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**DECISION**



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

*L. Wilcox  
Air Trans*

**FILE:** B-189969

**DATE:** February 8, 1978

**MATTER OF:** NASA employees - compensation - administratively determined rates

- DIGEST:**
1. NASA employees, whose rates of pay are established under 42 U. S. C. § 2473(c)(2), claim compensation at maximum rate of General Schedule instead of at lower rates set by NASA. Employees contend that they would have earned \$47,500 in General Schedule positions they held prior to appointment to NASA's excepted service. Claims are denied since employees are entitled only to salaries of excepted positions held and such salaries have no relation to General Schedule salaries except that the maximum rates payable may not exceed highest rate for GS-18.
  2. NASA employees holding positions in NASA's excepted service claim compensation at rate of \$47,500 rather than lower rates set by NASA. They contend that individuals holding positions with same titles in other offices within NASA are compensated at \$47,500. Claims are denied since NASA's pay-setting authority at 42 U. S. C. § 2473(c)(2) permits pay distinctions based on individual responsibilities, competence, and contributions rather than on organizational level.

By letter dated August 24, 1977, 11 employees of the National Aeronautics and Space Administration (NASA) submitted claims for the difference between their rates of pay and \$47,500 retroactively to February 20, 1977. The claimants are Messrs. M. J. Aucremann, W. E. Brunk, L. B. C. Fong, M. L. Garbacz, E. W. Glahn, S. H. Hubbard, F. D. Kochendorfer, J. Lehmann, J. D. Rosenbert, E. R. Schmerling, and M. Tepper. They hold excepted positions and their compensation is fixed under the provisions of section 203(b) of the National Aeronautics and Space Act of 1958, as amended, now codified as 42 U. S. C. § 2473(c)(2), by section 4 of Pub. L. 93-409, September 3, 1974, 88 Stat. 1070.

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The \$47,500 amount for which claim is made represents the statutory maximum payable to General Schedule employees in grade GS-18, effective the beginning of the first pay period after February 16, 1977. Claimants are scientific, engineering, or administrative personnel whose salaries were adjusted subsequent to February 16, 1977, under the authority of 42 U. S. C. § 2473(c)(2) to rates less than \$47,500. The individual claimants are compensated at rates of pay ranging from \$37,800 to \$42,300.

Among the arguments presented in support of their claims for increased compensation, claimants suggest that NASA's action in setting their salaries at rates less than \$47,500 may have been based in part on improper considerations of age. We understand that the 11 claimants have filed a formal class age discrimination complaint before the Federal Employee's Appeal Authority. Inasmuch as the disposition of allegations of discrimination based on age is a matter properly within the jurisdiction of that administrative body, the matter will not be addressed in this decision.

The basis for the claim is otherwise presented as follows:

"We \* \* \* hereby file a claim \* \* \* for compensation to which we are entitled under the Quadrennial Executive Pay Adjustment (effective February 20, 1977). We believe that we are entitled to the full adjustment of our salary to \$47,500 per annum on the basis that while here at NASA we had attained the equivalent of actual senior competitive service supergrade levels as detailed in the attachment (Enclosure 1). NASA was originally granted 425 excepted service positions to induce professionals with special expertise to join the Agency.

"This claim is based upon the inequitable and inconsistent manner used by NASA in its application of the Federal Executive Pay Adjustment in granting the full raise or almost all of it to some excepted service personnel but not to others who hold equal rank and responsibility. The only difference between these two groups of senior excepted service professionals is their organizational affiliation. For example, as indicated by selected pages from the NASA telephone directory (Enclosure 2), the

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Director level in the Office of Tracking and Data Acquisition (T Codes) received either \$47,500 or \$46,300 per annum. On the other hand, in the Office of Applications (E Codes), some Directors receive only \$39,600 (Code EP) and only \$42,300 (Code ET) per annum.

"Similarly, in the Office of Space Flight (M Codes), Deputy Directors received \$47,500 or \$46,300 per annum; while in E Codes, the Deputy Directors received only \$41,000 or \$42,300 per annum. Further disparities are evident in senior staff level personnel designated as Managers. In Code R, the Manager of Materials received \$47,500, while in Code E, Managers or senior staff received only \$41,000 or \$42,000 per annum.

"It would appear from the wide disparities cited above that uniform criteria were not used to set salary levels for senior excepted service professionals to assure some reasonable degree of consistency among the five major technical organizational elements at NASA Headquarters. Further, a senior salary review board either failed to recognize the wide disparities or took no action to rectify the inequities."

The claimants also state that they are career civil servants with many years of service and if they had remained in the competitive service they would have been at least in step 10 of grade GS-15. Summarily stated, the 11 NASA employees claim that they should be compensated at rates of pay they would have received had they not been removed from General Schedule positions and appointed in NASA's excepted service. They also claim that the distinctions drawn by NASA's pay-setting mechanism do not accord equal treatment based on organizational level of the excepted positions held.

