

DECISION

2-1668
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

118247

FILE: B-206156

DATE: April 27, 1982

MATTER OF: Edward J. Minkel - Federal Communications
Commission - Applicability of Senior
Executive Service to Managing Director -
DIGEST: Pay Rate

Section 1252 of Pub. L. 97-35 states that the Managing Director of the Federal Communications Commission shall be paid at a rate equal to the rate for Level V of the Executive Schedule (now \$57,500 per year). Title IV of the Civil Service Reform Act of 1978, 5 U.S.C. § 3132(a)(2), includes within the definition of a Senior Executive Service (SES) position any position in GS-16, 17 or 18 or in Level IV or V of the Executive Schedule or an equivalent position. The top pay for the SES is now \$58,500 per year. In order to harmonize the apparent conflict in the above laws as to the rate of pay of the Managing Director, we conclude that the Managing Director's position is within the SES and the Managing Director may be paid at the \$58,500 rate as proposed by the FCC.

Mr. Wayne B. Leshe, Chief, Financial Services Branch, Federal Communications Commission (FCC), has requested a decision as to what the appropriate rate of pay should be for Mr. Edward J. Minkel, FCC's Managing Director.

The issue is whether the position of Managing Director of the Federal Communications Commission is a Senior Executive Service position under 5 U.S.C. § 3132(a)(2) (Supp. III 1979), and therefore may be paid at any Senior Executive Schedule rate, or whether the position must be paid at the rate of Level V of the Executive Schedule under the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, August 13, 1981, 95 Stat. 738.

We conclude that the Managing Director's position is within the Senior Executive Service (SES) and may be paid at any SES pay rate.

BACKGROUND

Section 1252 of the Omnibus Budget Reconciliation Act of 1981, authorizes a new position of Managing Director in the FCC as follows:

"(f) The Commission shall have a Managing Director who shall be appointed by the Chairman subject to the approval of the Commission. The Managing Director, under the supervision and direction of the Chairman, shall perform such administrative and executive functions as the Chairman shall delegate. The Managing Director shall be paid at a rate equal to the rate then payable for level V of the Executive Schedule." (Emphasis added.)

The Chairman, with the approval of the Commission, appointed Mr. Edward J. Minkel to be Managing Director of the Commission. Mr. Minkel's appointment as Managing Director was approved with an effective date of October 7, 1981. At the time of Mr. Minkel's appointment, he was already a member of the Senior Executive Service, and he was being paid at the ES-6 level with a salary of \$52,750 per annum as the Management Systems Advisor to the Chairman. The latter amount was in excess of the rate then payable for Level V of the Executive Schedule which was \$50,112.50 per annum.

Prior to the appointment, the FCC Personnel Management Division requested guidance from the Office of Personnel Management as to whether Mr. Minkel could be paid \$52,750 per annum or whether he could only be paid \$50,112.50 per annum, the rate then payable for Level V of the Executive Schedule. The Office of Personnel Management, in a letter to the FCC Executive Director dated September 11, 1981, advised as follows:

"* * * positions which, among other things, meet the managerial and pay level (or equivalent) criteria for SES in 5 U.S.C. § 3132(a) are required

to be placed in the SES. Since Congress established the position in question at a pay rate equal to Executive Level V, and the position otherwise satisfies the SES criteria, we consider the new Managing Director position to be subject to the SES. We do not view the particular statutory language as attaching a set pay rate to the position. Moreover, pay in the SES is personal to the individual. Therefore, the Managing Director could be paid at any SES pay rate, including ES-6, if that is the pay level of an SES member reassigned to the position."

Mr. Minkel was subsequently advised that as a result of Pub. L. 97-92, December 15, 1981, his rate of pay as an ES-6 was being increased to \$58,500 per annum effective January 1, 1982. This rate of pay is in excess of the rate payable for Level V of the Executive Schedule which is \$57,500 per annum, effective January 1, 1982.

In view of the above, Mr. Leshe asks the following:

- "1. Should Mr. Minkel, who was appointed Managing Director of the Federal Communications Commission, be paid \$58,500.00 per annum in accordance with the attached voucher for the period 1/1/82 through 1/9/82, or must Mr. Minkel be paid \$57,500.00 per annum which is equal to the rate payable for level V of the Executive Schedule?
- "2. Should Mr. Minkel, who was appointed Managing Director of the Federal Communications Commission, have been paid \$52,750.00 per annum, in accordance with the retroactive personnel action, from 10/7/81 through 12/21/81 or should Mr. Minkel have been paid

\$50,112.50 per annum which was equal to the rate payable for Level V of the Executive Schedule for the period 10/7/81 through 12/31/81 * * *."

