



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

ADVISORY OPINION
IN THE MATTER OF
LIMITATIONS IMPOSED BY LAW ON
SALARIES OF EXECUTIVE OFFICERS OF
THE TENNESSEE VALLEY AUTHORITY

A new pay plan was adopted on October 7, 1981, by the Board of Directors of the Tennessee Valley Authority (TVA). Under this plan, a TVA executive officer occupying one of the positions covered would receive up to \$36,000 per year in addition to his regular salary. That executive would thus receive more yearly pay than the annual salary or "basic pay" prescribed by law for members of the TVA Board of Directors.

Notwithstanding that the TVA has final settlement authority of all claims against it under 16 U.S.C. 831h, we consider it to be our responsibility to render an advisory opinion in this matter, consistent with our duties under the Government Corporation Control Act to periodically audit the TVA and report to the Congress its financial transactions which in our opinion, "were made without authority of law." See 31 U.S.C. 850-51. Our opinion is that the new pay plan improperly contravenes the the salary limitation imposed by section 3 of the TVA Act.

Section 3 of the TVA Act of 1933, as amended and as codified at 16 U.S.C. 831b, provides in pertinent part that:

"The board shall without regard to the provisions of Civil Service laws applicable to officers and employees of the United States, appoint such managers, assistant managers, officers, employees, attorneys, and agents as are necessary for the transaction of its business, fix their compensation, define their duties, and provide a system of organization to fix responsibility and promote efficiency.
* * * No regular officer or employee of the Corporation shall receive a salary

in excess of that received by the members of the board." (Emphasis added.)

Members of the TVA Board of Directors under the terms of 5 U.S.C. 5315 hold positions at level IV of the Executive Schedule, and they are therefore currently entitled to "basic pay" at the rate of \$52,750 per annum. As a result of what is commonly referred to as the Federal executive "pay compression" problem, the purchasing power of level IV executive pay has decreased by about 40 percent since 1969 due to high levels of inflation during the intervening years. The TVA claims it has been experiencing increasing difficulties in retaining its top executives because of the "pay compression" problem, and the matter was specifically considered during oversight hearings on the TVA held earlier this year on March 16 and 17, 1981, by the Senate Committee on Environment and Public Works. TVA initially suggested to the Committee that a bill be introduced that would allow the TVA Board of Directors to set pay rates for its top executives in a manner consistent with private industry pay rates. This proposal apparently was dropped. Subsequently, in July 1981, TVA officials proposed to the Committee the introduction of a bill under which the General Accounting Office would set the TVA Board members' salaries based upon a survey of the levels of pay of chief executive officers prevailing in major power generating utility corporations in the southeastern United States. The Committee declined to act on this legislative proposal.

TVA officials then prepared a proposal for consideration by the TVA Board of Directors, recommending the adoption of the pay plan here in question. The plan was submitted to the Board at its October 7, 1981, meeting and was approved by the Board through a resolution which cited the pay compression problem as the reason for authorizing payment of the additional amounts. Under the TVA Board's October 7 resolution, TVA proposes to pay up to 75 of its executive officers a yearly amount of up to \$36,000 in addition to their regular salaries. That additional amount would be payable in 2 installments on October 1 and April 1 during the course of each fiscal year. In order to qualify for the additional pay, an executive would have to sign a

"retention agreement" and agree to remain with TVA for the following 3 years. Under the terms of the agreement an executive who voluntarily left TVA prior to the expiration of that 3-year period would be entitled to keep the additional pay he received in any prior fiscal year, but would be required to refund any additional pay received during the current fiscal year.

TVA officials acknowledged in the course of our investigation that this new pay plan is directly related to the executive "pay cap" imposed by section 3 of the TVA Act. Further, TVA officials indicated they waited until after October 1, 1981, to propose the new pay plan to the Board of Directors in order to see if the executive "pay cap" would be lifted effective the first day of the new fiscal year. Thus, it is evident that the new pay plan is directly related to the limitation imposed by law on the amount of salary authorized for TVA Board members and top executives, and that the plan was designed to set the annual pay or compensation of TVA's top executives at some fixed rate in excess of the yearly salary or "basic pay" authorized by law for the Board members.

