



Comptroller General
of the United States

142119

Washington, D.C. 20548

Decision

Matter of: Supplemental Retirement Benefits of President
of Radio Free Europe/Radio Liberty, Inc.

File: B-253469

Date: September 9, 1993

DIGEST

Supplemental Executive Retirement Plan benefits provided the president of Radio Free Europe/Radio Liberty, Inc., effectively are additions to salary in contravention of the salary cap set forth in 22 U.S.C. § 2882.

DECISION

The Chairman of the Board for International Broadcasting asks whether a supplemental retirement benefit provided the current president of Radio Free Europe/Radio Liberty, Inc. (RFE/RL), complies with 22 U.S.C. § 2882. Section 2882 limits appropriated funds that may be used for the president's "salary" to an annual rate not in excess of the rate payable for level IV of the Executive Schedule, currently \$115,700 per year.

For the reasons given below, we think supplemental retirement benefits effectively constitute additions to salary in contravention of the salary cap established by section 2882. Accordingly, it would not be proper to use federal funds to provide those benefits.

BACKGROUND

The Board for International Broadcasting (BIB) is an independent government agency established as the instrumentality for providing assistance to Radio Free Europe/Radio Liberty, Inc. RFE/RL is a private, nonprofit corporation wholly funded by United States annual grants through the BIB. The RFE/RL Board of Directors, which consists solely of the BIB members, is authorized to make all major policy determinations governing RFE/RL's operations and to appoint and fix the compensation of its managerial officers and employees. 22 U.S.C. §§ 2872-2873, 2880.

Mr. Ernest E. Pell was hired by contract to serve as president of RFE/RL, Inc., for 5 years, beginning

October 28, 1985. His benefits included (1) an annual salary equal to Executive Level IV; (2) a post allowance of \$10,000 (for housing); (3) a presidential allowance of \$15,000 "for expenses for which reimbursement would be impractical or impossible"; and (4) various other benefits/allowances (travel, insurance, health, car, etc.).

Mr. Pell's employment contract also included a Supplemental Executive Retirement Plan (SERP) because his rights to a pension under RFE/RL's regular pension plan would not have vested for 10 years.² The contract provided that RFE/RL annually would pay to the SERP 20 percent of Mr. Pell's base compensation.¹ The contract also provided that RFE/RL was to make payments to the SERP until Mr. Pell vested in the RFE/RL pension plan, or the date of termination of the employment agreement, whichever was sooner. Within 30 days after RFE/RL's obligations to make SERP payments ended, Mr. Pell was to notify RFE/RL of the time he wanted the payment of benefits to commence and the manner in which the payments were to be made; however, no payments were to be made while Mr. Pell was a full-time RFE/RL employee.

Contemporaneously, Mr. Pell and RFE/RL concluded a separate SERP agreement, which described the mechanics of the SERP contribution and basis for payment in greater detail. This agreement reiterated that SERP payments would end when Mr. Pell became vested in RFE/RL's regular pension plan.

The initial employment agreement was to run from October 28, 1985, to October 28, 1990. Mr. Pell and RFE/RL executed a superseding employment agreement on November 3, 1988, which ran from May 28, 1988, through May 28, 1993. The new agreement provided that the SERP was to remain in full force and effect in accordance with the original agreement.

While Mr. Pell was employed at RFE/RL, an amendment to the Employee Retirement Income Security Act (ERISA), Pub. L. No. 99-514, 100 Stat. 2447, had the effect of reducing the

¹Mr. Pell was not obligated to account for the expenditure of the presidential allowance.

²The pension plan for RFE/RL employees is noncontributory, and no fund is accumulated or computed on an individual employee basis. RFE/RL pays the entire cost based on actuarial advice as to the aggregate contributions needed for the pension trust to fund the aggregate pension liability. An individual's actual pension is based on salary level and years of service.

³The money was to be invested in an interest-bearing money market or investment account.

vesting period for the regular RFE/RL pension plan to 5 years. Under the change in the law, Mr. Pell was scheduled to vest in the regular pension plan on October 28, 1990, and SERP payments would end on that date. However, a few days before SERP payments were to stop, Mr. Pell and RFE/RL concluded an agreement, superseding all prior ones, to extend the SERP to December 31, 1991, and then for successive yearly periods. SERP contributions therefore were continued irrespective of Mr. Pell's vesting in the regular RFE/RL pension plan.⁴

BIB asks whether 22 U.S.C. § 2882 would preclude payment to Mr. Pell of RFE/RL's federally funded contributions to the SERP.⁵ BIB points out that while section 2882 applies only to "salary," its legislative history suggests that the Congress intended some limitation on benefits as well. BIB is concerned that the SERP might be considered a supplement to salary in excess of the salary cap established by that provision. Because of that concern, BIB directed that the SERP benefit not be included in any extension of Mr. Pell's contract beyond May 28, 1993.

