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J. D. Hosher

DECISION

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

FILE: B-173815.19 DATE: February 23, 1978

MATTER OF: Frank H. Denton -
Computation of post differential payments

DIGEST: AID properly computed post differential ceiling on biweekly, rather than annual, basis inasmuch as section 552 of the Standardized Regulations requires implementation of the ceiling by reduction in the per annum post differential rate to a lesser percentage of the basic rate of pay than otherwise authorized. The rule that the method of computation prescribed for basic pay by 5 U.S.C. 5504(b) shall be applied as well in the computation of aggregate compensation payments to officers and employees assigned to posts outside the United States who are paid additional compensation based upon a percentage of their basic compensation rates thus applies to post differential payments under section 552.

By letter dated July 14, 1977, the Agency for International Development (AID) has requested a decision concerning the proper method of computation of the post differential allowance authorized under 5 U.S.C. 5925 (1976).

By decision of April 22, 1977, the Foreign Service Grievance Board determined that AID had erroneously applied the statute and pertinent regulations in computing the post differential payable to Frank H. Denton, the grieving employee, and ordered AID to pay him an additional $247.25. AID has agreed to comply with the award by the Grievance Board, reserving, however, the right to request a refund if the Comptroller General should rule that the method of computation directed by the Board is improper. This Office has, therefore, been asked for a ruling on the legality of the decision of the Foreign Service Grievance Board with respect to the computation of post differential allowance and for our recommendation as to whether AID should alter its established method of computation.

Payment of a post differential to employees outside the continental United States is authorized by 5 U.S.C. 5925 (1976):

"§ 5925. Post differentials

"A post differential may be granted on the basis of conditions of environment which differ substantially from conditions of environment in the continental United States and warrant additional pay as a recruitment and retention incentive. A post differential may be granted to an employee officially stationed in the United States who is on extended detail in a foreign area. A post differential may not exceed 25 percent of the rate of basic pay. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 512."

Under this section, the Secretary of State has authorized a post differential of 10, 15, 20 or 25 percent, as appropriate, for specific posts of assignment abroad. The governing regulations, chapter 500 of the Standardized Regulations (Government Civilians, Foreign Areas), at section 552 provide that payments of post differential shall be limited as follows:

"552 Ceiling on Payments

"Notwithstanding the rate of differential prescribed for the differential post, if the country indicated in column 1, section 920, as applicable to the employee's post has a chief of mission position classified pursuant to 22 U.S.C. 866, the per annum post differential rate at which payment is made shall be reduced, if necessary, so that the combined per annum post differential and basic compensation (Sec. 040k) or post differential and salary (Sec. 040 l) authorized for the employee, does not exceed an amount which is one hundred dollars less than the per annum salary authorized for the chief of mission position." (Emphasis added.)

Chiefs of Missions are not entitled to post differential payments.

In implementing the aggregate pay limitation of section 552, the present practice of the State Department and AID is to first establish an annual amount $100 less than the salary rate of the chief of the particular mission, and then divide that annual amount by 2,080

to arrive at an hourly rate. The hourly rate is multiplied by 80 hours to establish a biweekly limitation on the aggregate amount payable on a biweekly basis to employees assigned to that mission.

This method of computation was approved by the Comptroller General in B-173815, August 29, 1973. In that case, the employee claimed an additional $1,317.67 in post differential payments for 3 years, based on his contention that the section 552 limitation should be applied on a purely annual basis whereby the employee would receive post differential payments at the full percentage rate authorized for the particular post until the last month of the calendar year when his pay would be adjusted over the final pay periods of that year to assure that the sum of his basic pay and post differential payments did not exceed an amount totaling $100 less than the annual salary of the Chief of Mission. Contrary to the general practice throughout AID and State Department, a component of AID in Guatemala City had been making payments of post differential on this basis. In denying the employee's claim and sustaining the method of computation used by State Department and AID, we held:

> "Because of the inconsistency of practice of some payroll units in the method of computing the pay of certain officers and employees, this Office issued a memorandum to the heads of departments and independent establishments, B-50870, November 17, 1958, in which they were instructed that the proper method of computing the pay of an officer or employee is to divide the annual basic rate of pay by 2080, counting any fraction of a cent as the next higher cent in order to derive an hourly rate. The hourly rate is then multiplied by 80 to derive a biweekly rate.
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> "The memorandum further instructed that this method is also to be applied:
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> > "'* * * in the computation of aggregate compensation payments to officers and employees assigned to posts of duty outside the United States who are authorized by law to be paid additional compensation based upon a percentage of their basic compensation rates.'

"In a recent decision we had the occasion to reaffirm the instructions of this memorandum. See B-177694, March 7, 1973, copy herewith.