OPINION

The two quoted statutory provisions, section 1252 of the Omnibus Budget Reconciliation Act of 1981 and 5 U.S.C. § 3132(a)(2) are in apparent conflict. The prior law in time, establishing the SES, includes within the definition of an SES position " * * * any position in level * * * V of the Executive Schedule, or an equivalent position * * *." (Emphasis added.) This accurately describes the position of Managing Director of the FCC. On the other hand the later law authorizing the position of Managing Director directs that the position "* * * shall be paid at a rate equal to the rate then payable for level V of the Executive Schedule." (Emphasis added.)

In this case, the law authorizing the position of Managing Director is later in time and more specific than the SES provision of the earlier enacted Civil Service Reform Act of 1978. However, we are not aware of any statutory intent or scheme which might justify reading that statutory provision as intended to maintain the position of Managing Director outside of the SES. Other than the literal reading of section 1252 of Pub. L. 97-35, taken alone, there would be no reason to exempt the Managing Director of the FCC from the Senior Executive Service. There is no background or history of an independent personnel system at FCC which would conflict with application of the SES provisions to its executives.

In reconciling these two provisions of law, we have found the following guidance to be instructive:

"In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal

or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together.

"Provisions in an act which are omitted in another act relating to the same subject matter will be applied in a proceeding under the other act, when not inconsistent with its purposes. Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision in all of them.

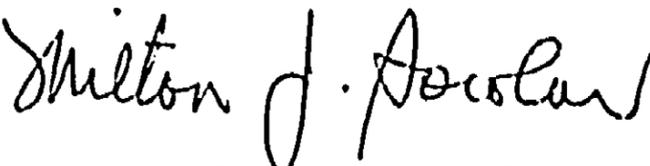
"Statutes in pari materia, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other. But if there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature."

2A Sutherland, Statutes and Statutory Construction, § 51.02 (4th ed. C. Sands, 1972)(footnotes omitted).

Although the subsequently enacted legislation authorizing the position of Managing Director is specific, we can find no inconsistency with its purposes in reconciling its provisions with the earlier legislation establishing the SES. Given the absence of a need to exclude the position of Managing Director from the SES, we think it is best to harmonize the two provisions so as to include that position within the SES. We note that the courts have taken the position that they have a duty to strive to interpret statutory language to further peaceful coexistence of two potentially conflicting statutes. Morton v. Mancari, 417 U.S. 535, 551 (1974). Further, the SES criterion and SES position definition appearing in 5 U.S.C. § 3132(a) makes clear that Congress had a very exact design for the scope of coverage of the SES. See H. Rep. (Conference Report) No. 95-1717, 95th Cong., 2d Sess. 146-147 (1978).

Considering the congressional intent to coordinate supergrade and equivalent positions Government-wide, the statutory definition of the SES includes positions in an agency which are outside the General and Executive Schedules but are equivalent to supergrade levels. Certain equivalent positions, however, are expressly excluded from the SES, e.g., Foreign Service positions, and are not affected by the Reform Act. See 5 U.S.C. § 3132(a)(2). In establishing the Managing Director position, Congress did not expressly exclude it from the SES. Thus a logical inference may be drawn that had Congress intended to exclude the Managing Director from the SES, it would have amended 5 U.S.C. § 3132(a)(2) to list it among the other specified exclusions. See Department of Medicine and Surgery, Veterans Administration - Applicability of Senior Executive Service, B-196611, December 19, 1979. Thus, we conclude that the legislation authorizing the position of Managing Director, when read with 5 U.S.C. § 3132(a), does not require that position's pay to be restricted to executive Level V compensation, but rather merely describes that position's status, which when section 3132(a) is applied, places that position in the SES.

We conclude, therefore, that Mr. Minkel has been and is being paid at a correct rate of pay and that he was properly placed at the ES-6 level when he was appointed to the Managing Director position, since the position of Managing Director may be placed at any level in the SES. The Managing Director's rate of pay need not be bound to the equivalent of Level V of the Executive Schedule. In view of this, there is no need to answer the question concerning Mr. Minkel's retroactive appointment.

for 
Comptroller General
of the United States