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

B-175785 JAN 22 1973

Mr. Milton Roll, 1st Vice President
American Federation of Government Employees
Local No. 1981
P. O. Box 271
LaJolla, California 92037

Dear Mr. Roll:

We refer further to your letter of April 12, 1972, wherein you requested a decision pertaining to the authority under 5 U.S.C. 5342 (now 5 U.S.C. 5348 pursuant to Public Law 92-392) of the Department of Commerce to change the method of setting pay rates for the officers and members of the crew of the vessel "DAVID STARR JORDAN" (the JORDAN), such change to become effective upon expiration of the present agreement.

The controversy in summary involves the question of whether the fixing of rates must continue to be by negotiation in view of previous agreements in the matter, or may such rates be fixed by administrative action, and whether the application of "East Coast" pay schedule and work rules is proper for a vessel operating in the Pacific Ocean. Before considering the matter it was necessary that we obtain a report from the administrative office. This was furnished by letter dated November 9, 1972, and we note that a copy thereof was sent to your office.

It is the contention of Local 1981, American Federation of Government Employees (AFGE), as set forth in your letter, that the Department of Commerce--specifically the National Oceanic and Atmospheric Administration (NOAA)--is in violation of title 5 U.S.C. 5348 by its announced policy with respect to:

"1. Deviation of Vessel Classification from maritime standards for compensation purposes.

"2. Use of Atlantic Marine pay schedule for Marine personnel on the Pacific Coast (consisting of differences in pay schedule and work rules) for compensation purposes."

The third from the last paragraph of your letter reads:

"Our charter of Local 1981 dates back to 1 June 1960. Local 1981 has had in effect a lawful agreement with

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management which was entered into prior to the effective date of E.O. 10988 and, accordingly, is covered by Section 24 (a)(1) of Executive Order 11491. As in the past the fixing and adjusting of the pay of the Officers and Crew members are done only by negotiation between Local 1981 and management in accordance with the exclusive recognition held by A.F.G.E. Local 1981. To remove the right to bargain wages at this point in time would most certainly interfere with the vested rights under the existing collective bargaining agreement, the renewal or continuation of which is permitted by Section 24 (a)(1) of E.O. 11491. Presently the wage agreement is in effect to June 15, 1972."

5 U.S.C. 5348(a) in pertinent part, reads:

"* * * the pay of officers and members of crews of vessels * * * shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."

NOAA reports that the controversy in question stems from the transfer of the former Bureau of Commercial Fisheries (BCF) of the Department of the Interior to the Department of Commerce--and, within the Department, to NOAA--pursuant to Reorganization Plan No. 4 of October 3, 1970. The JORDAN and its officers and crew, along with fourteen other BCF vessels and crews, came to NOAA as part of the transfer. In NOAA BCF has been renamed the National Marine Fisheries Service (NMFS). The 15-page report furnished by NOAA fully sets forth the reasons for its determination to establish a single-wage marine pay plan based on Atlantic Coast Maritime Work rules and pay practices. Inasmuch as the report has also been furnished your office, we see no necessity to repeat it here. Our jurisdiction in the matter extends to determining whether 5 U.S.C. 5348 requires an agency to negotiate wages to the exclusion of an administrative fixing of wages.

Executive Order No. 11616, dated August 26, 1971, and Executive Order 11636, dated December 17, 1971, amended Executive Order 11491, and section 24(a)(1) now appears as section 24(1) and reads:

Oct. 29, 1969

"Sec. 24. Savings Clauses. This Order does not preclude--(1) the renewal or continuation of a lawful

agreement between an agency and a representative of its employees entered into before the effective date of Executive Order No. 10988 (January 17, 1962);* * *"

In B-168090, February 2, 1970, in the next to last paragraph it is stated:

"* * * Moreover, we have no jurisdiction in the process of negotiating Federal employee labor agreements. During the period involved in the present case questions regarding negotiations were for disposition by the employing agency in accordance with the provisions of 5 U.S.C. 5342(a), Executive Order 10988 of January 17, 1962, and implementing regulations. We note that the cited Executive order has now been superseded by Executive Order 11491 of October 29, 1969, which provides a procedure for referring complaints of alleged unfair labor practices to the Assistant Secretary of Labor."

Executive Order 11491, as amended, in section 4 establishes a Federal Labor Relations Council which "* * * shall administer and interpret this order, decide major policy issues * * *." Additionally section 5 of the order establishes the Federal Services Impasses Panel with broad authority to settle negotiation impasses as provided in section 17 of the order. It would appear that your contention with respect to the effect of the savings provision of Executive Order 11491 would be primarily for resolution within the terms of that order. In our view, such provision could not preclude the requirement of 5 U.S.C. 5348 that wages shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

With respect to 5 U.S.C. 5348 we have held that the requirement to fix and adjust wages in accordance with prevailing rates and practices is subject to the administrative discretion that is embodied in the term "as nearly as is consistent with the public interest." 30 Comp. Gen. 158 (1950). See also 30 Comp. Gen. 356 (1951). In B-168090, August 18, 1970, we referred to 30 Comp. Gen. 356 and pointed out that two conditions were specified in the ruling, i.e., that not only must there be evidence that the action in question is, in fact, a practice in the maritime industry, but there must be a determination by the administrative office

that it is consistent with the public interest to follow such practice. We pointed out that the decision by no means compels an agency to follow every practice prevailing in the maritime industry.

NOAA reports that it has determined it would not be in the public interest that it--a single agency which administers the wages of wage marine employees on over 30 vessels--have one system of pay and work rules for the crew of the JORDAN (and other former BCF crews) and a second and different system for the remaining crews. NOAA states it has determined that it is not in the public interest to pay 100 percent of a rate which is applicable to crews of vessels up to 3,500 h.p. tons, to a crew of a vessel with slightly more than one-half of the h.p. tonnage and, that it is not in the public interest to pay for work which is not performed, i.e., for the 16 hours a week in port which, under Pacific rules, are paid at overtime rates if worked. In summary NOAA states:

> "In our view, public interest considerations indicate the desirability of (i) a single system for the determination of wage rates and work rules for the wage marine employees of this one agency; (ii) a basis for determining the wage rates which more precisely relates the h.p. tonnage ratings of the vessels involved with the rates of pay for the licensed positions on them than does the MSC basis; and (iii) payment only for hours actually worked in unlicensed classifications."

On the record we cannot say that NOAA is in violation of 5 U.S.C. 5348(a), X in the exercise of its discretion thereunder.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States