DECISION

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

60289

FILE: B-140583 DATE: DEC 10 1975 97607

MATTER OF: Civil Service Commission - Wage Retention for Prevailing Rate Employees

DIGEST:

1. A proposed Civil Service Commission regulation would provide indefinite wage retention for prevailing rate employees where a lower wage schedule would result from changes made by the Commission in the operating policies and procedures of the Federal Wage System. The proposal would exceed the Commission's authority under the statutory provisions and the intent of Congress in providing for the Federal Wage System.
2. The Congressional intent to permit policies and procedures in effect upon enactment of Public Law 92-392, to continue could be viewed as permitting the existing Civil Service Commission wage retention regulations prescribed by FPM Supplement 532-1, S5-14(d)(3) (saved pay when special rates applicable to critical occupational groups are cancelled); FPM Supplement 532-1, S8-8(a)(1) (saved pay when wage areas are consolidated); and 5 C.F.R. § 532.506(e) (saved pay when local wage survey is based, in part, on out-of-area data) to remain in effect.
3. Since the three existing administrative wage retention regulations are inconsistent with the statutory retention provisions applicable to certain categories of prevailing rate employees, in that former provide for indefinite saved pay while latter is limited to 2 years, the Civil Service Commission should take action to similarly limit the pay retention periods in the administrative regulations.

The Chairman of the Civil Service Commission seeks a decision as to the propriety of amending the Federal Personnel Manual (FPM) Supplement 532-1, to provide that prevailing rate employees will retain their existing rate of pay for an indefinite period "* * * in those instances where a lower wage schedule would result from the implementation of a change in the operating policies and procedures of the FWS [Federal Wage System]." Additionally, the Commission seeks a ruling

on the legality of three existing pay-savings regulations promulgated prior to the enactment of Public Law 92-392, namely: (1) Federal Personnel Manual Supplement 532-1, S5-14(d)(3) (pay savings for prevailing rate employees when special rates applicable to critical occupational groups are cancelled); (2) Federal Personnel Manual Supplement 532-1, S8-8(a)(1) (lower wage schedules resulting from the consolidation of existing wage survey area with parts of another survey area); and (3) Section 532.506(e), title 5, Code of Federal Regulations (lower wage schedules resulting from wage survey based, in part, on out-of-area data).

I. Proposed Indefinite Wage Retention Regulation.

The Commission proposes a policy whereby no prevailing rate employee would be required to suffer a reduction in his existing rate of pay in situations "* * * where a lower wage schedule would result from the implementation of a change in the operating policies and procedures of the FWS." The proposal contemplates indefinite wage retention, with the employee receiving one-half of the amount of each prevailing rate increase applicable to the employee's wage grade until such time as the actual prevailing rate of pay exceeds his retained rate.

Under the Federal Wage System (FWS) as enacted by Public Law 92-392, 86 Stat. 564, August 19, 1972, 5 U.S.C. § 5341 (Supp. II, 1972) et seq., the pay of prevailing rate employees is required to be "* * * fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates * * *." Although Congress, in enacting the FWS, provided for limited 2 year wage retention when prevailing rate employees were demoted or reassigned to a lower wage position through no fault of their own, Congress did not provide for general wage retention in the particulars proposed by the Commission. 5 U.S.C. § 5345 (Supp. II, 1972).

In 53 Comp. Gen. 665 (1974), we considered a prior proposal by the Civil Service Commission, substantially identical to that presented here, which would have provided for the indefinite retention of a prevailing rate employee's existing rate of pay when the application of the prevailing area rate would result in a wage schedule containing lower rates than those of the existing wage schedule for the same survey area. In that decision we concluded that it would be contrary to the

statutory provisions of the Federal Wage System to preserve the compensation of prevailing rate employees when local wage surveys disclosed lower applicable wage rates. Id. at 667. The Commission now urges that it be permitted to issue a regulation providing for the indefinite preservation of the compensation of prevailing rate employees when a lower wage schedule would result from a change in FWS "operating policies and procedures." The contemplated pay-savings plan appears to be substantially the same as the plan considered and disapproved in 53 Comp. Gen. 665 (1974). However, the Commission would distinguish the present pay retention proposal on the basis that it is applicable only in those instances where a lower wage schedule results from a change in FWS operating procedures.

The Commission has proposed the following "changes in operating policies and procedures" which may result in wage reductions:

> "--the addition or elimination of industry groups included in wage surveys;
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> "--changes in the minimum size of establishments which may be included in wage surveys;
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> "--revisions of survey job descriptions;
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> "--revisions in wage area boundaries and survey adequacy criteria."

Although 5 U.S.C. § 5343(c) affords the Commission considerable latitude in prescribing practices and procedures for conducting wage surveys, if the local wage area encompasses a number of comparable positions in private industry sufficient to establish wage schedules, a local wage area survey must be made. The survey must be representative of the area surveyed. 5 U.S.C. § 5343(c)(1) (Supp. II, 1972). Since the requirement for a representative local wage survey is statutory, we assume that any modifications to the wage survey process, including those mentioned above, will produce a representative local wage area survey and the subsequent application of the prevailing area rate contemplated by statute. See 54 Comp. Gen. 305 (1974).

