

(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.

## § 9901.362

## 5 CFR Ch. XCIX (1–1–10 Edition)

(d) *Applying regulations in 5 CFR part 550, subpart M.* In applying the regulations in 5 CFR part 550, subpart M (dealing with firefighter pay) to NSPS employees, the reference to “locality pay” in 5 CFR 550.1305(e) must be interpreted to be a reference to a local market supplement. Consistent with 5 CFR 550.1306(a), a firefighter compensated under 5 CFR part 550, subpart M, may not receive additional premium pay except for compensatory time off for travel under § 9901.362(j) or for religious observances under § 9901.362(k) and foreign language proficiency pay under § 9901.364.

(e) *Physicians and dentists.* Physicians and dentists (in occupational series 0602 and 0680, respectively) under NSPS are not eligible for premium pay except for compensatory time off for religious observances under § 9901.362(k).

(f) *Senior Executive Service.* Members of the Senior Executive Service under NSPS are not eligible for premium pay, except for compensatory time off for religious observances under § 9901.362(k).

### § 9901.362 Modification of standard provisions.

(a) *Premium pay limitations.* (1) An employee is covered by the premium pay limitations established under 5 U.S.C. 5547 and related regulations, except as provided in paragraph (a)(2) of this section. Notwithstanding the modification of various premium payments under this section, those payments are still considered to be payments in 5 U.S.C. chapter 55, subchapter V, for the purpose of applying 5 U.S.C. 5547 (including the purpose of determining the covered premium payments under 5 U.S.C. 5547(a)).

(2) Subject to § 9901.105, the Secretary may waive the limitations established by 5 U.S.C. 5547 and related regulations and instead apply an annual limitation equal to the rate payable under 3 U.S.C. 104 in the case of specified categories of employees and situations on a time-limited basis. Such a waiver may not apply with respect to additional compensation that is normally creditable as basic pay for retirement or any other purpose.

(b) *Overtime pay.* (1) An employee is covered by the overtime pay (including

compensatory time off) provisions in 5 U.S.C. 5542 and 5543 and related regulations, subject to the requirements and modifications described in paragraphs (b)(2) through (b)(6) of this section.

(2) Consistent with 5 U.S.C. 5542(c), an employee who is subject to section 7 of the Fair Labor Standards Act of 1938 (FLSA), as amended, is covered by OPM’s FLSA overtime regulations in 5 CFR part 551.

(3) Compensation for irregular or overtime work performed by National Guard Technicians is governed by 32 U.S.C. 709(h) and policies issued by the National Guard Bureau.

(4) Firefighters covered by 5 U.S.C. 5545b are subject to special overtime pay rules as described in that section and in 5 U.S.C. 5542(f) and in related regulations. (See also § 9901.361(d).)

(5) Compensatory time off earned under 5 U.S.C. 5543 must be used by the end of the 26th pay period after that in which it was earned. Compensatory time off not used within 26 pay periods will be paid at the overtime rate at which it was earned. Employees with unused compensatory time earned before June 8, 1997 (January 5, 1997, for Defense Logistics Agency employees), have had a separate “old compensatory time” account established for their use. Old compensatory time is charged only if the employee has insufficient current compensatory time (earned on or after June 8, 1997) to cover the compensatory time off requested. Within each category of compensatory time, the oldest will be charged first. When a DoD employee separates, moves to another Component, or transfers to another Federal agency, any unused compensatory time off balance will be paid at the overtime rate at which it was earned. Also, when an employee moves to a pay system that does not provide for compensatory time off (e.g., Senior Executive Service), any unused compensatory time off balance will be paid at the overtime rate at which it was earned.

(6) The following modifications to 5 U.S.C. 5542 and 5543 and related regulations apply:

(i) The overtime hourly rate cap for FLSA-exempt employees based on the rate of basic pay for the minimum rate for GS-10 does not apply; instead, an