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DECISION

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

FILE: B-198763 DATE: June 25, 1980

MATTER OF: Ronald H. Whelan -- Claim for retroactive wage adjustment

DIGEST: Employee of Governor's Island Ferry claims retroactive salary adjustment and corresponding backpay for the period 1970 through 1978 on the basis that annual wage increases were not consistent with that of maritime industry in New York Harbor. In view of claims having been considered and dismissed in the Courts, see Whelan v. Brinegar, 538 F. 2d. 924 (2d Cir. 1976), and as he has not provided any evidence to show agency has exceeded the scope of its administrative discretion afforded under 5 U.S.C. 5348, the claims may not be allowed.

This action is in response to an appeal by Mr. Ronald H. Whelan, an employee of the Governor's Island Ferry, United States Coast Guard, Department of Transportation (DOT), of the disallowance by the Claims Division of his claim for a retroactive salary adjustment for the period 1970 through 1978. We sustain the disallowance of his claim.

Mr. Whelan's claim was first received in the Claims Division on September 20, 1977. The Act of October 9, 1940, 54 Stat. 1061, as amended by section 801 of Public Law 93-604, approved January 2, 1975, 88 Stat. 1965, 31 U.S.C. 71a, provides that every claim or demand cognizable by the General Accounting Office (GAO) shall be forever barred unless received in this Office within 6 years after the date the claim first accrued. Our Office has held that the date of accrual of a claim for the purpose of the above-cited statute is to be regarded as of the date the services were rendered and that the claim accrues on a daily basis. 29 Comp. Gen. 517 (1950). Thus, that portion of Mr. Whelan's claim which accrued prior to September 20, 1971, is barred from consideration.

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Concerning the portion of the claim not barred by 31 U.S.C. 71a, the record shows that during the period in question Mr. Whelan was employed as an officer or crew member of the Governor's Island Ferry, New York. He claims that he is entitled to a retroactive adjustment in his rate of compensation from 1970 to 1978 as the annual wage increases during that period were not equal to that for the maritime industry in New York Harbor. He alleges that the wages set by his employer during those years were not established in accordance with the prevailing practices of the maritime industry which he contends is required by 5 U.S.C. 5348. In support of this allegation Mr. Whelan has submitted a chart which he has prepared in which he states that employees in the maritime industry in New York Harbor received a 79 percent total pay increase for the period 1970 to 1978, whereas the pay increase for employees of the Governor's Island Ferry was only 52.5 percent.

Mr. Whelan has also submitted a letter from his attorney which sets forth with greater specificity the basis of his claim. His attorney alleges that the annual wage increase of the employees of the Governor's Island Ferry (Ferry) had been improperly established for the period from April 1, 1970, through March 31, 1973, since vessel employees in the private sector in the New York Harbor had received considerably higher annual wage adjustments during this period. In addition, he contends that the U.S. Civil Service Commission improperly denied the Ferry employees exemptions from a 5.5 percent wage price ceiling in 1972 and 1973.

Section 5348(a) of title 5, United States Code, provides as follows:

> "(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."

In Whelan v. Brinegar, 538 F. 2d 924 (2d Cir. 1976) the Court of Appeals, Second Circuit, considered the appeal presented by Mr. Whelan and other Ferry employees of the judgment of the District Court for the Southern District of New York which had dismissed the complaints against DOT and the Civil Service Commission for retroactive pay adjustment with corresponding backpay.

Concerning the complaint against DOT, as stated by the Court of Appeals, since 1969 DOT has used as a guideline for salary rates the prevailing industry rates of the entire New York Harbor whereas the Ferry employees asserted that DOT should have used as its salary guidelines the salary of only New York City, Staten Island Ferry employees and should have maintained parity with the wages of the Staten Island employees. The "Staten Island Parity" rule had been used by the Department of the Treasury which until October 15, 1966, had jurisdiction over the Coast Guard.

