

the promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the promotion (*i.e.*, using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the promotion that would have been applied to the employee if he or she had remained in the position held immediately before that promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9901.342(1) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

§ 9901.356 Pay retention.

(a) Pay retention prevents a reduction in base salary that would otherwise occur by preserving the former rate of base salary within the employee's new pay band or by establishing a retained rate that exceeds the maximum rate of the new pay band. Local market supplements are not considered part of base salary in applying pay retention.

(b) Pay retention will be based on the employee's rate of base salary in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate will be compared to the range of rates of base salary applicable to the employee's position.

(c) Pay retention will be granted for a period of 104 weeks. The Secretary may issue implementing issuances describing exceptions to the 104-week retention limit.

(d) Under NSPS, pay retention will be granted when an employee's base salary would otherwise be reduced in the following situations:

- (1) As the result of reduction in force or reclassification;
- (2) When an otherwise eligible employee is placed through the Priority Placement Program (PPP), including placement resulting from early registration, even though the employee does not have a specific reduction in force (RIF) notice;
- (3) When an organization undergoes realignment or reduction, and

(i) An employee who would not be affected personally requests a reduction in band;

(ii) Management determines the employee's reduction in band results in placement in a more suitable position; and

(iii) That action lessens or avoids the impact of the RIF on other employees;

(4) When an employee accepts a position in a lower pay band designated in advance by the component as being hard-to-fill using any of the following criteria:

(i) Rates of pay offered by non-Federal employers are significantly higher than those payable under NSPS for the area, location, occupational group, or other class of positions involved;

(ii) The remoteness of the area or location involved;

(iii) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or

(iv) Any other circumstances the Component considers appropriate, subject to review and approval by an official who is at a higher level than the official who made the initial decision;

(5) When an employee is reduced in band on return from an overseas assignment under the terms of a pre-established agreement including—

(i) An employee released from a period of service specified in his or her current transportation agreement due to an involuntary, management-initiated action other than for unacceptable performance and/or misconduct;

(ii) An employee, who has completed more than one year of service under a current agreement, released from a transportation agreement for compelling humanitarian or compassionate reasons; and

(iii) A non-displaced overseas employee under no obligation to return to the United States who is otherwise eligible for PPP registration in accordance with DoD Instruction 1400.20;

(6) When an employee declines an offer to transfer with his or her function to a location outside the commuting area, or is identified with such function but does not receive an offer at the gaining activity, and is placed in a position in a lower pay band at the

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losing activity or any other DoD activity;

(7) When an employee accepts a position in a lower pay band offered by an activity to accommodate a disabling medical condition similar to the circumstances described in 5 CFR 831.1203(a)(4);

(8) When an employee occupying a position under a Schedule C appointment (authorized under 5 CFR 213.3301) is placed, other than for unacceptable performance and/or misconduct or at the employee's request, in a position in a lower pay band in the competitive service or in another Schedule C position, provided that such action is not solely the result of a change in agency leadership (change in administration);

(9) When an employee occupying an Army or Air Force dual status military technician position lost, or is scheduled to lose, eligibility for dual status technician employment through no fault of his or her own and accepts placement without a break in service to a non-dual status technician position in a lower pay band;

(10) When an employee occupying a National Guard dual status technician position is involuntarily separated, through no fault of his or her own, and accepts placement, without a break in service, to a non-dual or dual status technician position in a lower pay band or a competitive service NSPS position in a lower pay band;

(11) When an employee whose job is abolished declines an offer within the competitive area, but outside the commuting area, and is placed in a lower pay band position in the commuting area, provided the employee is not serving under a mobility agreement;

(12) When an employee's base salary is reduced as the result of the movement of his or her position from a DoD nonappropriated fund (NAF) instrumentality to coverage by the DoD civil service system without a break in service of more than three days; or

(13) When an employee's base salary would exceed the maximum of the rate range because the maximum of the rate range decreased or as a result of a management-directed reassignment.

(e) An authorized management official may grant pay retention for circumstances other than those detailed

in paragraphs (d)(1) through (d)(13) of this section. This determination is discretionary, and appropriate use is subject to higher-level approval. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who recommended the determination. These circumstances may be specified in advance or may be approved on a case-by-case basis. This authority applies to personnel actions initiated by management, not at the employee's request, and other than for unacceptable performance and/or misconduct, and only if those actions would further the agency's mission in accordance with applicable law and regulation.

