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DECISION



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

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FILE: B-164371

DATE: FEB 4 1975

MATTER OF: Prevailing Rate Employees--Lump-Sum Leave Payments

DIGEST: Civil Service Commission seeks GAO concurrence in application of 47 Comp. Gen. 773 (1968) to Prevailing Rate employees. Retroactive adjustments to wages of Prevailing Rate employees are governed by 5 U.S.C. §5344 which places limitations on those categories of employees entitled to such adjustments. Employees separated prior to date wage increase is ordered into effect may have wages and/or lump-sum leave payments adjusted only if they died or retired between effective date of increase and date increase ordered into effect (and then only for services rendered during this period) or if they are in the service of the Government actively or on terminal leave status on date increase is ordered into effect.

This matter involves a request by the Civil Service Commission (CSC), for our concurrence in its application of the holding in 47 Comp. Gen. 773 (1968) to employees whose rates of pay are adjusted under the Act of August 19, 1972, Public Law 92-392, 86 Stat. 564, codified as 5 U.S.C. §§5341-5349 (Supp. II 1972). These employees are generally known as Prevailing Rate or Wage Board employees.

In 47 Comp. Gen. 773 (1968), we held that when a General Schedule civil service employee was to be separated from Government service, and was to receive a lump-sum payment for accrued annual leave, that payment should be adjusted to reflect a general salary increase granted under the Act of December 16, 1967, Public Law 90-206, 81 Stat. 613, that became effective during the period that would have benefited the employee had he remained on the rolls until exhausting his accrued annual leave. That decision was based on provisions of Public Law 90-206 and on 5 U.S.C. §5551(a) which now provides, in pertinent part that:

"An employee * * * who is separated from the service or elects to receive a lump-sum payment for leave * * * is entitled to receive a lump-sum payment for accumulated

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and current accrued annual or vacation leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave. The lump-sum payment is considered for taxation purposes only."

For purposes of this section, "employee" includes both General Schedule and Wage Board employees. It is important to note when the adjustment of the lump-sum leave payment is to be made. In the above decision, we stated that:

"However, the final adjustment in the amount of lump-sum leave payment due the employee for the period covered by the new salary rate should not be made until the effective date of the new salary rates promulgated by the President." 47 Comp. Gen. 773, 774.

It is also necessary to consider 5 U.S.C. §5344, which provides:

"(a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date the wage survey is ordered to be made.

"(b) Retroactive pay is payable by reason of an increase in rates of basic pay referred to in subsection (a) of this section only when--

"(1) the individual is in the service of the Government of the United States, including service in the armed forces, or the government of the District of Columbia on the date of the issuance of the order granting the increase; or

"(2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase, and only for services performed during that period."

This section was enacted in its present form as part of Public Law 92-392, but the basic provisions were first made part of the Prevailing Rate pay system by the Act of September 2, 1958, Public Law 85-872, 72 Stat. 1696. The current section has two functions: the setting of an effective date for Prevailing Rate wage increases, and the delineation of those categories of employees that are entitled to receive retroactive pay adjustments when Prevailing Rate wage increases are actually ordered into effect. It is clear from the legislative history of Public Law 85-872 that, at that time, there were frequently long delays between the time a wage survey was ordered, and the time the new wage rates were finally ordered into effect. The effective date was set as it now stands to prevent the wages of Prevailing Rate employees from unnecessarily lagging behind the wages of employees in the private sector. The provisions regarding retroactive payments were necessary to make it clear that these payments could be made, in spite of the general rule that wages cannot be adjusted retroactively.

The legislative histories of Public Law 85-872 and Public Law 92-392 are both silent regarding the effect of retroactive wage adjustments on lump-sum leave payments made to employees leaving Government service. In fact there is very little explanation of the meaning or intent of the retroactive pay provisions in the history of either act. The only statement that is of assistance is found in the House report on the bill that became Public Law 92-392, H. Rep. 92-339, July 8, 1971. On page 16 of that report, with regard to retroactive increases, it states:

" * * * Also, an individual who retires or dies during the period beginning on an effective date of the rate increase under subsection (a) and ending on the date of issuance of the order by the lead agency granting the rate increase will be paid retroactive pay only for services actually performed during that period. * * *"
(Emphasis added.)