DISCUSSION

Section 2882 was added to title 22 by the State Department Authorization Act for fiscal years 1984 and 1985, Pub. L. No. 98-164, 97 Stat. 1017, 1037, which amended the Board for International Broadcasting Act of 1973, Pub. L. No. 93-129, 87 Stat. 456. The conference report accompanying the law did not discuss the provision, but the conferees did adopt the House bill. H.R. Rep. No. 563, 98th Cong., 1st Sess. 75 (1983).

The House report stated that the House provision was to limit the amount of public funds that could be used to compensate the president of RFE/RL to an Executive Level IV salary and the normal allowances and benefits provided

⁴Counsel for RFE/RL points out that the benefits Mr. Pell would have received (beginning at age 62) if he had left RFE/RL at the end of his initial 5-year employment agreement would have compared poorly with those of high level federal employees who by the nature of their positions may well accumulate 30 years of creditable service. Counsel states that the RFE/RL Board of Directors decided to continue the SERP on a year-to-year basis to bring total pension benefits payable to Mr. Pell more closely in line with those of its top-level, long-term management employees.

⁵We understand that as of early May 1993, the SERP was valued at \$205,000, consisting of \$126,300 in direct RFE/RL contributions and \$78,500 in capital gains and interest.

RFE/RL employees under standard Department of State guidelines. The House report further explained that the provision was added in response to the substantial increase in salary and benefits granted Mr. Pell's immediate predecessor. H.R. Rep. No. 130, 98th Cong., 1st Sess. 78 (1983). In this regard, the report mentioned both the predecessor's base salary of \$95,000 and a deferred annuity benefit very similar to the SERP as concerns. The report concluded that "at a time of severe budgetary constraints and personnel cutbacks, the Committee believes that RFE/RL, Inc. should also exercise restraint." Id.⁶

The BIB Inspector General suggests that the SERP, which allows payment in a lump sum, is really a deferred compensation plan substantially similar to that provided the previous RFE/RL president, and criticized by Congress in 1983, rather than a true pension plan.

Counsel for RFE/RL contends that the SERP is consistent with section 2882. Counsel states that the SERP is not an addition to salary, but a form of retirement benefit provided to Mr. Pell because at the time of the initial employment agreement he would not have vested in RFE/RL's regular pension plan for 10 years. As no president had ever served for 10 years, RFE/RL's policy was to provide separate pension benefits to the person holding that office. It was intended that the benefits provided would closely conform Mr. Pell's status to that of senior level State Department officials. Counsel also points out that section 2882 addresses only salary, and thus does not on its face limit the retirement benefit package that RFE/RL could pay its chief executive.

We considered the relationship between "salary" and supplemental benefits in a series of cases involving the Tennessee Valley Authority (TVA). In B-205284, Nov. 16, 1981, we concluded that a pay plan providing retention payments of \$36,000 per year to executives who agreed to remain with TVA for an additional 3 years was established to circumvent a statutory salary limitation. In that case, TVA indicated it was experiencing difficulties retaining its top executives because of a pay compression problem.⁷ To remedy this, TVA made several attempts to have legislation passed that would make the salaries of top TVA executives

⁶A prior Senate report and Senate hearing expressed similar concerns. S. Rep. No. 685, 97th Cong., 2d Sess. 4, 20-23 (1982).

⁷The purchasing power of Level IV executive employees had decreased by about 40 percent between 1969 and 1981 due to high levels of inflation.

consistent with the salaries of private industry counterparts. After this proved unsuccessful, TVA officials established the described pay plan. They acknowledged that the new pay plan directly related to the statutory pay cap, and that they waited to propose the plan to TVA's Board of Directors until it was clear that the pay cap would not be lifted.

We reached the same conclusion regarding a Merit Incentive Supplemental Retirement Income Plan that provided TVA managers with additional income upon retirement.⁶ In B-222334, June 2, 1986, and B-222334.4, Apr. 4, 1989, we found that the supplemental retirement benefits were alternate ways of compensating employees in a manner comparable to private sector positions, in circumvention of statutory salary limitations.