"Under the circumstances, as related heretofore, we find that the method of computation of basic pay and post differential allowances under section 552 by the Regional Office in Guatemala City was incorrect and that the practice in the Department of State and AID was in accordance with our instructions of November 17, 1958."

Mr. Denton, the grievant whose situation is the subject of the present award by the Foreign Service Grievance Board, received post differential payments in 1974 under the method of computation approved in B-173815, supra, which totaled $247.25 less than he would have received had computation of his post differential entitlement been made on the basis once used by AID's Guatemala City office and held to be improper in that same decision.

The $247.25 discrepancy resulted in part from the fact that Mr. Denton returned to the United States for home leave and for stateside duty from June to September of 1974, during which period he did not receive post differential pay. For the first 20 pay periods of 1974, Mr. Denton received a biweekly base salary of $1,190.40. During pay periods that he was in Kabul, Afghanistan, he received the full 20 percent post differential authorized for that post of assignment, amounting to $238.08 per pay period. Beginning with the 21st pay period of 1974, he received a step increase raising his biweekly salary to $1,256. However, by virtue of the biweekly basis upon which AID calculates the limitation imposed by section 552, his post differential payments were simultaneously reduced to $201.75, an amount equal to 16.06 percent of his increased base salary. Thus, for the six final pay periods of 1974, the grievant received reduced payments of post differential despite his salary increase.

Mr. Denton objected to that reduction because he could have received the full 20 percent differential throughout the entire year without having his base pay and post differential payments for the year aggregate more than $100 less than the $38,000 per annum salary authorized for the chief of that mission. However, if he had instead remained in Kabul and received post differential payments throughout all of 1974, the reduction of his differential rate from

20 to 16.06 percent would have been necessary to assure that his salary and post differential payments for the entire year did not exceed the ceiling.

The issues considered by the Foreign Service Grievance Board included the grievant's objection to the particular method by which AID applies the limitation on post differential imposed by section 552. In considering that issue, the Board specifically addressed the fact that AID's method of computation had been reviewed and approved in B-173815, supra. It noted the statement in that decision that the process of converting the ceiling established by section 552 into biweekly rates is a "derivative" of the statutory method for converting the annual rate of basic pay to hourly, daily, weekly or biweekly rates provided by 5 U.S.C. 5504(b), and that this "derivative" method is consistent with the Comptroller General's memorandum to Heads of Departments and Independent Establishments, B-50670, November 17, 1958, instructing them to apply the same method.

> "* * * in the computation of aggregate compensation payments to officers and employees assigned to posts of duty outside the United States who are authorized by law to be paid additional compensation based upon a percentage of their basic compensation rates."

The Board then noted that 5 U.S.C. 5504(b) does not itself purport to deal with other than the conversion of basic pay from an annual rate to an hourly, daily, weekly or biweekly rate when such a conversion is necessary in order to compute the employee's pay and that the term "basic pay" does not include allowances such as post differential.

Finding that the practice of converting compensation other than basic pay from an annual to a biweekly rate cannot be traced to 5 U.S.C. 5504(b), the Board concluded that AID's reliance on the Comptroller General's memorandum of November 17, 1958, as authority for its "derivative" method of applying the ceiling of section 552 is misplaced:

> "Where, then, does the Agency derive its authority to convert Mr. Denton's post differential allowance to a bi-weekly allowance rate reduced proportionally to a level which, if paid to the grievant throughout

the 52 administrative workweeks of the year, would meet the $100-less-per-year rule of Section 552? The apparent answer is that it finds such authority in the last sentence of the Comptroller General's November 17, 1958 memorandum (B-50870) to agency heads which stated that 5 U.S.C. 5504(b)'s method for converting 'basic pay' from an annual rate to basic hourly, daily, weekly or bi-weekly rates 'is to be applied in the computation of aggregate compensation payments to officers and employees assigned to posts of duty outside the United States who are authorized by law to be paid additional compensation based upon a percentage of their basic compensation rates.'

"In the Board's judgment, the Agency's reliance on the quoted statement is misplaced. In the absence of Section 552's annual ceiling provision, grievant Denton's post differential rate would constitute 'additional compensation based upon a percentage of . . . (his) basic compensation rate(s).' But the very purpose of Section 552 is to displace the percentage-of-basic-compensation rate with a rate tied to the Chief of Mission's annual salary rate. Whatever the merits of converting allowances or other forms of 'non-basic' compensation which are based upon a percentage of the employee's basic pay, the Board sees no basis in the CG's B-50870 memo for applying such a conversion to allowances which are not so based, particularly where, as here, the result is to deprive the employee of a portion of the allowance to which he is otherwise entitled. To the extent that the Comptroller General's letter (B-173815) of August 29, 1973, may be deemed to support a different result on the different facts of the case there before him, the Board respectfully suggests that this question be reexamined by the Comptroller General in the light of the facts of this case."