The pay rates of the 11 claimants are fixed by NASA under the following authority of 42 U.S.C. § 2473(c)(2):

"(2) to appoint and fix the compensation of such officers and employees as may be necessary to carry

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out such functions. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, except that (A) to the extent the Administrator deems such action necessary to the discharge of his responsibilities, he may appoint not more than four hundred and twenty-five of the scientific, engineering, and administrative personnel of the Administration without regard to such laws, and may fix the compensation of such personnel not in excess of the highest rate of grade 18 of the General Schedule \* \* \*."

Authority to appoint 260 employees without regard to the civil service laws and to fix their compensation was contained in section 203(b)(2) of the National Aeronautics and Space Act of 1958, Pub. L. 85-562, July 29, 1958, 72 Stat. 429. Section 5 of the NASA Appropriation Act for 1961, Pub. L. 86-481, June 1, 1960, 74 Stat. 153, raised the number of excepted positions to 290. The current number of 425 excepted positions was authorized by section 206 of the Classification Act Amendments of 1961, Pub. L. 87-367, October 4, 1961, 75 Stat. 791. Specific monetary limitations for the 425 positions were removed by section 1001(f) of the Postal Service and Federal Employees Salary Act of 1962, Pub. L. 87-793, October 11, 1962, 76 Stat. 864, and section 306(d) of the Government Employees Salary Reform Act of 1964, Pub. L. 88-426, August 14, 1964, 78 Stat. 429, and the ceiling was fixed at the highest rate payable for grade 18 of the General Schedule.

NASA's request for authority for 30 additional excepted positions in 1960 was supported by a memorandum entitled "Establishment and approval of excepted positions and salaries under the authority of section 203(b) of the National Aeronautics and Space Act." That memorandum is published at pages 242 through 245 of the Hearings Before the Committee on Science and Astronautics and Subcommittees Nos. 1, 2, 3, and 4, U.S. House of Representatives, 86th Cong., 2d Sess., on H.R. 10246 and states in pertinent part:

#### I. LEGAL BASIS

"The National Aeronautics and Space Act of 1958 provides in section 203(b)(2) that '(A) to the extent the

Administrator deems such action necessary to the discharge of his responsibilities, he may appoint and fix the compensation (up to a limit of \$19,000 a year, or up to a limit of \$21,000 a year for a maximum of 10 positions) of not more than 260 of the scientific, engineering, and administrative personnel of the Administration \* \* #1

"II. STEPS TO IMPLEMENT THE PERSONNEL AUTHORITY

"In order to provide a method of appointment to key positions in the new programs of the NASA as well as to assure the maintenance of the high morale level of those employees presently on our staff, the Administrator has approved the following items:

"1. A policy statement of objectives regarding the use of positions established under this authority.

"2. Salary intervals for positions established under this authority.

"3. Administrative methods for selecting candidates and establishing positions to be filled under this authority.

"4. Eligibility criteria for candidates for positions approved under this authority.

"III. POLICY OBJECTIVES REGARDING USE OF POSITIONS ESTABLISHED UNDER SECTION 203(B) AUTHORITY

"The positions established by the Administrator under authority of section 203(b) of the Space Act will be used solely to attract and retain the specially qualified scientific, engineering, and administrative personnel necessary to maintain this Nation's leadership in aeronautical and space activities.

"1. It is the Administrator's objective to set the compensation for such positions at levels as nearly competitive as possible with the salaries the incumbents could be expected to command in the best

modern research and development organizations in industry.

"2. Identical criteria for selection to expected positions will be used with respect to those formerly on the NACA staff and the new employees recruited for NASA.

"3. The position and salary will be identified with the incumbent or prospective incumbent and will exist only during the period the position is occupied by such incumbent.

"IV. SALARY LEVELS FOR POSITIONS ESTABLISHED UNDER THIS AUTHORITY

"1. For not to exceed 250 positions, salary scales in the range of \$14,500 to \$19,000 will be established, initially in \$500 levels. For not to exceed 10 other positions, rates of \$20,000 or \$21,000 will be established.

"2. A minimum salary of \$14,500 for positions under this authority has been adopted in order to provide for an increase beyond the top-of-the-grade rates being paid in GS-15 (\$13,970). The Administration proposes to recognize, through use of 203(b) position authority, only those with a competence and level of responsibility clearly beyond what can reasonably be expected from employees at the GS-15 level.

"3. Depending upon the particular eligibility criteria applicable to each individual, appointments may be made at any \$500 increment level within the \$14,500 to \$19,000 range. It is a NASA objective to provide pay adjustments in recognition of performance rather than offer automatic salary increases through lapse of time.