(f) Pay retention under this authority will terminate—

(1) At the end of the 104-week period (except as otherwise provided under paragraphs (c) and (m) of this section);

(2) When the employee moves to another position with a rate range that encompasses the employee's retained rate;

(3) When an increase in the maximum rate for the employee's pay band causes the maximum rate to equal or exceed his/her retained rate, or the employee's base salary is encompassed within his or her assigned rate range as a result of a pay reduction based on unacceptable performance and/or conduct, subject to adverse action procedures;

(4) When the employee is no longer covered by an NSPS position or has a break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under another section of this regulation;

(5) When the employee is reduced in band for unacceptable performance and/or conduct; or

(6) When the employee is reduced in band at his or her request in circumstances other than stated in paragraph (d) of this section.

(g) An employee whose pay retention terminates at the end of the 104-week period will have his or her pay set at the maximum rate of the pay band in which he/she is currently assigned.

(h) Upon termination of pay retention, the employee immediately becomes eligible for any applicable general salary increase and performance payout which may include an increase to base salary, unless otherwise ineligible.

(i) Pay retention does not apply in the following circumstances:

(1) Declination of a position offer under RIF procedures set forth in 5 CFR part 351;

(2) Break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under paragraph (d) of this section;

(3) Movement from a non-DoD position to an NSPS-covered position;

(4) Failure to satisfactorily complete a supervisory probationary period;

(5) Return to an employee's former position at the end of a temporary promotion or temporary reassignment;

(6) Reassignment or reduction in band for unacceptable performance and/or conduct; or

(7) Reassignment or reduction in band at the employee's request in circumstances other than stated in paragraph (d) of this section.

(j) Employees entitled to a retained rate will receive any performance payouts in the form of bonuses, rather than base salary adjustments, as provided in § 9901.342(g)(8).

(k) An employee receiving a retained rate will receive any general salary increase under § 9901.323(a)(1), subject to the conditions in § 9901.323, and will receive any applicable local market supplement adjustment, subject to the conditions in § 9901.334.

(l) The 104-week time limit established under paragraphs (c) and (f)(1) of this section will be extended by a period of time equal to the length of time an employee is deployed away from his or her regular duty station in support of a contingency operation as defined in 10 U.S.C. 101, or an emergency as determined in accordance with DoD Directive 1400.31, "DoD Civilian Work Force Contingency and Emergency Planning and Execution" (or any successor regulation).

(m) Any employee with a preexisting entitlement to pay retention under 5 CFR part 536 immediately before be-

coming covered by NSPS through a management-directed action, or who obtains entitlement to pay retention upon becoming covered by NSPS through a management-directed action, will be entitled to a retained rate under this section without regard to the 104-week limit (as described in paragraphs (c) and (f)(1) of this section). Pay retention will terminate under the conditions in paragraphs (f)(2) through (f)(6) of this section.

PREMIUM PAY

§ 9901.361 General provisions.

(a) *Introduction.* As provided in § 9901.303(a)(2), the provisions of 5 U.S.C. chapter 55, subchapter V, and related regulations are waived or modified as provided in paragraph (e) of this section and §§ 9901.362 through 9901.364 (except as provided in paragraph (b) of this section). To the extent that the provisions of 5 U.S.C. chapter 55, subchapter V, and related regulations are not waived or modified, NSPS employees and positions remain subject to those provisions. Sections 9901.363 and 9901.364 establish new types of premium payments in addition to those found in 5 U.S.C. chapter 55, subchapter V.

(b) *Provisions not waived or modified.* The following provisions of 5 U.S.C. chapter 55, subchapter V, are not waived or modified:

(1) 5 U.S.C. 5544 (relating to prevailing rate employees); and

(2) 5 U.S.C. 5545b (relating to firefighter pay).

(c) *Applicability of Fair Labor Standards Act.* The Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. 201 et seq.) and OPM regulations in 5 CFR part 551 apply to NSPS employees. DoD must determine whether an employee is exempt or nonexempt under the FLSA minimum wage and overtime pay provisions in accordance with the FLSA and OPM regulations. In applying FLSA overtime pay provisions, local market supplements are treated the same as locality pay under 5 U.S.C. 5304 and are included in computing total remuneration, the hourly regular rate, and straight time rate under 5 CFR part 551.