

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE:

B-183660

MATTER OF:

DATE: JUL 11 1975

50891

95422

Paul H. Drake - Highest previous rate - Backpay**DIGEST:**

Employee was promoted from prevailing rate position to one in the General Schedule soon after a pay increase in the General Schedule and before an increase in the prevailing rate position. Under the highest previous rate rule governing the setting of the rate in the General Schedule position, the employee gets no rate benefit from the prevailing rate increase since the employee's pay rate and the General Schedule rate at the time of promotion are the bases for the pay adjustment. Also, a pay rate attained under a temporary promotion limited to 90 days or less may not under the applicable regulation be used to determine the highest previous rate.

This action concerns an appeal by Mr. Paul H. Drake from the disallowance of his claim for additional compensation incident to his promotion from Gyrocompass Mechanic, WD-12, step 3, to Industrial Engineering, GS-7, step 7, effective August 24, 1969, as an employee of the Department of the Navy, as set forth in Settlement Certificate of March 20, 1975, issued by our Transportation and Claims Division.

The claim involves the application of the "highest previous rate rule" promulgated by the Civil Service Commission, 5 C.F.R. § 531.203(c), where Mr. Drake changed from a prevailing rate position to one under the General Schedule during a period just after a pay increase in the General Schedule and before one in the prevailing rate position. Additionally, Mr. Drake had been detailed to the General Schedule position (to which he was later appointed) and promoted on a temporary basis of less than 90 days to another prevailing rate position before the change in pay systems. There is, thus, for consideration whether such personnel actions provide a basis for granting him additional compensation.

The data before us shows that Mr. Drake, as an employee of the Long Beach Naval Shipyard, submitted his application under the Navy Merit Promotion Policy for the position of Industrial Engineering Technician, GS-895-7, in June 1969. He indicated on his application at that time

that his lowest acceptable salary was step 10 of GS-7, which would have been the appropriate rate since Mr. Drake was receiving \$4.36 an hour as a Gyrocompass Mechanic and \$4.36 an hour was step 10 of grade GS-7. The agency notes that Mr. Drake did not indicate his lowest acceptable salary in terms of money although it expected the application form to show the lowest grade and pay acceptable. Accordingly, the agency assumed that Mr. Drake set step 10 as his lowest acceptable salary of a GS-7 based upon the salary schedule in effect at the time of his application. Mr. Drake was selected for the GS-7 technician position and his promotion was effected on August 24, 1969. On July 13, 1969, the General Schedule rates were increased. Under the new General Schedule rates, Mr. Drake's salary as a Gyrocompass Mechanic--\$4.36 an hour--fell between steps 6 and 7 of GS-7. His rate was set at step 7 of GS-7 which resulted in an increase in salary to \$9,169 a year, the annual equivalent of \$4.41 an hour.

The agency indicates that in February 1970, Mr. Drake submitted a request to be returned to his former position of Gyrocompass Mechanic. However, subsequent to Mr. Drake's promotion on August 24, 1969, and prior to his request, the prevailing rate employees received a substantial pay increase as a result of a Department of Defense Wage Survey and the implementation of the Coordinated Federal Wage System on November 23, 1969. Thus, the agency states, to have returned Mr. Drake to his former position of Gyrocompass Mechanic would have involved a promotion action under the Shipyard's Promotion Policy. Accordingly, he was advised he would not be returned until such time as he made application under the appropriate announcement and had been selected in accordance with Merit Promotion regulations. He did not return to his previous position. It is stated that Mr. Drake was promoted to Industrial Engineering Technician, GS-895-9, on August 23, 1970.

Mr. Drake submitted copies of several personnel actions which occurred prior to his promotion on August 24, 1969. These actions show that effective June 3, 1969, Mr. Drake was detailed to the GS-7 position at step 10, \$9,078 a year (\$4.36 an hour), not-to-exceed September 30, 1969. The detail was terminated effective June 28, 1969, and effective the following day he was given a temporary promotion not-to-exceed September 20, 1969, to the position of Foreman Instrument Mechanic (General) WS-58-1 at \$5.20 an hour. The temporary promotion was terminated effective August 24, 1969, the same day he was promoted to the GS-7 technician position.

The applicable Civil Service Commission Regulations found at 5 C.F.R. § 531.203(c) and (d) read in pertinent part as follows:

"(c) Position or appointment changes.

" * * * when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. When an employee's type of appointment is changed in the same position, the agency may continue to pay him at this existing rate or may pay him at any higher rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate.

"(d) Computation of highest previous rate.

"(1) The highest previous rate is based on a regular tour of duty at that rate under an appointment not limited to 90 days or less, or for a continuous period of not less than 90 days under one or more appointments without a break in service."

The agency advises that it is the policy of the Long Beach Naval Shipyard when an employee moves from a prevailing rate position to a General Schedule position to fix the pay in the General Schedule position at a step rate which preserves the prevailing rate employee's existing rate of basic pay. Additionally, the Shipyard uses the employee's existing rate of basic pay at the time of the personnel action as the highest previous rate in the movement of the employee into the General Schedule.

Mr. Drake's temporary promotion to a position at \$5.20 an hour was less than 90 days in duration. Therefore, such rate could not be used as his highest previous rate under section 531.203(d)(1). As noted above, Mr. Drake was detailed to the position of Industrial Engineering Technician, GS-895-7, step 10, \$9,078 a year (\$4.36 an hour). The salary rate of that position may not be used either since Mr. Drake was not appointed to that position. Mr. Drake also indicated on his application that his lowest acceptable salary was step 10 of GS-7. The agency assumed, since Mr. Drake did not indicate his lowest acceptable salary in terms of money, that he meant he would accept a GS-7 based on the salary schedule in effect at the time of his application. We believe such assumption was reasonable, particularly since Mr. Drake accepted the appointment to GS-7 on that basis.

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In view of the above, since Mr. Drake's hourly pay rate of \$4.36 was between step 6, \$4.29 an hour, and step 7, \$4.41 an hour, on August 24, 1969, when he was promoted to the GS-7 position, the agency action in setting his pay rate at step 7 was within the provisions of section 531.203(c), supra. Also, see 5 C.F.R. 531.203(d)(4)(i). Accordingly, the settlement action of March 20, 1975, disallowing his claim is sustained.

Since Mr. Drake recommends changes in the highest previous rate rule, we have discussed informally with the Civil Service Commission his situation. The Commission advises it has, as a major objective, the conduct of a series of feasibility and desirability studies directed toward review of current policies and the development of new concepts and systems for compensating Federal employees. As part of that effort, the Commission is reviewing laws and regulations governing the setting of basic pay rates, including situations involving movement between the prevailing rate system and the General Schedule, with a view of determining what changes can be made, and whether these changes can be accomplished under the current regulatory authority or whether legislation is needed.

The Commission points out that it permits agencies the greatest flexibility in fixing pay of employees, except where legal restraints have been imposed. Unless an agency has established a definite time limit in which it will process a promotion action, either in its own regulations or in a collective bargaining agreement, the agency has leeway in deciding when to implement a personnel action. Thus, when a personnel action involves movement between the prevailing rate pay system and the General Schedule, the agency does have the discretion in a situation, such as in the case of Mr. Drake, of timing the personnel action so that the employee would receive the benefit of either the General Schedule or the local prevailing rate increase to the extent the agency is aware of such pay changes before processing the personnel action. However, for whatever reasons, Mr. Drake's agency did not avail itself of that option and there is no authority to reverse that choice retroactively.

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States