Nevertheless, TVA officials have suggested to us that, as a matter of law, the new pay plan is permissible under section 3 of the TVA Act. They note that while section 3 contains a prohibition against an employee receiving a "salary" in excess of that received by the members of the Board, it also authorizes the Board to appoint employees and "fix their compensation." They suggest that amounts received by the executives under the retention agreements should be regarded as "compensation" but not as "salary." Their reasoning in support of that suggestion is set forth in a letter dated October 28, 1981, from their private legal counsel. They admit that the terms "salary" and "compensation" are sometimes used interchangeably and as synonyms. They then point out that these terms have distinct and different meanings, "compensation" being the generic term which includes all emoluments--salary and other benefits, such as bonuses and contributions to retirement funds. They argue that since Congress used both terms in section 3, above, this shows that the Congress intended them to have different meanings. Additionally,

their counsel says that the action of the TVA Board should be upheld since the construction of the TVA Act is primarily the responsibility of the TVA Board.

We find that we are unable to agree with this reasoning as applied to the pay plan here in question.

As TVA officials and their private counsel point out, section 3 of the TVA Act of 1933 prohibits an employee from receiving a "salary" in excess of that received by the Board members, but it also authorizes the Board to fix an employee's "compensation." However, we have found nothing in the legislative history of the TVA Act indicating whether the Congress in 1933 intended to distinguish the terms "compensation" and "salary" as used in section 3. It appears that, in fact, from the time the TVA was established in 1933 until 1955, TVA officials construed the words "compensation" and "salary" as used in section 3 of the TVA Act as being exactly synonymous. On September 15, 1955, the TVA's general counsel noted that in applying statutes involving salary limitations, our Office had held that the term "salary" means "basic compensation," and he cited our decisions 22 Comp. Gen. 795 (1943), 23 Comp. Gen. 445 (1943), and 26 Comp. Gen. 271 (1946), as well as the Supreme Court's opinion in Benedict v. United States, 176 U.S. 357 (1900). He noted in particular that in the first case cited our Office had held that the word "salary" as used in the statute there under consideration meant the "annual rate of compensation for (a) civilian office or position," and did not include overtime compensation. The TVA general counsel then concluded that overtime compensation should no longer be included in applying the salary limitation imposed by the TVA Act. Since 1955 the TVA has continued to construe the word "salary" as used in section 3 of the TVA Act as meaning an employee's "basic compensation" or "annual rate of compensation," not including overtime compensation, occasional bonuses based on job performance or special circumstances, retirement fund contributions, and miscellaneous fringe benefits. We agree with that now longstanding construction of the statute adopted by the TVA that the terms "compensation" and "salary" in section 3 of the TVA Act have different meanings as set forth above.

However, the new pay plan here in question was clearly designed to set a higher basic rate of pay for TVA's top executives, a fixed rate exceeding the yearly salary or "basic pay" authorized by law for TVA's Board members. We do not regard the proposals made by TVA officials earlier this year to amend the law alone as being the only significant indication of the purpose of this pay proposal. Nevertheless, those unsuccessful legislative proposals, together with the statements made by TVA officials concerning the intended purpose of the new pay plan adopted through administrative action, demonstrate that the new plan was specifically designed to authorize additional basic salary and to circumvent both the "salary" and executive "pay caps" imposed by law. In that connection, we note that the yearly additional pay of \$36,000 equals the 40 percent decrease in the purchasing power of top executives' salaries since 1969 caused by inflation. Thus, although the term "compensation" as used in section 3 of the TVA Act is viewed as having a broader meaning than the term "salary" as used in that section, we conclude that payments under this plan would constitute part an executive's "salary." It is therefore our opinion that the new pay plan improperly contravenes the "salary" limitation imposed by section 3 of the TVA Act.

Signed Charles A. Bowsher
Comptroller General
of the United States