The Foreign Service Grievance Board concluded in favor of the grievant as follows:

"* * * The principles involved are simple: an employee is entitled to the full post differential

> rate, subject to Section 553's limitation which, by its terms, is to be applied on an annual basis. In Mr. Denton's case, this means that since his post differential allowance plus salary for the year 1974 were well below the $37,900 ceiling imposed by the Chief of Mission's salary, Denton was entitled to receive the full 20% post differential rate during pay periods 21 through 25. His claim for the payment of an additional $247.25 is sustained."

After reviewing our prior rulings and examining the decision of the Foreign Service Grievance Board, we conclude that the Board erred in sustaining the grievant's claim for an additional post differential allowance of $247.25. For the reasons stated below, AID properly computed the grievant's allowance under its regulations and he is not entitled to the additional payment ordered by the Board.

The source of our disagreement with the Board is the specific language of section 552 of the Standardized Regulations which requires that "the per annum post differential rate at which payment is made shall be reduced" so that the combined per annum post differential and basic compensation or post differential and salary authorized does not exceed an amount which is $100 less than the per annum salary authority for the Chief of Mission position. In light of the specific directive that the ceiling be implemented by reducing the per annum post differential rate at which payment is made, we fail to understand the basis for the Board's conclusion that section 552 displaces the percentage of basic compensation rate of determining post differential with a rate that is not based on a percentage of basic compensation. In our opinion section [illegible] clearly contemplates a reduction in the percentage rate of basic pay otherwise authorized for payment of post differential to a lower percentage rate. While that reduced percentage rate is related to the per annum salary of the Chief of Mission, it is nonetheless a rate equal to a percentage of the employee's basic compensation rate. As such it falls squarely within the instruction contained in the Comptroller General's memorandum B-50870, supra, that the method of computing basic pay adopted by 5 U.S.C. 5504(b) be applied as well in the "computation of aggregate [illegible] compensation payments to officers and employees assigned to posts of duty outside the United States who are authorized by law to be paid additional compensation based upon a percentage of their basic compensation rates."

With respect to the State Department's authority to adopt a ceiling on post differential payments that reduces the percentage rate of post differential otherwise authorized, we note that 5 U.S.C. 5925 specifies only that post differential may not exceed 25 percent of the rate of basic pay. By Executive order the Secretary of State is delegated authority to prescribe regulations implementing section 5925. It is clearly within his authority to prescribe rates of post differential insofar as they do not exceed that 25 percent maximum. While the general scheme of post differential payments adopted by the Secretary of State provides for payments at the rates of 10, 15, 20 or 25 percent, there is nothing to preclude the Secretary's adoption of a scheme providing for payments of altogether different or lesser rates. Section 552 is a proper exercise of the Secretary's authority to prescribe different or lesser rates. Moreover, the method followed by AID in computing the reduced rate is consistent with our decisions and we believe that those decisions remain valid.

As previously noted, the Secretary of State is not precluded from imposing a ceiling on post differential payments to be applied on purely an annual basis. The Grievance Board makes the following recommendations with respect to administration of such ceiling:

> "In theory, the Agency might apply the full post differential allowance for most of the year and then terminate the allowance completely near the end of the year, when the employee's cumulative allowance payments, taken together with his projected basic compensation or salary for the year, have reached the ceiling amount of $100 less than the Chief of Mission's annual salary. Alternatively, it would appear permissible and, perhaps, administratively convenient to start by doing what the Agency did here--i.e., pro-rating the employee's per annum post differential rate, as reduced by Section 552, and paying him at a reduced, pro-rated bi-weekly rate throughout the year--provided, that near the end of the year it adds up the employee's total post differential and basic salary payments to determine whether or not he is within the $100-less-per-year limit and adjusts his remaining post differential allowances accordingly."

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We make no recommendation as to whether State Department's regulations should be revised to provide for administration of the ceiling in the manner suggested by the Grievance Board. However, we note that such a revision would significantly complicate payment procedures and would result in employees at the same grade and step levels receiving different amounts of post differential depending on any of a number of factors, the most significant being the extent of the particular employee's presence at the differential post during any particular year.

For the reasons stated above, we find that the Foreign Service Grievance Board's determination that AID is without authority to use the "derivative" method of computing the ceiling imposed by section 552 to be in error and, further, find that its award of $247.25 to the grievant is contrary to governing law and regulations. Amounts paid to the grievant in satisfaction of that award should be recovered.

Deputy Comptroller General
of the United States