The court reviewed the procedures used by DOT in setting the salary rates of Ferry employees since 1966 and affirmed the judgment of the District Court with regard to dismissal of the complaints against DOT. The Court of Appeals held that there was no error in the District Court's determination that the Ferry employees were being paid "in accordance with prevailing rates and practices in the maritime industry" as required by 5 U.S.C. 5348(a).

The complaint by Mr. Whelan and the other Ferry employees against the Commission arose incident to a wage rate ceiling. Executive Order 11639, January 11, 1972, issued pursuant to the Economic Stabilization Act of 1970, as amended, 12 U.S.C. 1904 (1970), note,

authorized the Civil Service Commission to issue guidelines on the fixing of rates of basic pay. Furthermore, the Order provided that no pay schedule adjustment would exceed the guidelines except where (1) a tandem relationship existed between a Federal pay schedule for a specialized employee unit and a similar specialized private employee unit, (2) a pay increase had been permitted in the private employee unit which was in excess of the guidelines, and (3) a comparable increase was essential to the continued operation of the Government employee unit. See also 5 C.F.R. 532.1106 (1973). The guidelines established by the Commission included a 5.5 per cent permissible annual aggregate pay increase. See Attachment to FPM Letter 532-27, February 2, 1972.

As stated by the Court of Appeals in Whelan, in March 1972 and May 1973, the Commission denied the Ferry employees an exemption to the 5.5 percent ceiling on the basis that the required conditions for an exemption had not been met.

The Court of Appeals dismissed the appeal from the District Court's dismissal of the complaint against the Commission on the basis that section 211(b)(2) of the Economic Stabilization Act, 12 U.S.C. 1904 (1976) confers exclusive jurisdiction for appeals arising under the Act in the Temporary Emergency Court of Appeals.

We note in this instance, that the action of the District Court would not be appealable as section 211(b)(2), supra, provides, in part, that an appeal under the Act shall be filed with the Temporary Emergency Court of Appeals within 30 days of the entry of judgment by the District Court.

On the basis of the above judgments entered by the District Court and the Court of Appeals, we must conclude that the plaintiff class, including Mr. Whelan,

have fully litigated the matter as to whether the salaries of Ferry employees had been properly established pursuant to 5 U.S.C. 5348 and whether the Commission had properly denied exemptions from the applicable annual wage adjustment ceilings. This Office has consistently adhered to the position that the doctrine of res judicata applies when a party raises the same issue before this Office that he raised in the courts. 47 Comp. Gen. 573 (1968). This doctrine is to the effect that a valid judgment rendered upon the merits constitutes an absolute bar to a subsequent action on the same claim or demand.

Accordingly, we hold that there is no basis for this Office to further consider those claims presented by Mr. Whelan which he and other Ferry employees have litigated in the courts.

We note that while Mr. Whelan's claim extends beyond the period that such claim was considered by the courts, he has not provided any evidence to show that DOT has at any time set the salary of Federal employees in such an arbitrary or unreasonable manner so as to violate the provisions of 5 U.S.C. 5348. The burden is on the claimant to establish the liability of the United States and the claimant's right to payment. See 4 C.F.R. 31.7 (1978). The requirement to fix and adjust wages in accordance with prevailing rates and practices under 5 U.S.C. 5348 is subject to the administrative discretion that is embodied in the term "as nearly as is consistent with the public interest" so that an agency is by no means compelled to follow every practice prevailing in the maritime industry. See 50 Comp. Gen. 93 (1970). See also 30 Comp. Gen. 158 (1950), and 30 Comp. Gen. 356 (1951). In view of the administrative discretion afforded an agency in fixing and adjusting pay pursuant to 5 U.S.C. 5348, we must conclude that the mere showing of a discrepancy in pay between the public and private sectors is not sufficient to show that the setting of pay rates was so arbitrary or unreasonable as to be improper.

In view of the above, the Claims Division's settlement denying Mr. Whelan's claim for additional compensation is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States