

5777

HARRIS
M.P.

DECISION



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

FILE # ~~169262~~

DATE: March 22, 1978

MATTER OF: Surgeon General of the Public Health Service

- DIGEST:**
1. Decision in 49 Comp. Gen. 722 (1970), holding that Surgeon General of the Public Health Service (PHS) may not be compensated at pay grade 0-9 on the basis that 0-9 is the pay grade of the Surgeon General of the Army is reaffirmed, since the pay grade of the Surgeon General of the PHS is established at 0-8 by 37 U. S. C. 201(a) (1970).
 2. In the absence of additional legislation, no legal basis exists for assigning pay grade 0-9 to the position of Surgeon General of the Public Health Service which under Reorganization Plan No. 3, of 1966 has also been administratively designated Assistant Secretary for Health, HEW, since the Surgeon General's position is established by law (42 U. S. C. 205) with the pay grade of 0-8 (37 U. S. C. 201(a)).

This action is in response to a letter dated October 17, 1977, from the Secretary of Health, Education, and Welfare (HEW) requesting a decision concerning the appropriate rate of compensation to be paid Dr. Julius Richmond who currently serves as both the Assistant Secretary for Health and as Surgeon General of the Public Health Service (PHS) in HEW. The primary question presented by the Secretary's letter is whether section 206(a) of the Public Health Service Act (42 U. S. C. 207(a)) which provides that the Surgeon General of the PHS "shall be of the same grade as the Surgeon General of the Army," authorizes compensation of the Surgeon General of the PHS at the same rate as the Surgeon General of the Army which is currently pay grade 0-9, or whether he is to be paid only at pay grade 0-8 as provided in 37 U. S. C. 201 (1970).

The Secretary indicates that he is aware that we previously examined this matter and in 49 Comp. Gen. 722 (1970) held that the proper pay grade of the Surgeon General of the PHS is 0-8. However, he asks that that decision be reconsidered for the following reasons:

B-169262

- "1) Section 206(a) of the PHS Act was not repealed by P. L. 85-422.
- "2) The inclusion of the position of Surgeon General, PHS, at the 0-8 level in P. L. 85-422 was correct in 1958 since the Surgeon General of the Army was also at 0-8. Under the provisions of Section 206(a) of the PHS Act, the Surgeon General of PHS could not have been put at any other grade.
- "3) Notwithstanding the correctness in 1958, it was inappropriate to include a position by title in a grade table. Section 206(a) of the PHS Act clearly indicates that "Surgeon General" refers to a position and not a grade.
- "4) P. L. 89-288 raising the Surgeon General of the Army to 0-9 followed P. L. 85-422, and given the provision of Section 206(a) can be interpreted to permit paying the Surgeon General of PHS at 0-9."

We carefully considered this matter in 49 Comp. Gen. 722, including the history of the statutes involved. As was indicated there, the act of May 20, 1958, Public Law 85-422, 72 Stat. 124, amending section 201(b) of the Career Compensation Act, created two additional pay grades for commissioned officers--0-9 for lieutenant generals and vice admirals, and 0-10 for generals and admirals. No change was made in the pay grade structure relating to commissioned officers of the PHS, the pay grade of the Surgeon General being listed as 0-8 as it is in the current provisions of 37 U. S. C. 201(a). Under the provisions of 10 U. S. C. 3036(b) as in effect in 1958 the Surgeon General of the Army was, if he held a lower regular grade, appointed in the regular grade of major general, which, like the Surgeon General of the PHS, was assigned pay grade 0-8 by Public Law 85-422.