Thus, the above "changes in operating policies and procedures" constitute nothing more than factors to be considered in a local wage area survey incident to a prevailing area rate determination. In our opinion, these "changes" are essential to the determination of an equitable prevailing rate on the basis of an accurate and representative

local wage area survey. As such, the prevailing rates so established would more nearly reflect the congressional policy that there will be equal pay for substantially equal work and that levels of pay be maintained in line with the prevailing levels for comparable work within the local wage area. S. Rep. No. 92-791, 92d Cong., 2d Sess. 3 (1972); H. R. Rep. No. 92-339, 92d Cong., 1st Sess. 8 (1971). Any consequential wage reductions would be the result of the normal and intended operation of the Federal Wage System.

Although this Office has recognized limited wage retention when certain groups of employees would otherwise receive wage reductions due to changes in the system by which their wage rates are established, we have never authorized the indefinite preservation of wage rates simply because a properly conducted local wage area survey compels the application of lower prevailing rates. See 44 Comp. Gen. 476, 479 (1965); 53 Comp. Gen. 665, 666-667 (1974). The primary consideration in adjusting the pay of prevailing rate employees is the applicable prevailing rate, regardless of the direction of its fluctuation. The Commission's proposal substantially deviates from the stated congressional policy in that it seeks to apply the prevailing rate scheme only to wage surveys that disclose an escalating wage schedule.

We recognize that the individual hardships attendant to wage surveys which disclose lower applicable prevailing rates are similar to the hardships Congress sought to avoid when limited statutory wage retention benefits were afforded prevailing rate employees who were demoted without fault or reassigned. However, the instant proposal is not authorized by statute and should be reserved for congressional consideration. We, therefore, view the present proposal as standing on the same footing as the one considered in 53 Comp. Gen. 665, supra, and are of the opinion that its implementation, without statutory authority, would similarly be improper.

II. Continued Application of Existing Indefinite Wage Retention Regulations.

In addition to the proposed general regulation discussed above, the Commission seeks our decision on the legality of continuing three existing wage retention regulations, all of which were promulgated prior to the passage of Public Law 92-392, namely;

(1) 5 C.F.R. § 532.506(e) (1975), authorizing indefinite wage retention when a lower prevailing rate results from a wage survey based, in part, on data obtained from a locality other than the local wage area; (2) FPM Supplement 532-1, S8-8(a)(1), authorizing indefinite wage retention when, as a result of the consolidation of one wage survey area with another, an employee's scheduled rate of pay would otherwise be reduced; and (3) FPM Supplement 532-1, S5-14(d)(3), authorizing indefinite wage retention for prevailing rate employees who were members of critical occupational groups and whose special rates for such specialized occupations are revised or cancelled.

In 5 U.S.C. § 5345(a)-(d), supra, Congress has authorized limited 2-year wage retention for those prevailing rate employees who are demoted through no fault of their own or reassigned to a lower wage schedule position. Section 5345, however, makes no mention of indefinite wage retention when local wage area surveys indicate that recruitment or retention problems no longer exist with respect to a previously designated critical occupational group. Similarly, section 5345 does not authorize indefinite wage retention or the issuance of regulations so providing when, as a result of consolidated wage area surveys or wage surveys based, in part, on out-of-area data, prevailing rates disclose a lower applicable wage schedule.

However, the legislative history of Public Law 92-392, 5 U.S.C. § 5341 (Supp. II, 1972) et seq., does disclose a congressional intent to continue the established practices and policies related to Federal blue collar employees which had previously been adopted administratively, except where Congress expressly indicated that changes were to be made. S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972); H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971). In summarizing the purpose of Public Law 92-392, the House Report states, in pertinent part, the following:

> "The major provisions of the bill may be summarized as follows:
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> "One-enacts into law the long established principles and policies for setting the pay of prevailing rate employees.
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> "Two-makes the following changes in the current operating system and procedures * * *." H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971).

The Senate Report, in summarizing the intent of Public Law 92-392, contains similar language. S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972).

Although our general view, as stated in 53 Comp. Gen. 665 (1974), and its predecessor 44 Comp. Gen. 476 (1965), questions the propriety of indefinite wage retention in the absence of analogous statutory provisions so providing, the foregoing legislative history indicates, with respect to pay-savings provisions in effect immediately prior to the enactment of Public Law 92-392, that different considerations could obtain. Thus, in B-177313, November 8, 1972, we found, in another context, that Congress intended to continue established administrative practices under the Federal Wage System. See also 52 Comp. Gen. 716 (1973). Since the three wage retention regulations for which the Civil Service Commission seeks our approval were in effect immediately prior to the enactment of Public Law 92-392 a basis could be said to exist for the continued application of the regulations contained in Federal Personnel Manual Supplement 532-1, S5-14(d)(3), S8-8(a)(1), and 5 C.F.R. § 532.506(e) (1975).

We believe, however, that these three regulations are inconsistent with the statutory retention provisions of 5 U.S.C. § 5345, supra. A main difference is the indefinite saved pay under the regulations as contrasted with the 2-year saved pay under the statute. In view thereof, we are of the opinion that the conditions and limitations upon the granting of pay retention benefits to the three categories discussed above should conform as closely as possible to those prescribed by the Congress in 5 U.S.C. § 5345. Accordingly, we recommend that the regulations applicable to the three categories be amended to prescribe similar conditions and limitations, including a 2-year retention period. In the event the Civil Service Commission considers indefinite pay retention is necessary in these situations, we believe the matter should be submitted to the Congress for its consideration.

R.F. KELLER

Deputy Comptroller General
of the United States