\* \* \* \* \*

"VI. ELIGIBILITY CRITERIA

"The specific determination of an individual's salary will be based insofar as practicable upon the application of the following criteria in assessing an individual's competence:

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"\$21,000

"Outstanding, internationally known, and distinguished scientists who direct the several broadest areas of aeronautical and space research or developments or occupy the highest positions in planning, evaluation, or direction of the Nation's program.

"\$20,000

"Outstanding directors of the largest and most important research centers of major importance in the Nation's aeronautical and space research and development programs; or outstanding individuals in the most important top executive or staff positions of the administration.

"Scientists or administrators who head major broad research, development, or administrative programs, who are nationally known to have had a major influence on their broad areas and who rank with the top few experts in their areas of research, development, or administration. Also independent, internationally known scientists or other key staff officials or executives who have a personal record of sustained and distinguished major contributions which have had far reaching influence in their field.

"\$18,500

"Individuals who both by their direction of important research or development programs and by their own contributions and leadership in a scientific or other area are recognized as being outstanding leaders in their field.

"\$17,000 to \$18,000

"Outstanding heads of important research, development, or administrative programs who have made substantial contribution of broad influence in their field of work in a manner which has earned them a national reputation of high standing and promise.

"Independent consultants and authorities in specialized research, development, or other areas, whose work and contributions are well known both in this country and abroad and who are considered among the few top specialists in their fields.

"\$14,500 to \$16,500

"Heads of either broad or highly specialized research or development programs (including independent researchers of exceptional talent) whose contributions have received at least national recognition and whose potential for growth in the broader and more significant scientific or development areas seem sure.

"Also heads of key administrative or technical service programs or other key staff assistants whose outstanding performance in the direction of their program is unquestioned and their promise of future growth seems certain.

"An individual will be placed in the lower, the intermediate, or the upper level of any of the two above-salary ranges in accordance with a determination of his maturity, his previous rate of advancement and his relative value to the administration in relation to the individuals who are in the same class level.

"Many, though not all, individuals of superior talent, ability, and creativeness naturally tend to be placed in organizational positions of increasing importance and level. By this means the organization seeks to widen his capabilities for contribution by enabling him to work through and be assisted by others. Thus organizational level tends to be an indication or correlate of ability but no automatic assurance of continued excellence. Therefore, evaluation for assignment to excepted positions and salary levels shall be determined primarily in relation to the competence of individuals rather than to the organization levels at which the incumbents may be working.

"Accordingly, it will be expected that there will be a considerable range of as much as \$2,500 in the salaries paid individuals with presumably equal organizational status.



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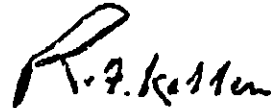
For example, top leaders of broad NASA activities will be compensated at maximums ranging to \$21,000; the maximum for division chiefs in excepted positions will be up to \$18,000; the maximum for assistant division chiefs in excepted positions will be up to \$17,000; and the maximum for those branch chiefs in excepted positions will be up to \$16,000."

The claimants' contention with respect to alleged inconsistencies in determining rates of pay is directed principally to the fact that individuals holding Director, Deputy Director, and Manager positions within certain offices receive less pay than individuals holding similar positions within other offices. Based on a review of the procedures for establishing rates of pay within NASA's excepted services, as outlined in the above-quoted memorandum and implemented as early as 1960, it appears that NASA has long construed its authority to fix the compensation of individuals appointed without regard to the civil service laws as permitting distinctions in pay based on other than organizational level. We specifically note the statement that evaluation for salary levels shall be determined primarily in relation to the competence of individuals rather than to the organization level at which he may be working. Given the fact that 42 U.S.C. § 2473(c)(2) gives NASA broad authority to establish rates of pay without regard to the principles of classification by duties encompassed by the civil service laws and regulations, and its long-standing interpretation of that authority as permitting the determination of salary levels based on the employees' responsibilities, performance, and contributions, we are unable to find that NASA is constrained to ascribe equivalent rates of pay to positions of equal level within its different offices, or even within the same office. The broad congressional grant of administrative discretion to NASA to establish rates of pay for its excepted employees carries with it a concomitantly limited scope of administrative and judicial review. See Benevento et al. v. United States, 198 Ct. Cl. 772, cert. den. 409 U.S. 1038. Since the salary rate determinations by NASA in this case appear to be rationally based on considerations not only of organizational responsibility but of the competence and particular contributions of the individual employees, they do not appear to be either arbitrary or capricious. Therefore, they are not subject to further scrutiny by this Office.

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The contention that the 11 claimants are entitled to the rates of pay they would have earned had they continued in the General Schedule positions they held prior to appointment to the excepted service is wholly without merit. They are entitled only to the pay of the positions they hold. The positions within NASA's excepted service have no relationship to the General Schedule except that the rates of such positions may not exceed the highest rate of grade GS-18.

For the foregoing reasons the compensation claims of the 11 NASA employees are denied.



Deputy Comptroller General  
of the United States