We think the circumstances here are similar to those in the TVA cases. The TVA cases show that a statutory salary cap cannot be avoided by providing a limited class of employees benefits supplemental to those normally part of an employee's salary package. Like the benefits in the TVA cases, the SERP is supplemental to RFE/RL's regular pension plan and is a benefit available only to Mr. Pell. It was precisely this kind of benefit, provided to Mr. Pell's predecessor and described as a deferred annuity, that the House report criticized in recommending that section 2882 be enacted. H.R. Rep. No. 563, 98th Cong., 1st Sess. 78 (1983).

We recognize that the aim of the original SERP was to ensure that Mr. Pell would have at least some retirement coverage. When Mr. Pell first signed his employment contract with RFE/RL, the vesting period under RFE/RL's regular pension plan was 10 years, and no president had ever served that long. This intention was reflected in the original employment contract and SERP agreement. Both provided that SERP contributions would be made only until Mr. Pell vested in the regular pension plan. Thus, it could be argued that the initial SERP was not a supplemental benefit, but was the sole retirement benefit that Mr. Pell would receive.

This argument fails for two reasons. The first is that any RFE/RL employees who may have assumed their positions prior to the change in the vesting period from 10 to 5 years were confronted with the same 10-year vesting problem. Although past experience suggested there may have been a better chance that more lower level employees would remain with

⁶Under the plan, employees received certain credits while employed by TVA, which became payable upon separation or retirement.

RFE/RL long enough to vest than RFE/RL presidents, there was certainly no guarantee that this would occur. Yet, only Mr. Pell was provided with the SERP benefit.

Second, Mr. Pell did vest in the regular RFE/RL pension plan in October 1990, after serving as president for 5 years. Thus, no matter how the SERP was viewed initially, once Mr. Pell actually did vest in the regular plan, the accrued SERP funds, when paid, would become benefits supplemental to those normally available to RFE/RL employees. When they vest in the regular plan, RFE/RL employees (including Mr. Pell) are credited for the period prior to vesting. Moreover, the rationale for the superseding SERP agreement in 1990 was not Mr. Pell's ineligibility under the regular pension plan, and instead appears simply to have been that the regular plan was inadequate for the president.

Similarly, the argument of RFE/RL's counsel that it was necessary to supplement Mr. Pell's pension benefits so that they would conform with those of senior level officials is not persuasive. In fact, it demonstrates, in our view, that the SERP is more generous than their plans, since the pensions of the officials in issue are based on long-term service, and are not payable until a minimum age has been reached.

In sum, we view the SERP as raising Mr. Pell's salary past Level IV in violation of section 2882's salary cap.

Additional Considerations

RFE/RL counsel maintains that even if RFE/RL were legally wrong in providing Mr. Pell the SERP benefit, Mr. Pell's good faith acceptance of the employment contract's benefits, and reliance on RFE/RL's tacit assurance of the terms on which he continued to work for the company for more than 7-1/2 years, require RFE/RL to honor its commitments. In this regard, counsel suggests contract and quantum meruit concepts, and the principle that an erroneous payment to a federal employee can be waived in certain circumstances, as possible bases for paying Mr. Pell the accumulated SERP benefits.

The issue for our consideration here, however, is not the enforceability of Mr. Pell's employment contract with RFE/RL or the value of his services, but simply whether section 2882 precludes the use of federal appropriations by RFE/RL to fund the SERP. As to waiver, Mr. Pell is not a federal employee, and the statutes providing for waiver of the collection of erroneous payments to federal employees are not applicable.

We note that the BIB Inspector General has questioned other benefits in Mr. Pell's contract.⁹ Two of them are a supplemental severance benefit that was paid to Mr. Pell in the amount of \$137,000 while he still was serving as RFE/RL president, and the presidential allowance for expenses for which reimbursement is considered impractical or impossible, and for which Mr. Pell is not obligated to account. Since the BIB Chairman's question to our Office focused on the SERP, we did not request views from BIB counsel or Mr. Pell regarding these two benefits. In the absence of any rationale for treating these benefits as different from the SERP, we agree with the Inspector General that they also appear to be salary supplements for which the use of appropriated funds is improper. BIB should recoup from RFE/RL any funds used in violation of the statute.

Wilton J. Fowler

Acting Comptroller General
of the United States

⁹According to the Inspector General, the most recent annual value of Mr. Pell's employment contract was more than \$300,000, including salary; post, housing and presidential allowances; the SERP; and termination and other benefits (travel, insurance, car, maid and gardener service, etc.).