioning from NSPS to GS when it was never provided in the first place and, 2. I would like the pay to be corrected for those (overpaid) who are receiving SSR which was subsumed under NSPS and never removed due to reassignment to other non-SSR or less SSR positions while still under NSPS.

The claims jurisdiction of OPM is limited to consideration of the statutory and regulatory merits of the individual claims before us. It does not extend to conducting broader program reviews at the behest of individual claimants.

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.