

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

**Claimant:** [name]

**Organization:** U.S. Marine Corps  
[city & State]

**Claim:** Pay setting (retroactive application of the superior qualifications and special needs pay-setting authority)

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 13-0019

/s/ Chris Hammond for

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Agency Compliance and Evaluation  
Merit System Accountability and Compliance

3/18/14

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Date

The claimant is employed as the [position], GS-301-14, with the U.S. Marine Corps in [city & State]. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of his request to retroactively set pay upon appointment to his position at GS-14, step 4. We received the claim request on March 27, 2013, the claim administrative report on November 5, 2013, and comments on the report from the claimant's duly appointed representative on December 17, 2013<sup>1</sup>. For the reasons discussed herein, the claim is denied.

After the claimant was selected for his current position, the agency forwarded him a job offer stating his pay would be set at GS-14, step 4. However, the agency subsequently set his pay upon appointment at GS-14, step 1, because the Human Resources Service Center – Southwest (HRSC-SW) had not reviewed and approved the selecting official's request to use the superior qualifications and special needs pay-setting authority to establish an advanced in-hire rate prior to his entrance on duty.

The agency explains in its claim administrative report:

On 14 June 2006 [the claimant] was selected for [position] by [the former Colonel]. On 29 June 2006, [the former Colonel] was given a brief and a memo from [the Human Resources Office (HRO)] [installation] explaining the requirement to create a Narrative Justification for Superior Qualification in the case of [the claimant]. On 30 June 2006, [the former Colonel] was replaced as Commanding Officer by [the succeeding Colonel] who was now responsible for writing the Narrative Justification for [the claimant]. [The succeeding Colonel] did not complete the narrative justification until Friday, 7 July 2006 which is the same day [installation] HRO submits an offer to [the claimant]... [The claimant] accepted the position at GS-14, step 4. He signed the acceptance letter on Sunday, 9 July 2006 and his entrance on duty was established for Monday, 10 Jul 2006. Within a week after his appointment, [the claimant] was informed of being appointed as a GS-14 step 4 that his pay was set by HRSC-SW as a GS-14 step 1.

The claimant disagrees with the agency's decision to set his pay at GS-14, step 1, as a result of the HRSC-SW not having approved the superior qualifications and special needs pay-setting determination prior to his entrance on duty. In his comments to the claim administrative report, he asserts the justification completed by the Commanding Officer (CO) for use of the superior qualifications and special needs pay-setting authority on his behalf was timely and adequate. He also contends the CO and local HRO official are vested with the authority, not HRSC-SW, to approve superior qualifications and special needs pay-setting determinations; thus, he states his pay should have been set upon appointment at GS-14, step 4.

However, we find the claimant's rationale is not supportable by controlling Government-wide regulations. He was hired at the GS-14 grade level with his pay established at step 1. As section 531.211 of title 5, Code of Federal Regulations (CFR), makes clear, an agency is only obligated to set the payable rate of basic pay at the minimum rate of the rate range for the employee's position of record. Setting pay above the minimum rate is at the discretion of the agency, whether based on the superior qualifications and special needs pay-setting authority in 5 CFR 531.212 or the maximum payable rate rule in 5 CFR 531.221. Further, 5 CFR 531.212(e) states

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<sup>1</sup> The claimant preserved the claim by filing an April 27, 2007, administrative grievance with the agency which was subsequently denied.

the agency must approve each determination to use the superior qualifications and special needs pay-setting authority prior to the candidate entering on duty.

The language applying to the superior qualifications and special needs pay-setting authority in 5 CFR 531.212 is revealing. By using the permissive term “may” in relation to the superior qualifications and special needs pay-setting authority, agencies are clearly granted discretionary authority in allowing or disallowing the setting of the payable rate of basic pay for a newly appointed employee above the minimum rate of the grade. In contrast, the regulations clearly shift to clear and mandatory terms (e.g., “will,” “shall,” or “must”) to describe the timing of such pay-setting determinations, plainly stating decisions must be made before the employee enters on duty.

Within the scope of 5 CFR 531.212, which sets forth basic eligibility criteria for using the superior qualifications and special needs pay-setting authority, the head of an agency may issue further implementing instructions for the guidance of the agency with regard to the granting of and accounting for the use of pay-setting authorities. In this instance, agency implementing guidance and instructions such as that contained in Department of Defense (DoDI) 1400.25, Volume 531, may impose additional requirements.

The claimant references DoDI 1400.25, Volume 531, in his comments to the claim administrative report to support his assertion the CO has authority to approve a superior qualifications pay-setting request on his behalf, pointing to the relevant part of the instructions stating:

The authority to use superior qualifications appointments to set advanced in-hire rates at all grade levels under Reference (b) and section 531.212 of Reference (d), is delegated through Component and command channels to officials who exercise personnel appointing authority (normally the head of an installation or activity).

