

**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 Materiel Command
[installation & State]

Claim: Back pay for National Security Personnel
System increases

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0035

/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 a General Engineer, GS-801-12, position at the [agency component], Air Force Materiel Command, at [installation & State]. He asserts the agency erroneously set his pay when his position converted out of the National Security Personnel System (NSPS) and into the General Schedule (GS) system. We received the claim on September 5, 2012, and the agency's administrative report on September 27, 2012. For the reasons discussed herein, the claim is denied.

On September 14, 2009, the claimant was appointed under the NSPS to an Aerospace Engineer, YD-861-01, position with an adjusted basic salary equivalent to the GS-7, step 5 (\$47,985) on the special salary rate table. His position was appointed under the Defense Career Intern Program (DCIP) authority and was eligible for salary increase awards under provisions of the component's Accelerated Compensation for Developmental Positions (ACDP) policy. The ACDP is an increase to base salary provided to employees participating in training programs or in other developmental capacities.

The AFB's ACDP policy for scientist and engineer positions describes the starting base salaries, awards, and other rules relating to DCIP positions. Intern positions are grouped into categories based on education and cumulative grade point average. The policy explains that interns placed in the same group as the claimant's normally spend 24 months in pay band 1 and are promoted to band 2 upon conversion to a career appointment after completing the formal training plan. It further describes progression of positions in the claimant's group, including salary increases at intervals of six months (equivalent to GS-9, step 5 at \$58,694) and 12 months (to GS-11, step 5 at \$64,403).

On October 28, 2009, the President signed into law the National Defense Authorization Act (NDAA), Public Law (P.L.) 111-84, which repealed the statutory authority for NSPS and required the Department of Defense to convert civilian employees and positions to non-NSPS personnel and pay systems before January 1, 2012. Consequently, on September 12, 2010, two days short of his completing the 12 months of service to be eligible for an ACDP award, the claimant's position was converted from the NSPS to a position in the GS system equivalent to GS-11, step 3. The agency erroneously processed a within grade increase (WIGI) to step 4 on September 26, 2010. The Defense Finance and Accounting Service subsequently sent the claimant an October 8, 2011, letter informing him of the mistake, their intention of correcting the WIGI retroactive to the effective date of the error, and his owing \$441.60 for debts due to overpayment of wages. The claimant does not contest the agency's determination that an error occurred when the WIGI was processed prematurely. However, he states the error is moot since he asserts he was entitled to an ACDP award for 12 months of service and thus his pay should have been set upon conversion to the GS system equal to GS-11, step 5. The claimant states he is owed \$2,870, although he does not explain his calculation of the amount requested.

The agency's March 29, 2012, decision denied the claimant's request, stating his conversion from the NSPS to the GS system was processed prior to his completing the 12-month service requirement to be eligible for an ACDP award. The agency's decision further explains the ACDP increase that existed under NSPS is not a feature of the GS compensation structure, thus its provisions were no longer applicable to the claimant's position upon conversion. The record shows the ACDP under NSPS was terminated with the implementation of the NDAA. Employees once covered by the NSPS became subject to provisions of the GS upon conversion.

Since ACDP was not a feature of the GS system, the agency had no authority to continue ACDP salary increases¹.

The claimant contends the agency, by failing to minimize the impact on his pay upon conversion between personnel systems, failed to comply with section 1113(c)(1) of the NDAA which states in relevant part:

(1) IN GENERAL.--The Secretary of Defense shall take all actions which may be necessary to provide, beginning no later than 6 months after the date of enactment of this Act, for the orderly termination of the National Security Personnel System and conversion of all employees and positions from such System, by not later than January 1, 2012, to--

(A) the statutory pay system and all other aspects of the personnel system that last applied to such employee or position (as the case may be) before the National Security Personnel System applied; or

(B) if subparagraph (A) does not apply, the statutory pay system and all other aspects of the personnel system that would have applied if the National Security Personnel System had never been established.

No employee shall suffer any loss of or decrease in pay because of the preceding sentence, and, for purposes of carrying out such preceding sentence, any determination of the system that last applied (or that would have applied) with respect to an employee or position shall take into account any modifications to such system pursuant to the provisions of subsections (a) and (b) of section 9902 of title 5, United States Code, as amended by subsection (d).

The claimant further suggests other options available to the agency relating to setting his pay in the GS system. His request states:

The “clear successor” position, or equivalent position I would have attained if the NSPS/GS conversion personnel action had not occurred, is a GS11 step 5. The agency could have simply converted me as a GS11 step 5 as that was where I should have been at that time.

¹ The claimant attempts to rely on “promises” he asserts were made by his agency. 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...”))