A similar provision regarding retroactivity is found in the Federal Salary Act of 1967, Public Law 90-206. This Act granted the General Schedule salary increase involved in 47 Comp. Gen. 773 (1968). Section 218 of that Act, found at 81 Stat. 638 provides, in pertinent part:

"(a) Retroactive pay, compensation, or salary shall be paid by reason of this title only in the case

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of an individual in the service of the United States (including service in the Armed Forces of the United States) or the municipal government of the District of Columbia on the date of enactment of this title, except that such retroactive pay, compensation, or salary shall be paid--

"(1) to an officer or employee who retired, during the period beginning on the first day of the first pay period which began on or after October 1, 1967, and ending on the date of enactment of this title, for services rendered during such period. * * *

Similar provisions are contained in the note following 5 U.S.C. §5332, note 5, of the General Schedule Pay Rates. In 47 Comp. Gen. 773 (1968), the individual employee involved was "in the service of the United States" on the date of the enactment of Public Law 90-206. He retired April 30, 1968, more than four months after the enactment of the statute, and two months before the effective date of the salary increase. The date of his retirement did not fall within the period covered by the exception which granted limited retroactive pay to retirees.

We have considered 5 U.S.C. §5344 (Supp. II, 1972) on only two prior occasions. Once explicitly in 50 Comp. Gen. 266 (1970), relating to retroactive pay and wage increases granted under the "Monroney Amendment," which is now codified as 5 U.S.C. §5343(d)(1) (Supp. II 1972), which has no applicability in the instant matter. In the other case, B-168346, December 30, 1969, the section was considered only implicitly and was not directly cited. In that case, two employees were separated as a result of a Reduction-in-Force (RIF). Prior to their receipt of the notification that they were to be separated, a wage survey was ordered. Under the terms of the predecessor of 5 U.S.C. §5344 (Supp. II, 1972), the effective date of the wage increase was about 30 days prior to their separation. Approximately 3 to 4 months later both employees were hired by different Government agencies in the same wage survey area. The new wage rates were ordered into effect several months after the men were rehired. We held that the severance pay and lump-sum leave payments received by the men should be retroactively adjusted to reflect the wage increase. This was possible because the men were actually in the service of the United States on the day the order was issued granting the wage increase. Their service was not continuous, but the statute does not so require.

We are now asked to consider the case of Wage Board employees who have retired or were otherwise separated prior to the date a wage increase under Public Law 92-392 is ordered into effect. Since any adjustment would have to be made when the new wage rates are actually ordered into effect, such adjustments would be retroactive adjustments and would be governed by 5 U.S.C. §5344(b) (Supp. II, 1972). Under subsection 2 of that section, an employee who retires or dies between the effective date of a wage increase and the day the increase is ordered into effect, will receive a retroactive adjustment to his pay, but it will be limited to the pay received during that period for services actually performed by the employee. There will be no adjustment of any lump-sum leave payment that might have been received.

Alternatively, subsection 1 of 5 U.S.C. §5344(b) (Supp. II 1972), provides that an employee may receive a retroactive adjustment in his pay if he is "in the service of the Government" on the day the wage increase is ordered into effect. Normally, when an employee is separated, he receives a lump-sum payment for accrued annual leave. We have long held that the period of time that is included in or covered by such a payment is not "service" for any purpose. See 24 Comp. Gen. 511, 514 (1945), answer to question 5; 24 *id.* 659, 662 (1945) answer to question 8; and 31 *id.* 215, 221 (1951) answer to question 6(b). Therefore, if an employee who has been separated receives a lump-sum payment for accumulated and current accrued annual leave, he may not have that payment retroactively adjusted, even if the leave for which he was paid would have extended beyond the date the new wage rate was ordered into effect.

It is possible, although not usual, for an employee to be placed on "terminal leave" instead of receiving a lump-sum payment at the time of his separation. This practice is now the exception rather than the rule because it has long been our position that the administrative authority to grant an employee terminal leave immediately prior to separation from the service, when it is known in advance that the employee is to be separated, is limited to cases where the exigencies of the service require such action. See 34 Comp. Gen. 61 (1954). However, if the requirements justifying terminal leave can be met, and such leave extends to or beyond the date when a new wage rate is ordered into effect, then an employee's pay, including any lump-sum leave payment received, may be retroactively adjusted to reflect the new wage rate in accordance with 5 U.S.C. 5344(b)(1).

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Accordingly, we cannot concur in the application of the holding in 47 Comp. Gen. 773 (1968) to employees whose rates of pay are adjusted under Public Law 92-392, except in the limited circumstances set forth above.

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Comptroller General
of the United States