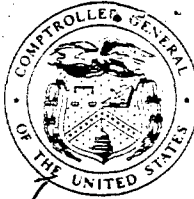


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DECISION

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

[Entitlement to Wage Increase in Lump-Sum Annual Leave

FILE: B-164371

DATE: May 28, 1980

Payment]

MATTER OF: Prevailing Rate Employees

- DIGEST: (1) A prevailing rate employee is on the rolls on the date a wage increase is ordered into effect but separates before the effective date of the increase. The period covered by his accrued annual leave extends beyond the effective date of the increase. He is entitled to receive his lump-sum annual leave payment, authorized under 5 U.S.C. § 5551(a), paid at the higher rate for the period extending beyond the effective date of the increase. 54 Comp. Gen. 655 (1975) distinguished.
- (2) A prevailing rate employee who separates after a wage survey is ordered but before the date the order granting the wage increase is issued and his accrued annual leave extends beyond the effective date of the increase is entitled to have his lump-sum leave payment paid at the higher rate for the period extending beyond the effective date of the increase, as long as the order granting the new wage rate is issued prior to the effective date set by 5 U.S.C. § 5344(a).

The issue presented is whether prevailing rate employees who are being separated from employment are entitled to have their lump-sum annual leave payment include a wage increase when they are on the rolls on the date the order is issued granting that wage increase but are separated before the effective date of the increase, and the period covered by their accrued leave extends beyond the effective date of the increase. Also, we are asked to decide whether such employees are entitled to have their lump-sum annual leave

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payment include a wage increase when they separate prior to the date the order granting that wage increase is issued, but the period covered by their accrued leave extends beyond the effective date of the increase. For the reasons stated below employees in the first situation are entitled to have their lump-sum annual leave payment include the wage increase. Employees who fall under the second situation are also entitled to have their lump-sum annual leave payments include the wage increase if they separate after the date a wage survey is ordered, and the order granting the new wage rate is issued prior to the effective date of the increase.

These questions were presented in letter of April 24, 1979, from Assistant Secretary of the Army (Manpower and Reserve Affairs), and arise as a result of our decision in 54 Comp. Gen. 655 (1975). There we held that prevailing rate employees who separated prior to the date the order granting a wage increase is issued may have their lump-sum leave payments retroactively adjusted only if they died or retired between the effective date of the increase and the date the order granting the increase was issued, and then only for services rendered during this period. We based our decision on the fact that any adjustment would have to be made when the order granting the new wage rate is issued and that, at the time, orders granting wage increases were usually issued after the statutory effective date of the increases.

We do not view the above decision as controlling the present situation. Rather, it should be limited to situations concerning the payment of retroactive wage increases governed by 5 U.S.C. § 5344(b). The present case concerns the payment of prospective wage increases, i.e., wage increases ordered into effect prior to their effective dates.

Although section 5344 is not controlling here because it is designed to deal with instances where the order granting the wage increase is issued after the effective date of such increase, it does influence the outcome. That section provides in part that:

"(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."

Thus, as long as the order granting a wage increase is issued prior to the effective date mandated by section 5344(a), any salary changes or payments for lump-sum leave will be prospective payments and section 5344(b) will not apply.

We will first consider the situation where a prevailing rate employee separates between the time the order granting a wage increase is issued and the date the increase is to become effective. 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 which was granted prior to his separation but became effective during the period that would have benefited the employee

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had he remained on the rolls until exhausting his accrued annual leave. That decision was based on 5 U.S.C. § 5551(a) which provides, in pertinent part, as follows:

"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 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.* * *"

It is important to note that for the purpose of this section, "employee" includes both General Schedule and Wage Board (Prevailing Rate) employees.

In addition to the above statute, 47 Comp. Gen. 773, was also based on the rationale that the right of an employee to the lump-sum payment vests at the time of the employee's separation. Thus, the lump-sum payment is to be computed on the basis of the employee's rights at the time of separation under all applicable laws and regulations at that time which would have affected his compensation had he remained in the service for the period covered by his leave. See also: 43 Comp. Gen. 440 (1963); 26 Comp. Gen. 102 (1946); and Federal Personnel Manual, Chapter 550, subchapter 2-3 (November 3, 1975). In effect, upon separation prior to the effective date of a wage increase an employee for salary purposes only is considered to be on the rolls of his agency until his accrued leave expires. Therefore, such an employee is entitled to any salary increases which he would have received had he remained in the service for the period covered by his leave. Thus, since in 47 Comp. Gen. 773, the order granting the wage increase was issued

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prior to the employee's retirement and would have been effective to increase his rate of compensation had he remained in the service until his annual leave was exhausted, the employee was entitled to be paid for his leave at the higher rate for any period covered by his lump-sum payment extending beyond the effective date of the increase.

In response to a submission similar to the one at hand we applied the above rationale to prevailing rate employees and allowed payment at the higher rate. See: B-165201, October 2, 1968. Therefore, the first question is answered in the affirmative.

