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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-193977

DATE: June 9, 1980

MATTER OF: Computation of Pay Rates For
Dempsey A. Anderson et al. - Alaska National
Guard technicians

DIGEST:

Pay rates of Alaska National Guard technicians were fixed at rates in General Schedule upon the effective date of Public Law 90-486, which converted State technicians to Federal employee status. Technicians claim that their pay was improperly set because their cost-of-living allowances were not used in setting rates of basic compensation in General Schedule. Setting of technicians' rates in General Schedule is controlled by Public Law No. 90-486 which excludes cost-of-living allowances in determining rates. Also, allowances were taxed by Federal Government because they were not excludable from gross income under 26 U.S.C. § 912.

The National Guard Bureau requests our decision on the proper computation of the rates of basic pay of National Guard technicians in Alaska whose positions were converted to the General Schedule pursuant to Public Law No. 90-486, August 13, 1968, 32 U.S.C. § 709 note (1976).

Mr. Wayne A. Robertson, Chief, Office of Technician Personnel, National Guard Bureau, by letter of November 3, 1978, forwarded the claims of Dempsey A. Anderson and other Alaska National Guard technicians who allege that their pay rates were improperly set pursuant to Public Law No. 90-486 (hereinafter referred to as the "Act"). That Act converted the various State National Guard technicians to a Federal employee status. Mr. Robertson states that even though the technicians were State employees prior to the effective date of the Act, their pay was set by the Secretary of the Army at Federal salary rates pursuant to 32 U.S.C. § 709 (1964) and was adjusted by the Secretary from time to time. In this connection the pay of technicians

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in Alaska was set at a rate which equaled the rate for technicians in the 48 contiguous United States plus a cost-of-living allowance of 25 percent.

Upon their conversion to Federal employee status by the Act the pay rates in the General Schedule of the technicians in Alaska were set by excluding the cost-of-living allowances in determining the technicians' rates of basic pay. That is, the technicians' State pay rates, excluding the cost-of-living allowances, were used to fix their General Schedule rates.

The technicians argue that this method of setting their pay was improper. They believe that their pay in the General Schedule properly should have been set using their gross pay rates (rates of basic pay plus cost-of-living allowances). It appears that the basis of their claim is that prior to their conversion to a Federal status their cost-of-living allowance was subject to Federal income tax while the cost-of-living allowance authorized by 5 U.S.C. 5941 (1976), to Federal employees was exempt from Federal tax. They state that the Internal Revenue Service did not recognize any of the National Guard Category (NGC) salary as a cost-of-living allowance and the individual was taxed on the entire amount. The technicians argued that since their cost-of-living allowances were treated as basic pay for Federal tax purposes, they also should be treated as basic pay for the purpose of establishing their General Schedule rates.

Public Law No. 90-486, supra, controls the conversion of the technicians to Federal status and the establishment of their compensation in the General Schedule. Section 8(a) of that Act sets forth the rules for fixing their pay rates upon conversion to Federal status. For example section 8(a)(2) reads as follows:

"If the technician is receiving a rate of basic compensation which is equal to a rate of the appropriate grade of the General

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Schedule, or which is equal to a rate of the appropriate grade or compensation level under the appropriate prevailing rate schedule, as applicable, in which his position is placed, he shall receive basic compensation at that rate of the General Schedule, or at that rate under the prevailing rate schedule, as applicable. (Emphasis supplied.)

We have previously ruled on the question whether the underscored term includes a cost-of-living allowance earned prior to the effective date of the Act. In Alaska National Guard technicians, B-175124 June 2, 1976, we held that the cost-of-living allowance is not included in the term "basic compensation," and should not have been considered in fixing the rate of pay at the time of conversion. That case involved technicians who were converted from wage grades to the General Schedule on the effective date of the Act. However, since the term in question in that case is the same term that is involved in the instant case, we see no reason why the same result would not apply to this case. Accordingly, we hold that the Alaska National Guard technicians may not include the cost-of-living allowances that they received prior to the effective date of the Act in setting their rates of basic pay in the General Schedule under the provisions of Public Law No. 90-486.

We now turn to the contention of the technicians that the cost-of-living allowances was basic compensation because they paid taxes on such allowances. For the reasons stated below we hold that the taxability of their allowances has no effect on the rates of pay they were entitled to receive in the General Schedule.

Section 61 of title 26, United States Code (1976) provides:

"Except as otherwise provided in this subtitle, gross income means all income from whatever source derived * * *"

Section 912 of title 26, United States Code, exempts from gross income, inter alia, any cost-of-living

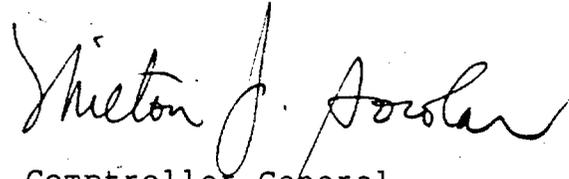
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allowance received in accordance with regulations approved by the President. The regulations issued by the President authorizing a cost-of-living allowance to Federal employees further required that such allowance may only be paid to employees whose basic compensation is fixed by statute. See Executive Order 10,000, September 16, 1948.

In Revenue Ruling 57-592 a question was presented concerning whether the cost-of-living allowances received by National Guard technicians in Alaska were exempted from gross income by section 912. The Revenue Ruling found that the technicians' basic compensation was fixed by administrative order issued by the Secretary of the Army pursuant to 32 U.S.C. 709, supra, and was not fixed by statute. The Revenue Ruling thus held that the cost-of-living allowance was includable in the technicians' gross income.

The Revenue Ruling did not hold that the technicians cost-of-living allowances were part of their basic pay. Rather, it found that the particular cost-of-living allowances that the technicians were receiving did not meet the criteria established by section 912 in order to be considered exempt from gross income.

For the reasons set forth above, we find that the General Schedule compensation of the Alaska National Guard technicians was correctly computed by excluding the 25 percent cost-of-living allowances that they received prior to the effective date of Public Law No. 90-486.



Acting Comptroller General
of the United States