DECISION

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

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FILE: B-175124 DATE: June 2, 1976

MATTER OF: Alaska National Guard technicians

DIGEST: 1. Alaska National Guard technicians' positions were converted to Federal status in General Schedule, effective January 1, 1969, pursuant to Public Law No. 90-486, August 13, 1968. Under section 8(a)(4) of that Act, their rates of basic compensation should have been set without regard to the cost-of-living allowance authorized by 5 U.S.C. §5941. We have held that the cost-of-living allowance is not part of basic compensation for employees whose positions are converted from wage board to General Schedule.

2. Alaska National Guard technicians, whose rates of basic compensation were set under section 8(a)(4) of Public Law No. 90-486, August 13, 1968, should have cost-of-living allowance authorized by 5 U.S.C. §5941 computed on basis of the rate of pay fixed by statute for the position held, rather than on basis of saved salary. Regulations authorize an allowance for Alaska of a percent of rate of "basic pay," which is defined by regulation as "rate of pay fixed by statute for the position held by an individual."

3. National Guard technicians whose rates of basic compensation were set, effective January 1, 1969, under section 8(a)(4) of Public Law No. 90-486, August 13, 1968, are not precluded from receiving pay adjustments pursuant to 5 U.S.C. §5305. Implementing regulations contained at 5 C.F.R. §531.205(a)(3) (1976) are for application. Thus, future increases would be tied to the grade to which demoted. However, any classification actions which are taken after January 1, 1969, and are independent of Public Law 90-486, supra, are for consideration under 5 U.S.C. §5337 and implementing regulations.

This action is in response to a letter dated October 6, 1975, from Wayne A. Robertson, Chief, Office of Technician Personnel, National

Guard Bureau. Mr. Robertson's letter involves questions which have arisen incident to the conversion of certain National Guard technicians in Alaska to Federal status pursuant to the National Guard Technicians Act of 1968, Public Law 90-486, August 13, 1968, 82 Stat. 755, (hereinafter referred to as the Act).

In his letter Mr. Robertson states the following:

> "In accordance with section 8 of Public Law 90-486, as technicians were converted to Federal status their positions were placed in the appropriate grades and steps of the General Schedule or wage rate schedule by reference to Civil Service Commission Classification Position and job grading standards. The resultant classification actions included upgrades, downgrades, reassignments, and transfers between the two pay systems.
>
> "There were some Alaska National Guard technicians who, on January 1, 1969, were converted, with their positions, from the Wage system to the General Schedule. Their existing rates of pay far surpassed the top step of their newly established General Schedule grades. In accordance with section 8(a)(4) of PL 90-486, these individuals were placed in a retained pay status until they left the position or became entitled to a higher rate of basic compensation. Our questions pertain to the pay of these technicians and each of the methods by which the pay could have been set is illustrated below:
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> "Example A: Existing rate -WG 13/3, $6.72 per hour 13,978
> Converted with existing rate retained GS 8/10 13,978
> Cost-of-living allowance computed on and added to existing rate 3,495
> gross rate 17,473
>
> "Example B: Existing rate - WG 13/3, $6.72 per hour 13,978
> Converted with existing rate adjusted downward so that when COLA is added the existing rate is preserved
> adjusted retained rate 11,182
> plus 25% COLA 2,796
> gross rate 13,978

"Example C: Existing rate - WG 13/3, $6.72 per hour 13,978
Converted with existing rate retained GS-8/10 13,978
COLA computed on the tenth step of GS-8, $10,012 2,503
gross rate 16,481"

Mr. Robertson then asks four questions concerning the above:

"1. Should the cost-of-living allowance have been considered in fixing the rate of pay at time of conversion thus preserving the existing rate of pay without increase or should the existing rate have been converted and increased by the cost-of-living allowance?

"2. Does the language in section 8(a)(4) '... he shall continue to receive basic compensation without change in the rate...' preclude technicians from receiving statutory pay increases as prescribed in section 531.205(a) of [title 5, Code of Federal Regulations]?

"3. Is the cost-of-living allowance computed on the retained rate for technicians being discussed here or does '...the rate of pay fixed by statute for the position held by the employee...' exclude a retained rate (reference Federal Personnel Manual, chapter 591, definitions)?

"4. Which method of pay setting is correct for technicians who, under the ongoing system, have been promoted, demoted, or reassigned from the Wage system to the General Schedule in routine personnel actions completely unrelated to the initial conversion * * * ".

Section 8(a) of the Act, Public Law No. 90-486, supra, set out as a note to 32 U.S.C. §709 (1970), states in pertinent part:

"* * * the Secretary concerned shall fix the rate of basic compensation of positions existing on the date of enactment of this Act in accordance with the General Schedule set forth in section 5332 * * * of title 5, United States Code. * * * In fixing such rate--

* * * * *

"(4) If the technician is receiving a rate of basic compensation which is in excess of the maximum rate of the appropriate grade of the General Schedule * * * in which his position is placed, he shall continue to receive basic compensation without change in rate until--

"(A) he leaves that position, or

"(B) he is entitled to receive basic compensation at a higher rate,

"but when any such position becomes vacant, the rate of basic compensation of any subsequent appointee thereto shall be fixed in the manner provided by applicable law and regulation."

We shall respond to the first and third questions to begin with, in order to arrive at the proper method of fixing basic compensation upon conversion. The first question presented is whether the cost-of-living allowance for employees in Alaska, 5 U.S.C. §5941, is to be included in the term "basic compensation" for the purpose of fixing the rate of basic compensation of converted employees pursuant to section 8(a)(4). We understand that the technicians in question had their rate of basic compensation fixed by the formula set forth in example B of Mr. Robertson's letter.