The NSPS to GS Transition Guide, issued March 5, 2010, provides an understanding of transition-related personnel actions. The basic process for transitioning employees includes three steps:

1. Classify each NSPS position by applying GS classification standards and guides to the duties and responsibilities of the position and the qualifications required to perform those duties and responsibilities. This will result in a title, series, and grade determination for each position.
2. Assign each employee to the GS title, series, and grade classification for their permanent position.
3. Apply the GS mandatory pay retention rules as follows: Set each employee's pay at the lowest step rate of the highest applicable locality, special rate, or GS base pay range (i.e., the rate range that applies to the series, grade, and geographic location of the employee's permanent position) that meets or exceeds the employee's current NSPS adjusted salary. Place employees with an NSPS adjusted salary above the step 10 rate of the applicable locality, special rate, or GS base pay range on pay retention.

To establish pay upon the claimant's transition out of NSPS, while complying with the transition guide and applicable regulations, the agency compared the pay of his position immediately prior to his conversion between personnel systems (i.e., \$59,694 adjusted basic pay) to the GS-11 rates of pay on the 2010 GS salary table for the applicable locality pay area ("Rest of the United States.") His pay fell between steps 2 and 3, and his pay was set at the greater amount at step 3 (i.e., \$61,234 adjusted basic pay). The record shows the claimant's salary increased by \$1,540 upon conversion to the GS system.

The claimant states he lost pay in the NSPS to GS conversion based on his suggested entitlement to a salary equivalent to GS-11, step 5, upon fulfilling 12 months of service. However, since he did not complete 12 months of service, he did not qualify for an ACDP award; therefore, it is appropriate that such an increase was not used to determine his pay rate upon conversion to the GS system. Thus, the claimant has not suffered a loss in pay as defined in the plain language of section 1113(c)(1) of the NDAA providing that "no employee shall suffer any loss or decrease in pay."

We reject the other "options" identified by the claimant as available alternative methods allowing the agency to grant his ACDP salary increase award. He points out the Under Secretary of Defense signed a July 12, 2010, memorandum allowing employee coverage of performance management policies under subpart D of part 9901 of title 5, Code of Federal Regulations (CFR), up to 90 days after transition from NSPS staffing, classification, and pay systems or December 15, 2010, whichever is earlier. In his request, the claimant contends, "[i]f coverage of these continues via the memorandum, then my eligibility for a pay award should not have been revoked and is within regulations."

In reviewing the July 12 memorandum in conjunction with the NDAA and other references from which the guidance stems, the language in the policy is both clear and specific with its stated purpose of providing continuing coverage of the NSPS performance management system and policies to employees converting out of NSPS. The document is unrelated to and thus silent on

the continuing coverage of the ACDP award when converting out of NSPS. Furthermore, the ACDP's expiration is highlighted in Chapter 3 of the transition guide, which describes the impact on employees receiving ACDP under NSPS, stating: "Once the career ladder position becomes covered by the GS system, further advancement is governed by the promotion requirements of the GS system...."

The claimant also suggests the agency converted him to the GS system earlier than necessary as P.L. 111-84 required conversion of all employees to occur no later than January 1, 2012. He states the conversion of his position should have been postponed until after his completing the formal training and development program.

Based on information released by the Air Force (AF) Public Affairs Office, the transition of civilian positions to the GS was scheduled to occur in four different phases in 2010: Phase 1 on July 4, Phase 2 on July 18, Phase 3 on August 15, and Phase 4 on September 12. Along with other AFB positions, the claimant's position was converted out of the NSPS during the final phase of the AF's schedule (however, other groups of positions were slated to transition out of the NSPS in 2011 if transitioning to personnel systems other than the GS system, assigned to an organization affected by Base Realignment and Closure activities, etc.). Since AF positions were converted out of the NSPS in groups based on an arranged schedule, decisions regarding the timing of conversion actions were not made on a case-by-case basis dependent on individual circumstances as suggested by the claimant. Further, the claimant's reliance on the compensation and leave claims settlement authority in 31 U.S.C. § 3702(a)(2) to resolve what at heart is his disagreement with a discretionary action, the schedule AF adopted for NSPS to GS conversion, is misplaced. The authority in § 3702 is narrow and limited to adjudication of compensation and leave claims and does not extend to interfering with an agency's statutory authority under 5 U.S.C. § 302 to take final action on employment matters, including how and when AF positions would be converted from NSPS to GS.

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 failed to comply with the conditions of his employment, providing contents of his hiring package which he said laid out the agency's "promises" of his position's pay structure. Contrary to the claimant's statements, we noted the information provided did not characterize ACDP awards as either mandatory or "promises." His signed August 21, 2009, "Conditions of Employment" document states, "I understand that during the two-year training program 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." Use of the word *eligible* makes such increase possible but not required. Therefore, the decision to not process an ACDP increase 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.

The claimant asserts his agency failed to comply with 5 CFR 213.3202(o) regarding the development of a merit system-based career intern program. The claims jurisdiction of OPM is limited to consideration of statutory and regulatory merits of the individual compensation or leave claims before us. It does not extend to conducting a program review of an agency's career intern program at the request of individual claimants. Therefore, the claimant's assertion has no applicability to our claim settlement determination.

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.