

DECISION

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

FILE: B-210055

DATE: July 8, 1983

MATTER OF: Availability of Fiscal Year 1982 funding for award of performance pay to members of the Senior Foreign Service

DIGEST:

Unobligated balance of fiscal year 1982 Salaries and Expenses appropriation for the United States Information Agency remains available for obligation to fulfill any order of the Foreign Service Labor Relations Board arising out of an unfair labor practice proceeding instituted in September of 1982. Under 31 U.S.C. § 1502(b), provisions of law providing for the expiration of appropriations and their reversion to the Treasury do not apply to the funds involved in the pending proceeding.

The Regional Director of the Foreign Service Labor Relations Board (Board) has requested an advisory opinion on the current availability of fiscal year 1982 funds for the award of performance pay for that year to employees of the United States Information Agency (formerly the International Communication Agency) (Agency) who are members of the Senior Foreign Service. For the reasons set forth below, we hold that unobligated fiscal year 1982 funds remain available for such awards.

By way of background, the Regional Director explains that Chapter 10 of the Foreign Service Act of 1980, Pub. L. No. 96-465, 94 Stat. 2071, 2128, established a labor-management relations program in the foreign service and created the Foreign Service Labor Relations Board within the Federal Labor Relations Authority. The Act also created the Foreign Service Impasse Disputes Panel (Panel) to assist in resolving negotiation impasses arising during collective bargaining, 22 U.S.C. § 4110, and required that final action of the Panel be binding on the parties for the term of the collective bargaining agreement unless the parties have agreed otherwise, 22 U.S.C. § 4110(c)(3). Both the Board and the Panel were given jurisdiction over agencies having foreign service operations including the Agency, 22 U.S.C. § 4103. Section 1015 of the Act, 22 U.S.C. § 4115, created an unfair labor practice process, and defined unfair labor practice to include failure or refusal by an agency "to cooperate in impasse procedures and impasse decisions," as required under this chapter."

Local 1812 of the American Federation of Government Employees (Union), certified in 1978 as the exclusive representative for all eligible Foreign Service employees in the Agency, requested that the Panel consider a negotiation impasse concerning the Foreign

Service selection boards established by section 602 of the Act. Specifically, the parties were in dispute over (1) the composition of selection boards established to make recommendations concerning performance pay, (2) the procedures to govern the issuance of such recommendations, and (3) whether the Agency head was to be bound by the recommendations. The Union proposed (1) that the composition of selection boards be governed by The Agreement For The Establishment and Composition of Selection Boards, (2) that the selection boards determine the percentage of the funding available for performance pay to be awarded to each officer recommended, (3) that these recommendations be binding upon the Director, and (4) that the total amount of agency performance pay to be awarded for each class of officers be determined by the Director in writing before any boards were convened. On August 18, 1982, the Panel issued a Decision and Order in United States International Communications Agency, Washington, D.C. and Local 1812, American Federation of Government Employees, AFL-CIO, Case 83 PSIDP 3. The Panel concluded that the dispute should be resolved on the basis of the Union's proposal and ordered that the parties adopt and implement it no later than September 1, 1982.

In a letter dated August 30, 1982, the Agency refused to implement the Panel's Decision and Order. The Union, on September 13, 1982, filed an unfair labor practice charge before the Board, alleging that such refusal violated section 1015(a)(5) and (6) of the Act, 22 U.S.C. § 4115(a)(5) and (6).

In a decision dated March 25, 1983, an Administrative Law Judge of the Board recommended that the Board adopt an order compelling the Agency to implement the Decision and Order of the Panel, and to comply with such order as if it had done so no later than September 1, 1982. The Judge's decision directed the Agency to determine the amount of performance pay that was available as of August 30, 1982, and to treat such funds as now available for the payment of fiscal year 1982 performance awards. The Agency has

filed an exception to the Judge's decision, and the Board is now considering whether to affirm or reverse the decision.^{1/}

We are asked whether fiscal year 1982 funding remains available for the award of performance pay under the Panel's order. According to the submission, both the Union and the Agency believe that the fiscal year 1982 funds expired on September 30, 1982, and that, in the absence of the obligation of those funds by completion of the selection board process, they are no longer available or retrievable. The Agency points out that:

"* * * no performance pay selection boards were ever convened, no decision was ever made by the Agency as to whether any awards should be made in FY 1982, or in what amount, and no funds were obligated for performance pay purposes prior to the end of the fiscal year on September 30, 1982.

"On the contrary, since the Agency's payroll costs were running higher than planned, the entire amount available for payroll purposes for that fiscal year, including the \$230,000 [originally included within the Agency's financial plan for FY 1982 performance pay awards] was expended for other pay purposes. At the close of FY 1982, only \$1,324.34 remained unobligated in the Foreign Service pay allotment."

^{1/} In a letter dated May 12, 1983, which referred to our regulation at 4 C.F.R. § 22.8, the Union's attorney requested that we decline to issue an opinion in this case on the ground that the matter has been decided by the Administrative Law Judge and "is more properly within the jurisdiction of the" Foreign Service Labor Relations Board. We disagree with the assertion that the question posed to us has been decided by the Judge and with the suggestion that such question is more properly within the jurisdiction of the Board. We have been asked whether fiscal year 1982 funding remains available for the payment of the performance awards, a question which the Judge has not answered. In fact, he notes in footnote 13 to his decision that he is "aware that FY 1982 has ended," and he declines to express an opinion "as to how, or from what source, performance awards can, or should, be paid." Certainly, a question as to the period of availability of appropriated funds is suitable for resolution by this Office.