The DoDI does not explicitly identify the agency officials exercising personnel appointing authority to set advanced in-hire rates, only stating it is “normally” the head of an installation or activity. Thus, we do not find the claimant’s references to the agency’s implementing and other supplemental guidance<sup>2</sup> persuasive regarding his contentions that the CO and local HRO official have been delegated authority to approve superior qualifications and special needs pay-setting requests.

The record includes a September 29, 2008, denial from Commandant of the Marine Corps of the CO’s request for a review of the retroactive pay-setting and back pay for the claimant, stating the HRSC-SW retains pay-setting authority for non-demonstration project employees. This is reinforced in the January 5, 2011, denial from Department of the Navy, Assistant Secretary for Manpower and Reserve Affairs, to the Command Inspector General’s request for endorsement to

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<sup>2</sup> The claimant also references "OCPINST 12311.1 Personnel Manual, Navy Supplement," (no copy provided) and a January 24, 2003, memorandum, "Subject: Interim Guidance on Delegated Authorities under Civilian Human Resources Management Regionalization." No further documentation was provided to establish whether either was in effect at the time of the claimant's appointment.

retroactively use the superior qualifications and special needs pay-setting authority to set the claimant's rate, explaining:

Authority to set pay rests only with the appointing officials, the officer with the authority to legally certify the Requested Personnel Action (RPA) or the Notice of Personnel Action (NPA). In this case, the appointing official is located at HRSC-SW.

The DoDI 1400.25, Volume 531, states the authority to set advanced in-hire rates rests with the official exercising personnel appointing authority. The record includes documentation from U.S. Marine Corps and Department of the Navy officials identifying the HRSC-SW as the appropriate appointing officials to set pay, and the claimant's statements to the contrary with references to the agency's implementing instructions containing ambiguous language as to the appropriate authority to make superior qualifications and special needs pay-setting determinations are not sufficient to undermine the delegations of authority as stated by the agency. Moreover, OPM adjudicates compensation and leave claims by determining whether controlling statute, regulations, policy, and other written guidance were correctly applied to the facts of the case. The claims jurisdiction authority of OPM is limited to consideration of the statutory and regulatory merits of the individual claims before us. It does not extend to resolving internal agency disputes regarding delegations of authority, including decisions made by the agency under its own authority concerning delegations for superior qualifications and special needs pay-setting determinations. Since internal delegations of authority are the exclusive preserve of the individual agencies, such disputes must be addressed within the agency chain of command.

When the CO initially endorsed using the superior qualifications and special needs pay-setting authority to set an advanced in-hire rate on the claimant's behalf, the local HRO official issued a June 29, 2006, memorandum finding the claimant's qualifications in comparison to that of other candidates did not warrant an advanced in-hire rate. The memorandum further states:

If it is your intent to continue with the superior qualifications, please return your justification to me, I will complete the form and ask what salary you would like to consider. I will then forward to the HRSC and finalize the job offer to [the claimant].

Section 531.212(e) of title 5, CFR, requires an agency to approve a superior qualifications or special needs pay-setting determination prior to an employee entering on duty. In this instance, the local HRO official mentions the review by the HRSC office prior to the finalizing of any job offer. The CO completed a justification requesting use of an advanced in hire-rate on the claimant's behalf on July 7, 2006, but the agency states the request was not forwarded to the HRSC-SW for consideration and approval prior to his entrance on duty on July 10, 2006. Had the written request been submitted to the HRSC-SW prior to his appointment, a decision would have properly been made at that time as to whether the claimant met requirements established by 5 CFR 531.212 and implementing guidelines. However, this consideration of his qualifications by HRSC-SW officials never occurred and there is no statutory authority under which approval for using the superior qualifications and special needs pay-setting authority can be made retroactive. Section 531.212 of title 5, CFR, in addition to the agency's implementing guidelines and instructions, provide for no situations under which superior qualifications or special needs pay-setting determinations can be approved after the employee's entrance on duty. Accordingly, the claim is denied.

The claimant attempts to equate the agency's job offer to a contract, characterizing his request in comments to the claim administrative report as a correction to the "pay rate to that for which he contracted, with the approval of both the Commanding Officer and the Head of Personnel Operations." 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 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...")). Therefore, the Government's offer letter for the claimant's position and by extension any salary offer extended therein does not constitute a "contract" as asserted by the claimant.

Further, it is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials. Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice or information provided by a Government employee cannot bar the Government from denying benefits which are not otherwise permitted by law. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, *rehearing denied*, 497 U.S. 1046, 111 S. Ct. 5 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, that the claimant was initially told he would have his pay set at GS-14, step 4 by an agency official without the authority to do so does not confer eligibility not otherwise permitted by statute or its implementing regulations.

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.