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DECISION



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

FILE: B-186977

DATE: January 2, 1979

MATTER OF: Environmental and Night Differential - [Computing
Basic Pay Upon Conversion From Wage Grade to
General Schedule Position]

DIGEST: In computing an employee's rate of basic pay upon conversion of his position from Wage Grade to General Schedule, an agency may include the night and environmental differentials only if the employee is entitled to those differentials during the last hour that he is in a pay status prior to the conversion. There is no authority in 5 C.F.R. Part 539 which would permit an agency to establish an employee's rate of basic pay on the basis of a daily, annual, or some other form of proration.

Mr. Thomas R. Muir, Acting Director, Office of Civilian Personnel, Department of the Navy, requests that we resolve a conflict between a recent decision of this Office and a decision of a Federal District Court. Mr. Muir states that a court decision, Boquist, et al. v. Hampton, Civil No. C 75-803M, decided by the U.S. District Court, Western District of Washington, June 23, 1976, coupled with a decision of this Office, Matter of Donald R. Foulks, 56 Comp. Gen. 624 (1977), has raised several questions regarding the interpretation of the provisions of 5 C.F.R. Part 539, which deals with pay setting procedures incident to a conversion from the Wage Grade to the General Schedule.

In addition to Mr. Muir's letter, we have also received requests from Lieutenant Colonel C. T. Woolsey, Chief, Accounting and Finance, Tinker Air Force Base, Oklahoma, and from Mr. John K. Mumford, Headquarters, Ogden Air Logistics Center, Hill Air Force Base, Utah, on the same subject. In order to facilitate handling of this matter, we have combined the cases and this decision responds to all of the above-listed requests for decisions.

Mr. Muir presents the questions as follows:

"While we understand that night shift differential and environmental differential are to be included in establishing the rate of basic pay in the wage position for purposes of selecting a rate upon conversion to the General Schedule, we are uncertain as to the

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computation of amounts to be included. Of major concern to us are conversion actions involving a group of employees, all of whose positions are converted on the same date but who, throughout the year, have been assigned to rotating shifts or varying degrees of exposure to hazards. We would, therefore, like your guidance on the following questions:

"a. In determining the rate of basic pay in the wage position is the appropriate shift differential included only for those employees actually assigned to the second or third shift at the time of conversion?

"b. If the answer to a. is in the negative, are all employees to be credited with the third shift differential as ordered in *Boquist v. Hampton, et al* (Civil No. C75-803M W.D. Washington) regardless of shift assignment at the time of conversion?

"c. With regard to the hazard differential, is the employee who is in receipt of hazard differential based on actual exposure in accordance with FPM Supplement 532-1, S8-7j, credited only with the amount earned on the day immediately preceding conversion?

"d. If the answer to c. is in the negative is the same approach invalid for hazard differential based on the hours in a pay status?

"e. If the answers to a. through d. above are all in the negative is it appropriate to determine each employee's annual aggregate rate, based on 2,080 hours, for the year immediately preceding conversion which will include total hours paid for low hazard work, high hazard work and night shifts, and treat that amount as his rate of basic pay in the wage position?"

Decisions of this Office have required the inclusion of night differential and environmental differential in the rate of basic pay of a wage board employee who is in receipt of such differential when his position is converted from the wage board system to the General Schedule. See 50 Comp. Gen. 332 (1970), with regard to night differential, and 56 Comp. Gen. 624 (1977), with regard to environmental differential. Since our initial decision in this area, 50 Comp. Gen. 332, *supra*, this Office has been requested to resolve certain problems arising in the course of agency implementation of that decision. Thus,

in 51 Comp. Gen. 641 (1972), we addressed the issue presented by Mr. Muir's first question by stating that only those employees actually working and being paid for night shift work at the time of conversion of their positions from wage grade to General Schedule would be entitled to inclusion of the night differential in setting their rate of basic pay in the General Schedule. See 51 Comp. Gen. 641, 643 (1972) question 2. Accordingly, question "a" is answered in the affirmative.

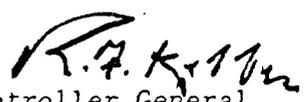
The above makes it unnecessary to respond to question "b". However, we note that this matter has been and continues to be the subject of litigation in various Federal courts. In two cases not mentioned by Mr. Muir, plaintiffs (employees who were assigned to rotating shifts and whose positions were converted while they were assigned to other than the night shift) prevailed pursuant to settlement agreements namely; (1) Kramer, et al. v. United States, Civ. No. C-74-0446-WTS, decided February 4, 1976, by the U.S. District Court, Northern District of California; and (2) United States v. McInnes, No. 76-1771, U.S. Court of Appeals, Ninth Circuit, filed June 23, 1977. Because of the manner of disposition in these cases, they are of little value as precedent. In the case referred to by Mr. Muir, Boquist, et al. v. Hampton, Civil No. C 75-803M, decided by the U.S. District Court, Western District of Washington, June 23, 1976, plaintiff employees were awarded the additional pay each would have received had night differential been included in this rate of basic pay upon conversion to the General Schedule, notwithstanding that he was not receiving night differential on the day of conversion.

After careful analysis we find nothing in the Boquist case which would compel us to reach a conclusion different from our prior holdings restricting inclusion of night differential in setting pay upon conversion to those employees actually receiving night differential, at the date of conversion. We have serious reservations about the holding of the Boquist decision, which was based on the "equal pay for equal work" principle set forth in the Classification Act, 5 U.S.C. 5101 et seq. (1976). In the McInnes case, supra, while the Court of Appeals required the Government to comply with the terms of the settlement it had agreed to, it also rejected as a basis for payment the "equal pay for equal work" principle, citing United States v. Testan, 424 U.S. 392 (1976), to the effect that the Classification Act does not create a substantive right enforceable against the United States. Accordingly, we do not intend to follow the holding of the District Court in the Boquist decision. See 14 Comp. Gen. 648 (1935) regarding the effect of decisions of courts on this Office.

Furthermore, we note that the Civil Service Commission has proposed a change to the applicable regulations which would go beyond our decision and prohibit any differential or allowance from being included in setting an employee's rate of basic pay upon the conversion of his position from a Wage Grade to the General Schedule. The proposed changes, if adopted, would avoid the "pyramiding" of the night differential that presently occurs and ensure that the "equal pay for equal work" principle is honored.

The third question concerns the computation of the rate to be used in arriving at the employee's Wage Grade rate of basic pay to be used for the purpose of establishing his pay in the General Schedule. This Office has consistently held that the rate of basic pay to be used in setting an employee's pay in the General Schedule is that rate which he is receiving at the time of conversion. We believe that the rate to be used is that rate which the employee is receiving during the last hour he is in a pay status prior to the effective date of the conversion action. Thus, the agency may include the night and environmental differentials in determining an employee's rate of basic pay only if he is in receipt of those differentials during the last hour he is in a pay status prior to his conversion. Accordingly, question "c" is answered in the negative. In response to question "d," in computing an employee's rate of basic pay for the purpose of a chapter 539 conversion, the rate of basic pay should be computed in accordance with the above.

While the above discussion makes a response to question "e" unnecessary, we note that in 51 Comp. Gen. 641, supra, we held that a rate of basic pay established under 5 C.F.R. Part 539 on the basis of a proration using an annual aggregate rate is not permissible. While recognizing the merits of such a proposal, we stated that we did not view the governing civil service regulations found at 5 C.F.R. Part 539 as authorizing or contemplating a proration such as suggested.


Deputy Comptroller General
of the United States