The second issue is whether prevailing rate employees are entitled to an adjustment of their lump-sum annual leave payments when they separate prior to the date the order granting a wage increase is issued but the period covered by their accrued leave extends beyond the effective date of the wage increase. We are limiting our consideration of this question to those cases, in which the order granting a wage increase is issued prior to its effective date, i.e., the effective date set by 5 U.S.C. § 5344(a). In 26 Comp. Gen. 102, 105 (1946) we considered a similar set of circumstances. There we held that an employee who separated prior to the date a statute authorizing a wage increase was passed would not be entitled to the benefit of a salary increase even though his unused leave would extend beyond the effective date of the increase. Our decision was based on the ground that at the time of the employee's separation the new salary rates were not authorized by statute. In other words, the employee did not have a vested right to the increase at the time of his separation.

As can be gleaned from the above, an employee who separates prior to the effective date of a wage increase must have a vested right to the increase before he becomes entitled to receive his lump-sum payment at the new rate. That is, at the time of an employee's separation the statutory mechanism for the wage increase must already

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have been enacted and the requirement for making the wage adjustment on the effective day of the increase must mandate action by the person or agency in charge of such adjustment. See: 47 Comp. Gen. 773.

Prior to the enactment of 5 U.S.C. §§ 5341 et seq. (1976), governing the pay adjustments of prevailing rate employees, the executive branch had great discretion in establishing an administrative system governed by regulation for adjusting the pay of prevailing rate employees. This discretionary system, under which the executive branch was free to establish, change and amend wage adjustment procedures was an administrative, as distinguished from a statutory, system, in that the resultant pay adjustment was discretionary with the executive branch and not controlled by legislative guidelines and standards. In contrast, the system presently in effect established under 5 U.S.C. 5341 et seq. has been narrowly defined by Congress so that the acts leading to a pay adjustment for prevailing rate employees performed by executive branch personnel are ministerial in nature leaving nothing to their discretion or judgment. With this in mind, we held in 54 Comp. Gen. 305 (1974), that the adjustment of wage rate of prevailing rate employees under 5 U.S.C. §§ 5341 et seq., may no longer be considered as granted administratively, but rather must be considered to be an increase in pay granted by statute. See also: Federal Personnel Manual Letter No. 531-47, May 28, 1975.

Under 5 U.S.C. § 5343(b) the Office of Personnel Management is required to schedule full-scale wage surveys every 2 years and interim surveys between each 2 consecutive full-scale wage surveys. We have been informed that the surveys are ordered to be conducted at the same time every year. Also, under section 5344(a) the effective date of any wage increase has been established to be no later than the first day of the first pay period which begins on or after the 45th day following the date the wage survey is ordered to be made.

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Thus, once a wage survey has been ordered to be made the employee can reasonably expect to receive a statutory wage increase within approximately 45 days of the order. Since a wage increase will be effective within 45 days after an order is given to conduct a wage survey it can be said that once the survey is ordered the employee would have a vested right in that increase if he were on the rolls on the effective date of the increase. As in 47 Comp. Gen. 773, the actual amount of the increase may not be established, but the right to an increase in pay, in an amount to be determined, is in being.

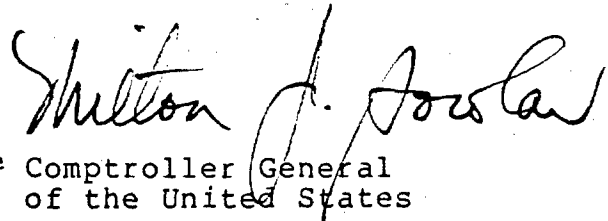
Therefore, even though an employee separates prior to the date the order granting a wage increase is issued, he is entitled to receive his lump-sum annual leave payment at the higher rate if his separation occurs after the date a wage survey is ordered to be made and his annual leave extends beyond the effective date of increase, so long as the order granting the new wage rate is issued prior to the effective date mandated by section 5344(a). The employee, however, is only entitled to be paid at the higher rate for the amount of his leave extending beyond the effective date of the increase.

We realize that this decision does not provide any relief for the prevailing rate employee who separates before the effective date of the wage increase, and the order granting the new wage rate is issued after the effective date of the increase. However, this result is statutorily mandated. In such a case, the lump-sum annual leave payment would be covered by the retroactive adjustment provisions of 5 U.S.C. § 5344(b), which prohibit any such adjustment.

Accordingly, a prevailing rate employee who is on the rolls on the date an order granting a wage increase is issued, but separates before the effective date of the increase is entitled to receive his lump-sum annual leave payment at the higher rate for the period his leave

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extends beyond the effective date of the increase. Moreover, a prevailing rate employee who separates before the date of the order granting the wage increase is also entitled to receive his lump-sum annual leave payment at the higher rate for any leave extending beyond the effective date of the increase if he separates after a wage survey is ordered to be made, and the order granting the new wage rate is issued prior to the effective date set by section 5344(a).

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States