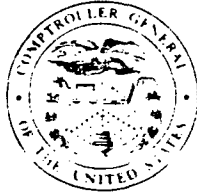


DECISION

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

40920

FILE: B-176051

DATE: July 10, 1974

MATTER OF:

Overpayment of environmental differential

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DIGEST:

Prevailing wage employees of the Department of the Navy whose positions included "built-in" environmental differentials were downgraded one grade to positions in which differentials were not "built-in" but were paid under subchapter S8-7, FPM Supplement 532-1. After the Civil Service Commission directed these employees to be restored retroactively to their former positions because of procedural defects in the downgrading they are not entitled to the higher grade pay plus differentials of the lower grade since the FPM Supplement differentials are not payable to employees whose pay rates included "built-in" differentials raising their rates one grade until their grades are properly reduced to eliminate the "built-in" differentials.

This is a request for a decision whether certain wage board employees of the Department of the Navy who have been restored to higher grades as a result of an appeal are liable for reimbursement of environmental differential payments made while the employees were in lower grade positions.

It is stated that in late 1970 a number of naval activities were directed to change to lower grade a large number of prevailing wage rate employees. This action resulted from the application of the Coordinated Federal Wage System (CFWS) environmental differential pay plan approved by the Civil Service Commission. The new environmental differential pay plan provided payment for exposure to specified environmental conditions by a separate pay differential instead of by giving credit for these environmental exposure factors in the job-grading process. Since the Department of the Navy had heretofore considered these factors in the job-grading process of certain ratings, it was necessary to reevaluate these jobs without consideration of the unusual hazards, physical hardships, and working conditions. This reevaluation resulted in a one-grade reduction in wage grade of all the jobs affected. A large number of these employees filed appeals and approximately 200 of them have been restored retroactively to their former grade and pay. As a

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result some employees, upon being restored to the higher grade, were determined to be entitled to less money because the pay of the lower grades plus environmental differential was in excess of the pay under the old system when the employees were paid the salaries of higher grades which included "built-in" environmental differentials.

The Department of the Navy interpreted decision B-176051, July 14, 1972, to preclude the payment of environmental differentials pertaining to lower grade level assignments with the payment of the higher grade level wages to which the employees were retroactively entitled in accordance with the Civil Service Commission determinations. The Department has advised that when the grades of the employees affected were lowered specific differentials were established and some employees received low environmental differentials while others received higher differentials. Pursuant to the Department's determination as indicated above we understand that those employees who were reduced in grade and assigned a low rate differential were entitled to receive the same pay when restored to their former grades either by virtue of the two rates being the same or under the pay savings provision of Federal Personnel Manual (FPM) Supplement 532-1, section S8-71(5), quoted below. On the other hand those employees who were assigned higher rate differentials upon grade reduction were entitled to receive less pay upon restoration to their former grades. The Department has advised the latter class of employees that they received excess payments during the period they were erroneously paid at the lower pay rates with the higher differentials and that such excess payments are subject to waiver under the provisions of 5 U.S.C. 5584. The affected employees, through their union, contend that they are entitled to pay at the restored pay rates plus the appropriate environmental differentials which were determined to be applicable to their positions upon implementation of the CFWS environmental pay differential plan. In support of their contention they cite decision B-170182, December 26, 1973. That decision held that when it was determined that a differential under subchapter S8-7 and Appendix J of FPM Supplement 532-1 was applicable on the effective date of such regulations, November 1, 1970, it was payable from that date although such determination was made at a later date.

Section S8-7c, FPM Supplement 532-1, provides in pertinent part:

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"* * * Exposure to a hazard, physical hardship, or working condition listed in Appendix J is not taken into consideration in the job-grading process, and additional pay for exposure to these conditions is provided only through the environmental differentials authorized by this section.* * *"

Section S8-71(5) of the FPM Supplement provides:

"(5) When the pay grade of an employee's position is reduced in order to eliminate consideration from the grading process of a hazard, physical hardship, or working condition of an unusual nature as provided for in Appendix J, and when it is clearly established that the consideration directly resulted in at least one additional grade, the employee's rate of pay will be the higher of:

"(a) His rate of pay before the job grading action was taken; or

"(b) The scheduled rate of pay for his position after the job grading action plus the appropriate pay differential."

