

DECISION



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

FILE: B-209114

DATE: June 14, 1983

MATTER OF: James E. Allen

DIGEST:

An employee of ACTION who was a former Foreign Service officer class 4, step 5 was reappointed in the Foreign Service by AID at class 4, step 7 after having executed document indicating he waived appointment at class 3, step 7. AID regulations for determining an individual's personal class and initial pay rate upon appointment provided for reappointment at the class and step previously held in the Foreign Service. Adjustment in class and step is permitted based upon qualifications at the time of reappointment, but these regulations do not entitle the individual to a class and step higher than that previously held. Thus, employee's assignment to class 4, step 7 was authorized without regard to his execution of a waiver, and his claim for backpay based on the higher class and step is denied.

By letter of September 7, 1982, Mr. James E. Allen appealed the adverse determination by our Claims Group, AFMD, in Settlement Certificate No. Z-2833837, issued July 26, 1982. Mr. Allen's claim is for a retroactive appointment as a Foreign Service Reserve officer in class 3, with pay at the step 7 rate, together with backpay for the difference in salary between that and class 4, step 7 which he held from July 2, 1978, until November 15, 1980. The Claims Group's denial of Mr. Allen's claim is sustained.

STATEMENT OF FACTS

In 1977, Mr. Allen, who had formerly held an FSR 4, step 5 position with the Agency for International Development (AID) and who was then an employee of ACTION, applied for reappointment with AID as an accountant in an overseas position. On June 16, 1977, a personnel staffing specialist at AID wrote to Mr. Allen stating that under AID regulations he must be employed at the FSR 3/7 level which

approximated his present grade and salary.¹ The staffing specialist explained that he could not be considered for appointment due to an agency policy of recruiting at lower levels to maximize promotions from within the Agency. On June 17, 1977, Mr. Allen responded stating that he waived his eligibility for appointment at the FSR 3/7 level and would "accept employment at the FSR 4/7 grade." He was appointed to class 4, step 7 on July 2, 1978, more than a year later, after having filed a new application for employment indicating no change in his submission of the prior year.

On April 30, 1979, Mr. Allen filed a grievance before the Foreign Service Grievance Board challenging the effect of the waiver he had executed. He claimed that AID had violated an agency regulation in appointing him at FSR 4/7 rather than FSR 3/7. The Foreign Service Grievance Board determined that AID had appropriately accepted his waiver and issued a determination adverse to the grievant on December 27, 1979.

Subsequently, Mr. Allen filed a claim concerning the same matter with our Claims Group. The Claims Group in a settlement issued July 26, 1982, determined that under the regulations Mr. Allen had been properly reappointed at the FSR 4/7 level.

PROCEDURAL CONSIDERATIONS

Mr. Allen submitted his claim after being unsuccessful in an action before the Foreign Service Grievance Board. The Board's determination predates the Foreign

¹The copy of that letter in our file shows a 3 superimposed over the 7 indicating that the step rate should have been 3 not 7. We do not know when this was done but it is true that the salary in class 3, step 3 was in excess of the salary for grade GS-14, step 4 which he was receiving at the time. Also, the calculation provided in the regulation for determining the salary rate, within the appropriate class, for Federal employees appointed in the AID Foreign Service would have resulted in placement at step 3 not step 7 if he had been appointed to class 3.

Service Act of 1980, Pub. L. 96-465, October 17, 1980, which establishes a statutory labor relations program for the Foreign Service and accords administrative finality to decisions of the Foreign Service Grievance Board. The Board's decision also predates the August 21, 1980 amendment to our "procedures For Decisions on Appropriated Fund Expenditures Which Are of Mutual Concern to Agencies and Labor Organizations" (45 Fed. Reg. 55,689-92) now contained in Part 22 of Title 4 of the Code of Federal Regulations (1982). Those procedures extend generally to requests for decisions from agencies and labor organizations participating in the labor management program established by the Foreign Service Act. With regard to our review of matters subject to negotiated grievance procedures, 4 C.F.R. § 22.7(b) provides:

"(b) Matters subject to a grievance procedure. The Comptroller General will not issue a decision or comment on the merits of a matter which is subject to a negotiated grievance procedure authorized by 5 U.S.C. 7121, except upon the request of an authorized certifying or disbursing officer, or the joint request of an agency and labor organization. Requests will be considered joint for purposes of this subsection when the other party has been served pursuant to § 22.4 and has not objected to submission of the matter to GAO."

