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

PLM II

[Claim Involving

FILE: B-194368 DATE: November 12, 1980

MATTER OF: Makoto Sawada - Nonforeign differential and cost-of-living allowance]

DIGEST: To accommodate 25 percent statutory limitation on nonforeign differential and allowance payable under 5 U.S.C. 5941, Navy paid 25 percent nonforeign differential for Guam to employee who was eligible for that differential as well as 15 percent nonforeign cost-of-living allowance for Hawaii. Absent regulation directing payment of nonforeign cost-of-living allowance first, Navy was not obligated to pay employee 15 percent nonforeign cost-of-living allowance and reduced 10 percent nonforeign differential even though that combination of nontaxable allowance and taxable differential would result in greater tax benefit to employees.

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Mr. Makoto Sawada, a civilian employee of the Department of the Navy, requests reconsideration of our Claims Division's May 4, 1978 denial of his claim for cost-of-living allowance (COLA) in lieu of nonforeign differential for periods he was detailed from his post of regular assignment in Hawaii to Guam, both nonforeign areas for purposes of 5 U.S.C. 5941.

Mr. Sawada's claim involves the following three periods during which he was assigned to Guam: February 15, 1972, to May 17, 1972; June 12, 1972, to August 8, 1972; and May 19, 1973, to August 19, 1973. (For these periods a nonforeign COLA of 15 percent was established for Mr. Sawada's regular post of duty in Hawaii.) Because 5 C.F.R. 591.401(h)(1) (1972) provides that payment of the COLA "at the rate prescribed for the post of regular assignment shall continue for all periods of detail from the post," Mr. Sawada continued to be entitled to the 15 percent COLA for Hawaii while assigned to temporary duty in Guam.) In addition, having aggregated more than 42 days on detail away from Hawaii, Mr. Sawada became

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concurrently entitled to the 25 percent nonforeign differential prescribed for Guam during the periods indicated above. In this regard, 5 C.F.R. 591.401(h)(2) (1972) provides:

> "* * * When an employee * * * has aggregated 42 days in a pay status at a differential post, he shall thereafter be paid the differential prescribed for each post of detail, but not for any time in transit. In any case the total amount of allowances and differentials payable under this part is restricted to 25 percent of the employee's basic pay as specified in section 5941 of title 5, United States Code, § 591.304, and paragraph (b) of this section. * * *." (Emphasis added.)

To accommodate the 25 percent aggregate limitation, the Navy paid Mr. Sawada only the 25 percent nonforeign differential for Guam.

While he does not claim that he is entitled to more than the 25 percent amount which he has been paid in the form of a nonforeign differential, Mr. Sawada claims that he should have been paid that same amount in the form of a 15 percent COLA and a reduced 10 percent differential. As he points out, the composition of the 25 percent amount is significant, not in terms of his gross pay, but because the COLA is not taxable whereas the differential he received is subject to Federal income taxation. In appealing from the Claims Division's adverse determination, Mr. Sawada states that the basis for it is unclear. In addition he notes that his duty station was at all times in Hawaii, and he takes exception to the Claims Division's statement that he was detailed to Guam. He points out that a detail was not reported on the Standard Form 52 or other appropriate document in accordance with the requirements of Chapter 300, subchapter 8-4c of the Federal Personnel Manual (FPM).

With regard to Mr. Sawada's contention that he was not detailed to Guam, we point out that the term "detail"

is not used in the sense of a temporary assignment to a different position as contemplated by FPM Chapter 300, subchapter 8. In the context of his temporary duty assignment to Guam and for purposes of his entitlement to the nonforeign allowance and differential payable under 5 U.S.C. 5941, the term "detail" is defined at 5 C.F.R. 591.101(d) (1972) to mean:

> "* * * the temporary assignment or temporary duty of an employee away from his post of regular assignment * * *."

Mr. Sawada's contention that his permanent duty station was at all times in Hawaii is consistent with this definition as is the Claims Division's use of the term "detail" to describe the nature of his assignment to Guam.

The Claims Division concluded that because Mr. Sawada was entitled to the 25 percent differential for Guam, the 25 percent ceiling on aggregate payments of COLA and differential precluded his receipt of any amount as a COLA. We do no find that the applicable regulations are entirely clear on this point. Where an employee, entitled to a nonforeign COLA at his regular post of assignment is detailed to a different post for which a nonforeign differential is prescribed we find no requirement that the full differential be paid before any COLA. In fact, we find that the regulations provide no guidance in applying the 25 percent aggregate limitation to the case at hand.

The regulations specifically set forth the manner in which the 25 percent limitation is to be applied to the case in which an employee is entitled to a nonforeign COLA and a nonforeign differential for the same post. Under the following provision at 5 C.F.R. 591.304, the COLA is paid first:

> "* * * When both an allowance and a differential are authorized at one post, the eligible employee shall be paid the full allowance first, and in addition, so much of the differential as will not cause

> the total amount for allowances and differentials to exceed a rate of 25 percent of his rate of basic pay."

In contrast, 5 C.F.R. 591.401(h)(1) (1972) requires the nonforeign COLA to be reduced for periods that an employee is detailed to a foreign post for which a foreign post differential is prescribed under 5 U.S.C. 5925 if the two aggregate more than 25 percent of the employee's rate of basic pay. The regulations do not address the case in which an employee is entitled to a nonforeign COLA for his regular post of assignment as well as a nonforeign differential for a different post and the two entitlements exceed 25 percent.

Absent any specific directive and given the statutory restriction on payments aggregating more than 25 percent, we know of nothing to preclude the Navy from designating the payment to Mr. Sawada as nonforeign differential for Guam to the exclusion of any amount for COLA. In any event, because Mr. Sawada has received the 25 percent gross amount to which he is entitled, there could be no further liability on the Navy's part for any additional amount. The tax consequence of the Navy's designation of the 25 percent payment is a matter between the employee and the Internal Revenue Service.

Accordingly, we find no basis to conclude that Mr. Sawada is entitled to an additional payment of allowances in the circumstances. The Claims Division's denial of Mr. Sawada's claim is therefore affirmed.

Harry R. Van Cleve

For the Comptroller General
of the United States