The act of September 7, 1962, Public Law 87-649, 76 Stat. 451, in codifying the Career Compensation Act of 1949, as amended, included the provisions of 37 U. S. C. 201(a) assigning major generals of the Army and the Surgeon General of the PHS to pay grade 0-8. At the same time section 11 of Public Law 87-649 amended section 206(a)

B-169262

of the PHS act "by striking out the words, 'with the same pay and allowances,' with respect to the Surgeon General of the PHS so that section 200(a) read, as it does now, that "the Surgeon General, during the period of his appointment as such, shall be of the same grade as the Surgeon General of the Army." Subsequently, the act of October 22, 1965, Public Law 89-288, 79 Stat. 1050, amended 10 U. S. C. 3036(b) to provide that the Surgeon General of the Army, while so serving, has the grade of lieutenant general. Lieutenant generals are assigned to pay grade 0-9 by 37 U. S. C. 201(a). No change was made in the pay grade of the Surgeon General of the PHS. Thus, while the Surgeon General of the PHS may be of the same grade or rank as the Surgeon General of the Army for other purposes, it is clear that under 37 U. S. C. 201(a) while the Surgeon General of the Army is a lieutenant general assigned to pay grade 0-9, the Surgeon General of the PHS remains assigned to pay grade 0-8 and may not be paid at the rate for pay grade 0-9. Accordingly our decision 49 Comp. Gen. 722 is affirmed.

In addition, however, the Secretary also states that whatever strictures may have prevented paying the Surgeon General of the PHS at pay grade 0-9, they should not prevent paying the combined Surgeon General and Assistant Secretary for Health at that grade based on the following:

- "1) The combined position of Surgeon General and ASH is a more demanding position than that of Surgeon General. The combination was made both possible and necessary by Reorganization Plan No. 3 of 1966 which transferred all statutory powers and functions of the Surgeon General to the Secretary. The Secretary has since delegated most of these powers and functions to ASH. Subsequent reorganizations have added the supervision of the Food and Drug Administration to the functions of ASH. PHS today has over 50,000 employees carrying out over 270 programs with a budget of more than \$7,000,000,000.
- "2) There is tradition and history attached to the position of Surgeon General. The general public tends to look to the Surgeon General as the Nation's doctor.

B-169262

Effective leadership and management of the PHS dictate that the functions of Surgeon General and ASH be combined in one position.

"3) The combined position of Surgeon General and ASH is not covered by the provisions of P. L. 85-422 and can be established at pay grade 0-9 as a new and different position."

While we do not dispute the importance of the position of Surgeon General and Assistant Secretary, our determination of the compensation to which the incumbent is entitled must be based on the applicable laws.

Initially it is noted that the salary prescribed for an Assistant Secretary of HEW under 5 U. S. C. 5315 (17) is fixed at Executive Level IV, currently \$50,000 per year. It is implicit in the submission that the appointment of the individual concerned as a medical officer paid at rates applicable to officers of the uniformed services at grades 0-8 or 0-9 results in pay and allowances in excess of those currently authorized for the Assistant Secretary positions. Our computation of military pay and allowances for such officers of the uniformed services confirms the probability of such pay entitlements.

Under 42 U. S. C. 205 the Surgeon General of the PHS is to be appointed from the Regular Corps of the PHS for a 4-year term by the President by and with the advice and consent of the Senate. As we understand it, the Surgeon General was administratively designated also as the Assistant Secretary for Health by the Secretary of HEW pursuant to Reorganization Plan No. 3 of 1966, 80 Stat. 1610, section 1 of which transferred to the Secretary of HEW all functions of the PHS and of the Surgeon General of the PHS. Section 2 of the Plan authorized the Secretary to make appropriate provisions for authorizing the performance of any such transferred functions by any officer, employee or agency of the PHS or of the Department of HEW. However, the Surgeon General continues to occupy the statutory position established by 42 U. S. C. 205 which, as is indicated above, is specifically assigned the 0-8 pay grade under 37 U. S. C. 201(a). Pay grade 0-8 is the highest pay grade authorized for any member of the commissioned corps of the PHS;

B-169262

accordingly, there is no authority to establish the current Surgeon General's position at pay grade 0-9. If it is considered desirable to establish the pay of the Surgeon General (Assistant Secretary for Health) at pay grade 0-9, we suggest the matter be presented to Congress for additional legislation to authorize it.

R. F. K. M.
Deputy Comptroller General
of the United States