In our decision 52 Comp. Gen. 695 (1973), we stated on page 697 that: "Under the General Schedule the employee receives a cost-of-living allowance which is not a part of basic compensation." In that decision we permitted the "pyramiding of cost-of-living allowances" for employees in Hawaii and Guam whose positions were converted from wage board to the General Schedule in accordance with the rules set forth at Part 539 of title 5, Code of Federal Regulations.

While the conversions of National Guard technicians in the instant case are governed by the rules of Section 8 of the Act, those rules are quite similar to those contained in 5 C.F.R. Part 539. Therefore, we see no reason to achieve a result different than that which obtained in 52 Comp. Gen. 695, supra. Also see 51 Comp. Gen. 656 (1972). Accordingly, we believe that the cost-of-living allowance is not included in the term "basic compensation," and should not have been considered in fixing the rate of pay at the time of conversion. Instead, the existing rate should have been converted and then increased by the cost-of-living allowance. Therefore, the method in example B is not

the correct method of setting the technicians' pay and question 1 is answered accordingly.

The question remains as to whether the cost-of-living allowance is to be computed on the retained rate, as in example A, or on the rate which attaches to the new position, as in example C. See question 3.

The allowance in question is authorized by 5 U.S.C. §5941 (Supp. IV, 1965-1968), which provides for an allowance not to exceed 25 percent of the rate of basic pay of employees stationed outside the continental United States or in Alaska. Implementing regulations appear in 33 F.R. 12472, September 4, 1968, and are contained in Part 591, title 5, Code of Federal Regulations (1971). Section 591.101 (i) provides:

> "'Rate of basic pay' means the rate of pay fixed by statute for the position held by an individual, before any deductions and exclusive of additional pay of any kind, such as overtime pay, night differential, extra pay for work on holidays, or allowances and differentials." (Emphasis added.)

Since Section 591.202 of title 5, Code of Federal Regulations (1971), authorizes a cost-of-living allowance for Alaska of a stated percent of the "rate of basic pay," the allowance must be computed on the rate of pay fixed by statute for the position, instead of being computed on the basis of the saved compensation received by the employee. Therefore, we find that the pay fixing method set out in example C of Mr. Robertson's letter is the correct method. Question 3 is answered accordingly.

Question 2 asks whether a National Guard technician to whom section 8(a)(4) of the Act applies may receive statutory pay increases. Apparently it is felt that the language of section 8(a)(4) could be construed to prohibit statutory pay increases under 5 U.S.C. §5305 (1970), and prior laws granting pay increases, such as Public Law 91-231, April 15, 1970. Section 8(a)(4) states in pertinent part that a technician receiving basic compensation in excess of the maximum rate of the appropriate grade of the General Schedule,

> "* * *shall continue to receive basic compensation without change in rate until-
>
> * * * * *

"(B) he is entitled to receive basic compensation at a higher rate * * *."

In our decision B-175124, April 19, 1972, we addressed certain questions arising incident to section 8(a)(4) of that Act. On page 3 of that decision we stated:

"Had it been necessary to invoke section 8(a)(4), our opinion is that, the technicians would have retained their salaries--not grades--as long as they remained in their same positions and future increases would be tied to the grade to which demoted." (Emphasis added.)

We believe that the underscored language in our prior decision means that, under section 8(a)(4), the technicians are entitled to receive the same statutory pay increases as other employees in the applicable grade. That result is in agreement with the regulations issued for the purpose of implementing statutory pay increases under 5 U.S.C. §5305 and prior laws granting pay increases. The regulations, which have not been materially changed, are currently contained in 5 C.F.R. §531.205 (1976). That section establishes pay conversion rules for rates of basic pay for all employees under the General Schedule at the time of a pay adjustment under section 5305. Specifically, section 531.205(a) applies to all employees who are receiving basic pay at a rate in excess of the maximum rate of their grade.

That section states:

"On the effective date of a pay adjustment under 5 U.S.C. §5305, the rate of basic pay of an employee subject to the General Schedule shall be initially adjusted * * * as follows:

* * * * *

"(3) If an employee is receiving basic pay immediately before the effective date of his pay adjustment at a rate in excess of the maximum rate of his grade, he shall receive his existing rate of basic pay increased by the amount of increase made by the pay adjustment under 5 U.S.C. §5305 in the maximum rate for his grade."

We are unaware of any reason why the quoted regulation would not apply to the technicians involved here.

Thus, the answer to question 2 is that statutory pay increases for National Guard technicians subject to section 8(a)(4) of the Act shall be computed under 5 C.F.R. §531.205(a)(3).

In regard to question 4, concerning personnel actions arising subsequent to and independent of section 8(a)(4) of the Act, B-175124, April 19, 1972, states the following on page 4:

> "Those technicians who were placed in General Schedule positions on January 1, 1969, were no longer subject to section 8(a)(4) after that date and any subsequent classification decisions that would 'downgrade' them and their positions are for consideration under 5 U.S.C. §5337 and implementing regulations. Their entitlement to future general increases in the rates saved by 5 U.S.C. §5337 would be governed by the pay-fixing rules included in the law or Executive order providing the increase. See, for example, the rules applicable to the increase authorized by Public Law 92-210 and published in 37 F.R. 859, January 20, 1972."

Accordingly, question 4 is answered by stating that the above paragraph in our decision of April 19, 1972, is applicable.

Sincerely yours,

R.F. Keller

Deputy Comptroller General
of the United States