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DECISION



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

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FILE: B-201821

DATE: February 25, 1982

MATTER OF: Professional Air Traffic Controllers
Organization - Cost-of-Living Allowances

DIGEST: Air traffic controllers request that cost-of-living allowance (COLA) in Molokai, Hawaii, be computed under private housing category, since, although they occupy Federal housing, they do not do so as a condition of their civilian employment. Even though Federal Personnel Manual (FPM) Letter 591-29, October 30, 1978, defines Federal housing category as applying only to those who occupy Federal housing as a condition of their employment, the FPM Letter's interpretation is erroneous since it misinterprets Executive Order No. 12,070, as amended, which refers to Federal housing as that occupied as a result of civilian employment. Therefore, the manner in which the Federal Aviation Administration has been computing the COLA is correct.

This decision is being issued at the request of the Professional Air Traffic Controllers Organization (PATCO) and the Federal Aviation Administration (FAA). It concerns the appropriate rate at which FAA employees should be paid cost-of-living allowances (COLA) at Kalae, Molokai, Hawaii. The specific issue is whether FAA employees residing in Federal housing on Molokai may have their COLA computed under the "Local Retail/Private Housing" category, as PATCO argues, or whether it should be computed under the "Local Retail/Federal Housing" category as FAA has been doing. For the reasons stated below, we hold that FAA's method of computing the COLA is proper.

The Office of Personnel Management (OPM) determines the COLA rates in question and issues regulations under the governing statute, 5 U.S.C. § 5941 (1976), and Executive Order No. 10,000, 13 Fed. Reg. 5453 (1948), as amended, reprinted under 5 U.S.C. § 5941, (Supp. III, 1979). Clark Edwards, B-189055, November 30, 1977. Accordingly, we requested OPM's comments on the submission. Although

PATCO has supplied us with its views, the FAA has chosen not to provide us with its rationale for its actions.

The record shows that since October 30, 1978, FAA employees residing in Federal Housing in Kalae, Molokai, have been authorized the allowance for "Local Retail/Federal Housing" rather than the allowance for "Local Retail/Private Housing." The PATCO, however, argues that under Federal Personnel Manual (FPM) Letter 591-29, October 30, 1978, entitled "Nonforeign Area Cost of Living Allowances," FAA employees in Molokai are entitled to a COLA rate of 15 percent by virtue of their being under the "Local Retail/Private Housing" category. No allowance was provided in FPM Letter 591-29 for employees in Hawaii in the "Local Retail/Federal Housing" category, because the survey was inadequate and needed to be redone. However, the FPM letter defines the two housing categories as follows:

"Definitions of Allowance Categories

The following definitions of the various allowance categories identified in the tables in this attachment shall be used in determining employee eligibility for the appropriate allowance rate:

"Allowance Category

Definition

"Local Retail/
Private Housing

This category includes those Federal employees who purchase goods and services from private retail establishments and who occupy housing units that are privately owned or rented. It also includes those employees who do not fall into one of the other allowance categories.

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"Local Retail/
Federal Housing

This category includes those Federal employees who purchase goods and services from private retail establishments and who occupy, as a condition of their Federal civilian employment, housing units that are owned or leased by a Federal agency * * *."

The above provisions were repeated in FPM Letter 531-32, February 20, 1979.

The PATCO argues that although FAA employees on Molokai, Hawaii, do occupy Federal housing, they do not come within the Federal housing category, quoted above, since they do not occupy Federal housing as a condition of their employment. Rather, PATCO argues that, since the private housing category includes " * * * those employees who do not fall into one of the other allowance categories," then the employees occupying Federal housing, but not as a condition of their employment, must be paid the allowance provided for under the private housing category. The FAA does not contest that the employees in question do not occupy Federal housing as a condition of their employment.

The Office of Personnel Management refers us to Executive Order No. 12,070, as amended, 43 Fed. Reg. 28977 (1978), reprinted under 5 U.S.C. § 5941 (Supp. III, 1979). That Executive order amended Executive Order No. 10,000 which was issued pursuant to the authority granted the President in 5 U.S.C. § 5941, to prescribe regulations establishing the rates and defining the area, groups of positions, and classes of employees to which each cost-of-living allowance rate applies. Executive Order No. 12,070, which became effective June 30, 1978, states:

"1-101. The requirement of Section 205(b)(2) of Executive Order No. 10000, as amended, that consideration be given to quarters or subsistence, commissary

or other purchasing privileges, in determining cost of living allowance rates, is suspended except to the extent that such privileges are furnished as a result of Federal civilian employment.

"1-102. Quarters or subsistence, commissary or other purchasing privileges, shall not be taken into consideration in determining cost of living allowance rates of employees who are furnished such facilities as a result of Federal civilian employment but who do not use them."

As OPM points out, Executive Order No. 12,070 states that the reduced allowance shall not apply to persons who are furnished quarters but who do not use them. Implicit in this, therefore, is the intent to reduce the allowance of those who have the option of using Federal housing privileges and who, in fact, do so.

More significantly, there is a crucial distinction in the wording found in Executive Order No. 12,070 from that found in FPM Letters 591-29 and 32. The Executive order states that consideration be given to quarters privileges in determining COLA rates as to those employees furnished Government quarters "as a result" of Federal civilian employment. The FPM Letters, however, take into account quarters privileges in reducing the allowance only if the quarters are furnished "as a condition" of the employee's Federal civilian employment. The FPM Letters, therefore, go beyond mere implementation of the Executive order and actually restrict the application of the Executive order to a more limited group of employees than that contemplated in the Executive order.

The Office of Personnel Management recognized that FPM Letters 591-29 and 591-32 were at variance with Executive Order No. 12,070, and it clarified its position in FPM Letter 591-37, September 12, 1980, to include in the Federal Housing category those employees,

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"who occupy, as a result of their Federal civilian employment, housing units that are owned or leased by a federal agency." The purpose of the change was to make it clear that this category was not limited to employees who are required to reside in such housing.

The implementing instructions in the Federal Personnel Manual are governed by the Executive order and cannot vary the Executive order's requirements, 52 Comp. Gen. 794 (1973). We hold therefore that FPM Letters 591-29 and 591-32 are invalid insofar as they may be interpreted to preclude the reduction of the cost-of-living allowance to employees occupying Federal housing as a result, but not as a condition, of their employment. Thus, the FAA properly computed the cost-of-living allowance for its employees who resided in Federal housing on Molokai, Hawaii.

Wilton J. Rowland
for Comptroller General
of the United States