The Regional Director of the Board notes that paragraph (6) of 31 U.S.C. § 1501(a) provides that an amount may be recorded as an obligation of the United States Government when supported by documentary evidence of "a liability that may result from pending litigation." The Regional Director accordingly contends that "previously unexpended expired funding relating to the award of performance pay remains available for obligation due to the pending unfair labor practice."

We agree with the Regional Director's conclusion, but not for the reason he argues. Subsection 1501(a) only provides that amounts may be recorded as obligations when supported by certain specified types of documentary evidence. It does not preserve the availability of funds beyond the end of a fiscal year when obligation of the funds did not take place during the year.

Further, with respect to paragraph 1501(a)(6), we have held that the phrase "a liability that may result from pending litigation" is applicable in only limited instances. For example, in 55 Comp. Gen. 185, 187 (1955) we stated:

"Subsection 6 was included in [31 U.S.C. § 1501(a)] for the purpose of permitting obligations to be recorded in the case of land condemnation proceedings under the Declaration of Taking Act * * * and similar cases. * * * In land condemnation and similar cases, a liability of the Government has been established, the only question being an exact determination of the amount of the liability. An intent to permit obligations to be recorded in every case where litigation is pending against the Government, which may or may not result in a liability, cannot possibly be imputed to the Congress. In view thereof and since the overall purpose of [31 U.S.C. § 1501(a)] was to restrict the amounts recorded as obligations, it is our view that obligations may be recorded under [31 U.S.C. § 1501(a)(6)] only in those cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government's liability."

We concluded in that case that amounts of back pay which might become due certain employees for a prior fiscal year as a result of

pending litigation did not constitute obligations which could be properly recorded under 31 U.S.C. § 1501(a)(6).^{2/}

In the case now before us, the Government is not "definitely liable for the payment of money out of available appropriations." Section 405(c) of the Foreign Service Act of 1980, 22 U.S.C. § 3965(c), provides:

"The Secretary shall determine the amount of performance pay available under subsection (b)(2) each year for distribution among the members of the Senior Foreign Service and shall distribute performance pay to particular individuals on the basis of recommendations by selection boards established under section 602 [22 U.S.C. § 4002]."

Both a report on the bill (H.R. 6790) prepared by the House Committee on Foreign Affairs, H. Rep. No. 96-992(I), 96th Cong., 2d Sess. 40 (1980), and a report prepared by the House Committee on Post Office and Civil Service, H. Rep. No. 96-992(II), 96th Cong., 2d Sess. 60 (1980) explained that:

"* * * The determination of the total amount which shall be made available in any one year is a budgetary determination left with the individual heads of the agencies, which means that members of the Senior Foreign Service are not [automatically]^{3/} entitled to performance pay."

^{2/} We expanded our interpretation of paragraph 1501(a)(6) to include anti-impoundment litigation in 54 Comp. Gen. 962 (1975). See also 61 Comp. Gen. 509 (1982). We reasoned that the basic premise of such litigation was that the refusal of the Executive branch to obligate appropriations was itself in derogation of the congressional design in providing appropriations. We thus concluded that it would be incongruous to construe 31 U.S.C. § 1501(a)(6) in a manner permitting its application to frustrate congressional objectives where the existence of substantial legal issues could be documented. This application of paragraph 1501(a)(6) is not relevant in the current discussion, however, since no impoundment of funds is involved.

^{3/} The Post Office and Civil Service Committee report contained the word "automatically," whereas the Foreign Affairs Committee report did not.

The report of the Senate Foreign Relations Committee, S. Rep. No. 96-913, 96th Cong., 2d Sess. 40 (1980), contained language identical to that of the report of the House Foreign Affairs Committee. This legislative history supports our conclusion that the law does not create a statutory entitlement to performance pay in members of the Senior Foreign Service. Since there is no statutory entitlement to performance pay, the Agency was not definitely liable to pay these awards from fiscal year 1982 funds. Therefore, under 31 U.S.C. § 1501(a)(6), fiscal year 1982 funds could not have been obligated on the basis of the unfair labor practice action brought before the Board.

Nonetheless, it is our opinion that any fiscal year 1982 funding which has not already been obligated for other agency purposes remains available for the payment of 1982 performance awards.^{4/} Subsection 1502(b) of title 31 provides that:

"A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance."

Clearly the unfair labor practice proceedings, instituted by the Union on September 13, 1982, for the purpose of compelling the Agency to comply with the Panel's order, is a right of action "involving the right to an amount payable from" the Agency's fiscal year 1982 Salaries and Expenses appropriation. Therefore, under 31 U.S.C. § 1502(b), neither subsection 1502(a) of Title 31 nor any other provision which provides for the expiration of appropriations and their reversion to the Treasury applies to the funds involved in the unfair labor practice proceeding before the Board. It follows that the Agency's unobligated fiscal year 1982 funds remain available for obligation for the purpose of fulfilling any order of the Board arising from the unfair labor practice charge it is currently considering.

^{4/} As we indicated above, we have been informed by the Agency that although \$230,000 was included within the Agency's financial plan for fiscal year 1982 for Senior Foreign Service performance pay awards, almost the entire amount available for payroll purposes for fiscal year 1982, including this \$230,000, was expended for other pay purposes. Only \$1,324.34 which remained unobligated at the close of fiscal year 1982 remains available for performance pay awards.

To the extent that the Agency has withdrawn part or all of these funds and allowed them to revert to the Treasury, 31 U.S.C. § 1552(a)(2) provides authority for the restoration of unobligated balances needed to fulfill an order by the Board. The sum of \$1,324.34 may accordingly be restored to the appropriate account.

for *Milton J. Fowler*
Comptroller General
of the United States