By its terms the above-quoted regulation does not apply to grievances entertained by the Foreign Service Grievance Board. However, we have recognized that in enacting Chapter 11 of the Foreign Service Act of 1980 Congress intended that decisions of the Foreign Service Grievance Board receive the same degree of administrative finality as grievance determinations authorized by 5 U.S.C. 7121. For this reason we have advised the Department of State that we will accord a like degree of deference to determinations of the Foreign Service Grievance Board and will apply the policy expressed in § 22.7 to matters grievable under the Foreign Service Act. In this instance, we have entertained Mr. Allen's unilateral request for a decision because it involves a matter decided by the Board in December of 1979.

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The pertinent regulations are found in AID Handbook 26, Chapter 2, entitled "Foreign Service Pay." These regulations set standards under which the personal class and initial pay rates of Foreign Service employees are determined. As it relates to Mr. Allen's claim, paragraph 2A3 provides:

"3. Determining Personal Class and Initial Pay Rates

"a. SER/PM makes all class and salary determinations for Foreign Service employees appointed in accordance with criteria provided for this purpose.

"b. A candidate, who is not currently serving in the Federal Service, appointed initially in the Foreign Service is assigned to a personal class in the Foreign Service which is compatible with the personal class at which other Foreign Service employees were appointed. Due consideration is given to level of experience, education, and current earning level. A rate of the class is selected which may give the candidate up to 6 percent increase over current earnings. If the increase falls between two rates of the class, the higher rate will be selected.

"c. Except as provided in 2A3d, a Federal employee who has served or is serving at the time of appointment in a position in the executive, legislative, or judicial branches of the Federal Government or in the government of the District of Columbia is entitled to a rate within his/her assigned personal class which provides the employee with at least \$200 per year more than he/she would have received through a within-grade increase [sic] by staying in his/her former position and grade. If the employee is receiving a rate of pay in excess of the maximum rate of the class selected for the

appointment, the employee may be appointed at a higher class. * * *

"d. A former Foreign Service employee who is being reemployed is assigned to the class and rate last held in the Foreign Service. However, if the candidate's experience after leaving the Foreign Service has increased his/her general qualifications as well as those relating to the proposed assignment, the appointee is offered a class and salary rate as if 3b were applicable."

Nothing in that regulation required Mr. Allen's appointment at a class and rate above class 4, step 5 which was the highest class and step previously held by him in the Foreign Service. Although the staffing specialist in a letter of June 16, 1977, stated that the regulations required his appointment at the FSP 3/7 level to preserve his grade and salary at ACTION, we do not find that statement to be supported by the regulation.

Mr. Allen was not covered by subparagraph c, applicable to candidates serving or who have served as Federal employees, because he was a former Foreign Service officer. Subparagraph c is applicable to Federal employees except those covered by subparagraph d which covers former Foreign Service officers. Thus, Mr. Allen could have been assigned to the class and rate he last held in the Foreign Service--class 4, step 5. That paragraph does provide for appointment of former Foreign Service officers at a higher class and salary rate than that last held based upon increased qualifications. Determination of the appropriate class and rate is to be made under subparagraph b. Because the application of subparagraph b requires a subjective evaluation of the applicant's qualifications as they relate to those of other appointees, this subparagraph cannot be viewed as establishing an "entitlement" to appointment at a given class or step rate. Moreover, the Foreign Service Grievance Board determined that appointment of Mr. Allen at class 4, step 7 was appropriate.

Since the regulations on which Mr. Allen relies to give him an "entitlement" to appointment in class 3 at step 7 do

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not in fact provide such an entitlement, we need not address the issue considered by the Foreign Service Grievance Board of the validity of the waiver he executed.

Mr. Allen was offered an appointment in the Foreign Service in class 4 at the 7th step. The increase from the 5th step to the 7th step of that class was apparently justified by his added experience and qualifications. At no time did AID offer or indicate that they would appoint him to class 3, and we find no provision which required such action. Accordingly, Mr. Allen is not entitled to additional pay for the period he was employed in class 4, step 7 by AID.

for *Milton J. Fowler*
Comptroller General
of the United States