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DECISION

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

FILE: B-187972 DATE: March 25, 1977

MATTER OF: Edwin Randolph Hille and David A. Reilly - Retroactive compensation

DIGEST: Seamen employed by NOAA claim retroactive pay for services rendered after effective date of pay increase, notwithstanding that they had separated before date of order approving increase. Claims may be paid since it is maritime industry practice to make such payments and since contrary provisions of 5 U.S.C. § 5344 do not apply to officers and crews of vessels.

This action is in response to a request dated November 30, 1976, from Mr. Joseph F. Giza, an authorized certifying officer of the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, for a decision concerning the claims of Edwin Randolph Hille and David A. Reilly, former NOAA employees, for retroactive compensation. Although not employed by NOAA when it approved a retroactively effective schedule of pay for crews of vessels, Messrs. Hille and Reilly, who had been employed as seamen, on the effective date of the increase, claim compensation from the effective date of the pay schedule to the date of their separation, based upon the practice of the maritime industry to provide such retroactive payments to separated employees.

The applicable statutory pay-fixing authority for vessel employees is 5 U.S.C. § 5348(a) (Supp. V, 1975) which provides in pertinent part as follows:

"§ 5348. Crews of vessels.

"(a) Except as provided by subsections (b) and (c) of this section, the pay of officers and members of crews of vessels excepted from chapter 51 of this title by section 5102(c) (8) of this title 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."

Pursuant to this authority, NOAA derives its schedule of pay for seamen from pay scales agreed upon in the private sector.

Although the pay schedules for employees in the maritime industry are normally negotiated to become effective on June 16 of each year, they frequently are not finalized or approved by that date. Accordingly, when the maritime industry agreement is reached, usually after June 16th, the pay schedules are given application retroactive to that date. Since under section 5348(a) the NOAA pay scales are determined with reference to the private sector agreement, a similar arrangement necessarily exists within NOAA. Thus, pay schedules for seamen employed by NOAA are usually approved some period of time after the maritime industry agreement, and are made effective retroactively to June 16th.

In the present case, the NOAA schedule of pay for crews of vessels was administratively approved on December 5, 1975, and was made effective retroactively to June 16, 1975. Although both claimants here were employed by NOAA on June 16, 1975, their employment had terminated before the approval date. Mr. Hille was separated on November 19, 1975, and claims $469 in retroactive pay. Mr. Reilly, who was separated on October 15, 1975, claims $502.27. Their claims are based upon the practice of the maritime industry to provide retroactive pay to all seamen who were employed between the effective date and the approval date of a pay raise, notwithstanding that they were not employed on the date of approval. This practice has been acknowledged by NOAA in its submissions to us. In addition, NOAA has stated, and we have informally confirmed, that the Military Sealift Command of the Department of the Navy follows the industry practice and makes such retroactive payments.

In response, NOAA stated that it makes retroactive payments of compensation to persons currently employed by it on the date the pay scales are approved, and to persons who retired or died between the approval and effective dates. However, based upon the provisions of 5 U.S.C. § 5344 (Supp. V, 1975), NOAA does not make such retroactive payments to persons who have separated from their employment before the approval date, but after the date on which the schedule became retroactively effective. 5 U.S.C. § 5344 (Supp. V, 1975), applies to increases in basic pay granted to "prevailing rate employees" pursuant to a wage survey. Subsection (b) of section 5344 contains the provisions upon which NOAA relies. Briefly stated, subsection (b) permits the retroactive pay increases granted under section 5344(a) only

to persons employed on the date of the order granting the increase and to persons who retired or died during the period between the effective date and the approval date.

Section 5344 of title 5, United States Code, however, has no application in the present case because the provisions of section 5344 are excluded from application to crews of vessels by reason of 5 U.S.C. § 5342(b)(3) (Supp. V, 1975) which states:

> "(3) This subchapter, except section 5348, does not apply to officers and members of crews of vessels excepted from chapter 51 of this title by section 5102(c) (8) of this title."

Accordingly, the crews of vessels are not subject to the retroactivity provisions found in section 5344. It should be noted that the just-quoted language merely states in more explicit terms the result under the prior law. Previously, 5 U.S.C. § 5344 (1970) provided for retroactive pay for increases of pay referred to in former section 5343, which in turn was limited to employees described in former section 5341. Since the authority for fixing the compensation of crews of vessels previously was found in 5 U.S.C. § 5342 (1970), the retroactivity provisions of former section 5344 were likewise inapplicable to pay adjustments for seamen.

This Office has previously held that retroactive payments of compensation may be made to officers and members of crews of vessels provided that it is a practice of the maritime industry to make such payments and that it is in the public interest to do so. 30 Comp. Gen. 356 (1951); 50 Comp. Gen. 93 (1970). It has been argued, however, that the payment of retroactive compensation in this case would be violative of the public interest since the effect of payment here is to treat seamen differently from other Government employees. It is our view, however, that such treatment was contemplated and intended by the Congress when it passed 5 U.S.C. § 5342(b)(3). Indeed, the Congress did not even consider the officers and crews of vessels to be prevailing rate employees, as evidenced by the analysis of that section in S. Rept. No. 92-791, 3 (1972):

> "Section 5342(b) excludes certain employees from this legislation. The exclusion relates to employees who are not wage board employees."

Similarly, the Court of Claims recently considered whether the Secretary of Commerce could lawfully refuse to pay a monthly leave supplement the payment of which was a maritime industry practice. Blaha v. United States, 206 Ct. Cl. 183 (1975). Holding that the Secretary's refusal to pay was not justified by any public interest and therefore was an abuse of discretion, the court considered the purpose of the pay provisions of 5 U.S.C. § 5348(a):

> "We think Congress meant to authorize Government agencies owning and operating ships, with civilian crews, to adopt private industry pay practices in their totality, as to differentials, overtime, premiums, or any other general pay practice that entered into and became a part of the seaman's take-home pay subject of course to the 'public interest' exception to be discussed presently.
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> "The Congress in enacting § 5348 recognized the unique character of the pay practices in the maritime industry. It saw that the pay practices existing shoreside with respect to Government employees would be a Procrustes bed if applied to Government vessels and to civilians employed as seamen thereon, union members doing the same work as their commercial counterparts. Its solution was to authorize pay practices to conform 'as nearly as is consistent with the public interest', not to Government shoreside practice, but to private industry practice afloat." (206 Ct. Cl. 191, 193.)

We therefore hold that the public interest does not create an impediment to payment of retroactive compenstion in this and similar cases.

Accordingly, by reason of the prevailing practice in the maritime industry, to the extent that the claimants and others similarly situated rendered services to NOAA after the effective date of the pay increase, they are entitled to be paid the

retroactive increase, notwithstanding that they had separated from their employment before the increase was ordered into effect.

Deputy Comptroller General
of the United States