In decision B-176051, supra, it was held that the provisions of the FPM Supplement did not cover the situation where a reduction in grade to eliminate a "built-in" differential and to assign a separate differential was delayed beyond the established date for conversion. Therefore, it was held that an employee was entitled to the pay of his grade with a "built-in" differential until the position had been properly downgraded. That case also involved the payment of a separate differential in addition to the "built-in" differential under the old system. It was held that the separate differential paid under the old system as well as the "built-in" differential should be paid for the period before the position was properly downgraded. However, the differential under the new CFWS was not authorized to be paid for that period.

In the instant case the employees involved occupied positions the pay rates of which included a "built-in" environmental differential. Pursuant to the provisions of the FPM Supplement the Department of

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the Navy downgraded the positions of the employees involved to eliminate the "built-in" differential and set an appropriate separate differential. The Civil Service Commission held that such actions were procedurally defective and ordered the employees restored to their former grades. Since the employees were not properly downgraded and their positions had a "built-in" differential the Department of the Navy held that they were entitled to their former pay rates without any additional differential under the FPM Supplement. We have considered the contention of the employees that decision B-170152, supra, should govern their pay entitlement instead of B-176051, supra. However, in B-170152 the employees' pay rates did not have a "built-in" differential and the agency held that the employees were not entitled to any differential. Subsequently the agency accepted an arbitrator's determination that the employees were entitled to a differential. Since the agency in the instant case has at all times recognized that the employees were entitled to a differential, the question of whether or not to pay a differential from the effective date of the FPM Supplement or from the date of a determination that an environmental differential is payable is not involved. Rather the question is the rate of the differential during the periods when the employees' reductions in grade were in force. The FPM Supplement provides that upon conversion thereunder the pay of positions with "built-in" differentials will be adjusted to eliminate such "built-in" differential and the employee's grade reduced if the inclusion of the differential resulted in an increase of at least one grade. An appropriate differential was to be assigned to the converted position. There is no provision that the employee may receive a "built-in" differential plus a differential determined in accordance with the FPM Supplement.

In view of the above and since the employees were not properly downgraded, we hold that the employees are entitled only to the pay of the grades to which they were restored until such time as they are properly downgraded and assigned appropriate environmental differentials in accordance with the provisions of the FPM Supplement. It would be inequitable to permit these employees to have the benefit of both the "built-in" differential applicable under the old system and the "add-on" differential applicable under the new system. Further, it was held in B-176051, supra, that employees were entitled to pay under the old system until they had been properly converted to the new system even though the conversion was unavoidably delayed beyond the date established by the CSC for such conversion.

It is also noted that section 5596 of title 5, United States Code, provides that an employee of an agency who, on the basis of a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to the pay, allowances, or differentials, as applicable, that the employee normally would have earned during the period if the personnel action had not occurred.

The employees in question all were restored to their former positions in which they were entitled to higher basic pay pursuant to an order of the CSC and each is entitled to backpay benefits to the extent authorized by the provisions 5 U.S.C. 5596 which reads, in part, as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation."

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Under the quoted provision the most an employee is entitled to is the pay he would have received had he remained continuously in the position to which he subsequently was restored. There is no authority under which he may be paid the higher pay of the former position which included the built-in differential and in addition the differential pay that would have been payable had he remained in the new position. Following restoration he would continue in the old position until, by an appropriate personnel action, his status is changed.

In recomputing the pay, allowances, and differentials the agency shall include changes in pay rates by reason of wage surveys, administrative action, law, or other changes of general application; changes in allowances or differential rates: within-grade or step increases or other periodic increases which would otherwise have become due; or any other changes which would affect the amount of pay, allowances, and differentials which the employee would have earned had it not been for the unjustified personnel action. Thus, under that provision, also, it was appropriate for the Department to recompute the pay of the employees involved under the old system without regard to entitlements under the new system.

If after restoring the employees retroactively to their former grades with their salaries computed in the manner described above it is determined that the employees have been overpaid because the wages of the lower grades plus the environmental differential were in excess of the wages in the higher grade, the employees concerned are indebted to the Government for such overpayments. However, such overpayments would be subject to waiver under 5 U.S.C. 5584 either by the Comptroller General or the Secretary of the Navy as the case may be. See 4 CFR 91.1 to 93.3.

R.F.KELLER

[Deputy] Comptroller General
of the United States