

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

Claimant: [name]

Organization: [agency component]
Department of the Air Force
[installation]

Claim: Back pay for National Security Pay
System pay increases

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0024

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

1/13/2012

Date

The claimant is currently employed as an Electronics Engineer, GS-0855-12, with the Department of the Air Force. He requests that the U.S. Office of Personnel Management (OPM) direct his employing agency to abide by its job offer letter to him, providing him with a “specific step increase schedule to be paid out after a performance-based review” from his supervisor. He asserts his conversion from the National Security Personnel System (NSPS) to the General Schedule (GS) does not release the agency from the original pay agreement. He requests back pay from the first pay period after September 27, 2010, to the date of settlement of this claim. OPM received the claim on June 27, 2011, and additional information from the agency on August 17, 2011. For the reasons discussed herein, the claim is denied.

The record shows that on September 3, 2009, the claimant received a letter from the agency stating he had been tentatively selected for the position of Electronics Engineer, at \$47,985 per annum, under the Defense Career Intern Program (DCIP). The letter explained the position was covered by the NSPS, a pay for performance system. Employees were required to successfully complete a two-year formal training and development program, making them eligible for performance-based salary increases in six-month increments while in the developmental pay pool. The claimant began employment on September 28, 2009, and received a pay increase six months later on March 28, 2010.¹

On September 7, 2010, the claimant received a notice indicating his position would be converted from NSPS to the GS system. It showed his salary would change from YD-0855-02², step 00 (\$59,694), to a projected salary of GS-11, Step 3 (\$62,019). The claimant states the agency did not meet its obligations as outlined in the job offer letter: “While the letter did state the position was an NSPS position, never did it say there would be a possibility of losing the pay increases due to a pay system change...” He stated a superior submitted a request for personnel action (RPA) for the NSPS one-year pay increase on September 10, 2010, “because I had worked hard and was entitled to the one year increase as laid out in my job offer.” The claimant states he later learned no RPAs would be processed due to the conversion. On September 12, 2010, the claimant was converted from YD-0855-01 (\$59,694), to GS-0855-11, Step 2 (\$60,343), due to the repeal of NSPS through the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010, Pub. L. No.111-84, § 1113, 123 Stat. 2190, 2499-2504 (2009). His NSPS salary of \$59,694 fell between steps 1 and 2 of the General Schedule. Therefore, his salary was set at step 2, \$60,343, resulting in a pay increase of \$649. However, the claimant states the RPA shows his supervisors agreed he should have the increase as stipulated in the job offer letter and the fourth bullet described in Conditions of Employment, DCIP, Entry-level Engineering-NSPS (Conditions):

I understand that during the two-year training period I will be in the developmental pay band for scientists and engineers and that I will be eligible for performance based increases every six months. However, these increases will be at the discretion of my

¹ The record shows the claimant was hired in the excepted service through the Federal Career Intern Program as an Electronics Engineer, YD-0855-01, \$47,895 per annum. The agency used NSPS’ Accelerated Compensation for Developmental Positions (ACDP) to provide performance-based increases at six-month intervals.

² However, the subsequent SF-50 shows the claimant was converted from a YD/01 position.

supervisor and will be based on my performance and satisfactory progression in the training program as required

The claimant states his favorable year-end review (Performance Appraisal Application (PAA), DD2906 Report) “entitles me to the “performance based increases” as laid out in the first paragraph” of his offer letter and the fourth bullet in the Conditions document.

It is well-established that retroactive pay actions may only be granted where the erroneous action was contrary to statute, regulation, or a nondiscretionary agency policy. *See* OPM file number S001798, July 28, 1998; 63 Comp. Gen. 417 (1984) and the decisions cited therein. The claimant states the agency did not meet its obligations as outlined in the job offer letter. Contrary to the claimant’s assertions, neither the offer letter nor the Conditions document can be read as mandating or entitling the claimant to receive a performance-based increase. The Conditions document stated “you will be *eligible* for performance-based increases in salary in six-month increments *while you are in this developmental pay pool.*” Use of the word *eligible* makes such increase possible but not required. Therefore, the decision to not process an RPA for the NSPS one-year pay increase on September 10, 2010, was within the agency’s discretion. With the repeal of the NSPS, the developmental pay pool no longer existed and the agency had no authority to continue performance-based increases at six-month increments.

The claimant states he was never informed that upon termination of the NSPS system, he would lose his future increases. He states the conversion from NSPS to GS does not release the employer from “the original pay agreement.” As discussed previously, the agency’s action to not process a pay increase under NSPS regulations prior to the claimant’s conversion to GS was not contrary to the plain language of either cited document. The record shows the ACDP under NSPS was terminated with the implementation of the NDAA for FY 2010. Employees once covered by the NSPS became subject to the provisions of the General Schedule upon conversion. Since ACDP was not a feature of the GS system, the agency had no authority to continue ACDP or the performance-based salary increases in six-month increments.³

The claimant states he lost pay in the NSPS to GS conversion. This assertion is based on his view he was “entitled to the \$5,709 raise” as of the first pay period after September 27, 2010, i.e., his NSPS annual performance-based increase. Since any such NSPS increase was prospective in nature, the claimant has not suffered a loss in pay as defined in the plain language of section 1113(c)(1) of the NDAA for FY 2010; i.e., “No employee shall suffer any loss of or

³ It is well-established that where a Federal employee holds his or her position by virtue of appointment, any entitlement to compensation must be based solely on the applicable statutes and regulations, and those statutes and regulations (or promises that they will be followed) do not give rise to an implied-in-fact contract. *See Chu v. United States*, 773 F.2d 1226, 1229 (Fed.Cir.1985) (“[A]bsent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government”; *see also Schism v. United States*, 316 F.3d 1259, 1275 (Fed.Cir.2002) (noting that “[f]ederal employees, both military and civilian, serve by appointment, not contract ...”))

decrease in pay.” The record shows the claimant’s salary was *increased* from \$59,694 to \$60,343 with his conversion to the GS system.

OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. See *Frank A. Barone*, B-229439, May 25, 1988. Where the record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. 5 CFR 178.105; *Jones and Short*, B-205282, June 15, 1982. Where the agency's determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, Mar. 15, 1982, as cited in *Philip M. Brey*, B-261517, December 26, 1995. The claimant has failed to establish that the agency acted in an unlawful manner when it converted him from NSPS to the GS system. Therefore, the claim is denied.

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.