The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Helen M. Jew - Highest Previous Rate Rule - Intermittent Employment

File: B-230840

Date: August 18, 1988

DIGEST

An employee who previously held a position as an intermittent employee is not eligible for highest previous rate consideration upon reemployment under 5 C.F.R. § 531.203(c) (1987), since the highest previous rate rule is based upon a regularly scheduled tour of duty and intermittent employment by definition does not involve a regularly scheduled tour of duty. Moreover, in this case the employee was properly classified as an intermittent employee inasmuch as the employee independently scheduled her work and the days and hours worked fluctuated each pay period.

DECISION

Ms. Helen M. Jew has appealed the determination by our Claims Group (Z-2865303, dated Dec. 28, 1987) denying her claim for a retroactive step increase and backpay since the highest previous rate rule in 5 C.F.R. § 531.203 (1987) applies only to full-time and part-time employees and not to intermittent employees. For the reasons stated below, we sustain the Claims Group's determination.

BACKGROUND

Ms. Jew was an intermittent employee grade GS-12, step 1, Equal Employment Specialist with the Department of the Navy (Navy) from March 2, 1986 through January 5, 1987, when she was separated as part of a reduction-in-force. Subsequently, Ms. Jew was reemployed by the Equal Employment Opportunity Commission (EEOC) on April 6, 1987, and she was placed in grade GS-11, step 4. If the EEOC had applied the highest previous rate rule contained in 5 C.F.R. § 531.203(c) (1987), under which a reemployed employee's rate of pay may be set at the highest previous rate earned on a regular tour of duty, Ms. Jew would have been placed in grade GS-11, step 7. The EEOC declined to apply this rule based on the agency's position that intermittent employment

by definition is not a "regular tour of duty" as defined by 5 C.F.R. § 531.203(d)(1).

Ms. Jew requested our review of EEOC's decision not to apply the highest previous rate rule in setting her rate of pay. Her position is that since she had worked 39 hours each week for the 10 months that she was employed by the Navy, she was qualified to receive her highest previous rate. She requested that the higher rate be made retroactive to April 6, 1987.

By letter dated December 22, 1987, our Claims Group denied Ms. Jew's request for a retroactive step increase and backpay based on a determination that a "regular tour of duty" for purposes of the highest previous rate rule in 5 C.F.R. § 531.203(d)(1) applies only to full-time and part-time employees and not to intermittent employees.

Ms. Jew now seeks reconsideration of our Claims Group determination, reiterating her belief that her tour of duty with the Navy constituted a regular tour of duty for purposes of the highest previous rate rule since, for the 10-month period, she had a "weekly tour of duty" of 39 hours per week. She also noted that she was promoted to a grade GS-12, step 1 at EEOC on October 25, 1987, and on December 23, 1987, she was granted a step increase to step 2 of grade GS-12. Ms. Jew questioned why the EEOC would consider her 10-month period as a grade GS-12 at Navy for purposes of determining time-in-grade for step increases but did not credit that period when determining her starting salary rate in April 1987.

We requested and received comments from the Naval Civilian Personnel Center, Walnut Creek, California, and that report states that when Ms. Jew was selected for her position with the Navy, she was given the option to elect either a temporary part-time or intermittent position. Ms. Jew elected to be an intermittent employee. The report further states that Ms. Jew's schedule of work was such that her hours and days of work fluctuated every pay period not to exceed 39 hours. The report noted that, as an investigator of discrimination complaints, Ms. Jew independently scheduled her work each pay period based on the caseload.

We also requested and received comments from the District Director, San Francisco District Office, EEOC, and that report states that the waiting period for Ms. Jew's within-grade step increase to grade GS-12, step 2, did in fact include the time-in-grade Ms. Jew had previously acquired while working on an intermittent appointment at Navy as a grade GS-12, step 1. However, the report points out that

the within-grade approval is not related to the highest previous rate issue since the deciding factors for a within-grade increase are satisfactory performance and time-in-grade at the GS-level, whereas the highest previous rate issue revolves around her having served on an intermittent appointment which, by definition, is not a regularly scheduled tour of duty.

OPINION

Under the provisions of 5 U.S.C. § 5334(a) (1982) and 5 C.F.R. § 531.203(c) and (d) (1987), an employee who is reemployed, reassigned, promoted or demoted, or whose type of appointment is changed may be paid at the highest rate of the grade which does not exceed the employee's highest previous rate. This is referred to as the highest previous rate rule. Carma A. Thomas, B-212833, June 4, 1984. Our decisions have consistently held that it is within the agency's discretion to fix the initial salary rate at the minimum salary of the grade to which appointed and that an employee has no vested right upon transfer or reemployment to receive the highest salary rate previously paid to the employee. See Barbara J. Cox, 65 Comp. Gen. 517 (1986), and cases cited therein.

