



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hansen's Disease Center -
Retroactive Payment of Overtime Pay
File: B-225960
Date: December 28, 1987

DIGEST

Employees' claim for retroactive overtime pay at the Gillis W. Long Hansen's Disease Center may be granted since such action is consistent with an act of Congress expressing approval of the overtime pay.

DECISION

The issue in this case is whether the Department of Health and Human Services may pay retroactive overtime pay to a group of employees at the Gillis W. Long Hansen's Disease Center. For the reasons stated hereafter, we conclude that the agency may make the retroactive payments.

BACKGROUND

Prior to April 7, 1986, the Public Health Service Act authorized additional pay of up to 50 percent of regular pay for civilian employees of the Public Health Service (PHS) assigned to duty involving intimate contact with persons afflicted with leprosy. 42 U.S.C. § 210(e) (1982). Under that law, such pay was to be "as provided by regulations of the President." This rulemaking authority was delegated to the Secretary of Health and Human Services by Executive Order 11140, section 1(f), January 30, 1964. The Secretary issued regulations implementing 42 U.S.C. § 210(e), under which, among other things, employees at the National Hansen's Disease Center^{1/} earned special pay at a rate of 25 percent of their base compensation. See 42 C.F.R. § 22.1 (1985).

On October 24, 1985, the Department of Health and Human Services published in the Federal Register a final

^{1/} The Center is now called the Gillis W. Long Hansen's Disease Center.

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regulation amending the existing regulation at 42 C.F.R. § 22.1 which had provided for special pay of 25 percent of base compensation. The new regulation eliminated this special pay effective January 5, 1986, for persons newly employed at or assigned to the Center on or after that date. The regulation called for the special pay to continue at the 25 percent rate for employees receiving it on January 4, 1986, but established a procedure for reducing the amount of special pay over a period of time to \$1,320 per year. Finally, the new regulation provided that this special pay could no longer cause an employee's aggregate pay to exceed the rate of basic pay for Level V of the Executive Schedule.

The period between the Federal Register publication (October 24, 1985) and the effective date of the new regulation (January 5, 1986) was provided to allow time for public comment and to meet the agency's legal and contractual obligations to Service Employees International Union (SEIU), 100, the exclusive representative bargaining unit for employees at the Center. Representatives of management and the union met on six separate occasions concerning the regulation. The parties failed to come to agreement on the implementation of the new regulation and jointly requested that the Federal Service Impasses Panel (FSIP) adopt a mediation-arbitration procedure to resolve their negotiation impasse. The FSIP notified the parties that it would resolve the impasse in a mediation-arbitration proceeding commencing April 17, 1986.

On April 7, 1986, with the enactment of the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law 99-272, 100 Stat. 82 ("COBRA"), the soon to be commenced mediation-arbitration proceeding was rendered moot. Specifically, the Act provided in section 17002(b), 100 Stat. 332:

"(b) EMPLOYEES AT THE GILLIS W. LONG HANSEN'S DISEASE CENTER. -- Section 208(e) of the Public Health Service Act (42 U.S.C. 210(e)) is amended to read as follows:

"(e) Any civilian employee of the Service who is employed at the Gillis W. Long Hansen's Disease Center on the date of the enactment of the Consolidated Omnibus Budget Reconciliation Act of 1985 shall be entitled to receive, in addition to any compensation to which the employee may otherwise be entitled and for so long as the employee remains employed at the Center, an amount equal to one-fourth of such compensation."

By enacting an entirely new version of section 208(e) of the Public Health Service Act, the COBRA provision terminated the general authority to prescribe by regulation special pay for Center employees. In its place, the new language provided a specific entitlement to special pay but only for persons employed at the Center on the date of enactment of COBRA, April 7, 1986. As the agency submission to our Office points out:

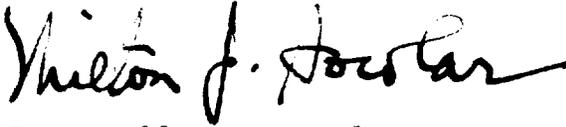
"* * * The effect of this provision was to eliminate the special pay authority from and after that date, to end the rulemaking authority that had been given to the President (and thence to the Secretary), and to grandfather all civilian employees as of that date at a straight 25% rate, without any reduction provision or aggregate pay cap such as the Department's regulation had imposed. Because this provision set the special pay level directly and terminated the rulemaking authority, the Department's regulation was effectively nullified from and after that date.* * *"

While the COBRA provision ended the bargaining impasse of the parties, it did not end this dispute. On January 17 and August 21, 1986, the union filed unfair labor practice complaints against the Center with the Federal Labor Relations Authority (FLRA), Region VI, in Dallas, Texas, alleging that the Center had not bargained in good faith regarding the final rule which went into effect on January 5, 1986. The union sought to restore full special pay for Center employees from January 5 to April 6, 1986. On August 29, 1986, FLRA, Region VI issued an unfair labor practice complaint and notice of hearing against the Public Health Service and the Center. The FLRA has postponed action on this matter pending our decision on whether the Center can retroactively pay its employees from January 5 to April 6, 1986, the special pay they would have received but for the final rule effective January 5, 1986.

DISCUSSION AND CONCLUSION

We have no objection to the retroactive payment of special pay to the affected employees. We are aware of no statutory or regulatory impediment to the payment. Moreover such payment would be in accord with the subsequent congressional action that rendered the regulation ineffective. Clearly, the proposal to allow the Center to retroactively abandon the regulation and pay its employees is in harmony with the COBRA provision that prospectively reinstated the special pay provision for incumbent employees of the Center.

Accordingly, we conclude that the Center may pay retroactively the individuals whose special pay was reduced between January 5 and April 6, 1986, under the now abandoned regulation.

for 
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