The highest previous rate is based on a regular tour of duty at that rate under an appointment not limited to 90 days or less, or for the continuous period of not less than 90 days under one or more appointments without a break in service. 5 C.F.R. § 531.203(d). "Tour of duty" is defined in 5 C.F.R. § 610.102(h) as the hours of a day (a daily tour of duty) and the days of the week (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek. "Regularly scheduled" work is defined in 5 C.F.R. § 610.102(g) as work that is scheduled in advance of an administrative workweek.

"Intermittent employment" is defined in the Federal Personnel Manual, ch. 340, § 4-1a (Inst. 321, April 3, 1985) as follows:

> ". . .'intermittent employment' means nonfull-time employment in which employees serve under an excepted or competitive service appointment in tenure group I or II without a regularly scheduled tour of duty. . . . 'Regularly scheduled' and 'tour of duty' have the meaning given those terms in 5 C.F.R. 610.102." (Emphasis added.)

As the underscored language indicates, intermittent employment by definition would not constitute the "regular tour of duty" required by the highest previous rate rule.

The leave authority contained in 5 U.S.C. § 6301(2)(B)(II) (1982), which requires that an employee work "a regular tour of duty during the administrative workweek" to be entitled to leave benefits, is analogous to the language in 5 C.F.R. § 531.203(d) pertaining to the highest previous rate rule. In 31 Comp. Gen. 581 (1952), we interpreted the leave provision as contemplating "a definite and certain time, day and/or hour of any day, during the workweek when the employee regularly will be required to perform duty." Unless a specific time is established in advance during an administrative workweek when an employee is regularly required to perform duty, the employee cannot earn leave.

Regarding Ms. Jew's contention that she in fact worked a regular schedule, FPM, Ch. 340, § 4-1c provides as follows:

> "c. Changing an intermittent to part time. When an agency schedules an intermittent employee, in advance of the pay period, to work at some time during each administrative week for more than two consecutive pay periods, the agency is required to change the employee's work schedule from intermittent to part time. . . . The employee would then be entitled to the benefits appropriate to the work schedule and appointment . . . ." (Emphasis supplied.)

Under this provision, Ms. Jew believes she was eligible for such a conversion from intermittent to part-time at the Navy based upon her work schedule. She would then be eligible at the EEOC for highest previous rate consideration.

We have specifically recognized that the mere designation of an employee's appointment as "intermittent" is not conclusive. We will look to the nature of the actual work performed and not the official job description in determining whether an employee has a regular tour of duty. For example, in Kenneth L. Nash, 57 Comp. Gen. 82 (1977), we held that an Immigration and Naturalization Service inspector whose position was designated "intermittent" was nonetheless entitled to annual leave benefits as a part-time employee having an established regular tour of duty where he was routinely issued a form scheduling his work at specific times and dates for each of the two workweeks of the next pay period.

However, in James P. Wendel, B-206035, Apr. 26, 1982, we held that a Department of the Army civilian employee appointed as a commissary store worker on an intermittent basis may not be retroactively granted a regular part-time appointment in the absence of evidence establishing that he worked a prescheduled, continuous, regular tour of duty. The employee in Wendel did not produce evidence sufficient to counter the administrative determination that he was not provided specific duty hours in advance, and the listing of hours worked showed that the daily hours of work he was required to perform varied each week.

Similarly, in Copp Collins, 58 Comp. Gen. 167 (1978), we ruled that an expert appointed on an intermittent basis was not entitled to leave even though he was compensated for 80 hours per pay period for substantially the full term of his employment, since his working hours in large part were determined by the demands of the particular tasks on which he was working, were within his discretion, and he was not required in advance to report at a definite and certain time within each workweek. See also Dr. David Pass, B-194021, Feb. 11, 1980; John W. Mantrau, B-191915, Sept. 29, 1978.

The record before us does not clearly establish that Ms. Jew served a regular tour of duty scheduled in advance under which she was required to perform duty at a definite time during an administrative workweek. Although the work schedules in the record indicate that she generally worked 39 hours a week, the actual days and hours worked varied each pay period. Further, Ms. Jew was responsible for setting her schedule based on her caseload and the hours she worked each week were largely within her discretion. Since Ms. Jew has not produced evidence sufficient to counter the administrative determination that she was not provided specific duty hours in advance, we cannot authorize a retroactive change in status on the basis of her claimed continuous regular tour of duty.

Regarding Ms. Jew's question concerning her within-grade increase, we agree with EEOC's response that the criteria for a within-grade increase and for highest previous rate rule consideration are different.

Accordingly, on the basis of the record before us, we must sustain the action of our Claims Group in denying Ms. Jew's claim.

for Milton J. Socolar
Comptroller General
of the United States