



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

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F-178370

June 5, 1973

The Honorable William P. Rogers  
The Secretary of State

Dear Mr. Secretary:

This is in reply to letter of April 4, 1973, from the Deputy Assistant Secretary for Budget and Finance, requesting our decision as to whether it is proper to make retroactive payment of a within-class salary increase to a grievant pursuant to a Remedial Order of the Foreign Service Grievance Board which was based on a finding of administrative error, delay and overreach within the meaning of section 222.3, Volume 3, Foreign Affairs Manual (FAM), and the Foreign Service Act of 1946, as amended. The case involves a grievant who transferred from the status of Foreign Service Staff Officer (FSSO) to Foreign Service Officer (FSO).

The record indicates that the grievant was promoted to grade FSSO-2 on February 21, 1971. He applied for a lateral transfer under the Management Reform Lateral Entry Program to grade FSO-4 on April 1, 1971, and was appointed on November 25, 1971, to grade FSO-4, step 1, with no change in salary. Regulations implementing the within-class salary increase provisions of the Foreign Service Act of 1946, as amended, are contained in 3 FAM 222. The service provisions for within-class increases are as follows:

a. FSOs and FSRs:

Each Foreign Service officer or Reserve officer receiving less than the maximum salary rate for his class (see section 221.2-2) receives increases in salary successively to the next higher salary rate within the class on July 1 of each year provided that:

- (1) He has been a Foreign Service officer or Reserve officer in the same class for a continuous period of 9 months or more;

\* \* \* \* \*

Foreign Service officers or Reserve officers who do not qualify for a within-class increase as of July 1 may not receive such increase until July 1 of the following year.

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b. FSSOs and FSO

Each full-time and part-time staff officer or employee receiving less than the maximum salary rate for his class (see section 221.2-3) receives an increase in salary successively to the next higher salary rate within the class at the beginning of the next pay period following completion of (1) 52 continuous calendar weeks of service in salary rates 1 through 6, or (2) 208 continuous calendar weeks of service in salary rates 7, 8, and 9 \* \* \*

The regulations do not provide for combining service as an FSSO with that for an FSO, even though the salary rates received may be the same. Therefore, since the grievant had not served the necessary time to qualify for a within-class increase as either an FSSO or an FSO, it was administratively held that he was not eligible for his next increase until July 1, 1973.

The submission indicates that the grievant is one of about a dozen FSSOs who transferred laterally and as a result of the time-in-class provisions are required to serve an additional 12 months before becoming eligible for within-class increases. The Department recognized the inequity in this matter and issued instructions on August 17, 1972, designed to avoid the loss of within-class increases by employees converting to the Foreign Service Officer Corps after that date. In general the instructions provide that the transfer should be delayed until the employee becomes eligible for a within-class increase as an FSSO or, under certain conditions, a pay increase upon transfer.

The grievant in this case prosecuted his grievance after the above-cited instructions were issued. The Board held that it was administrative error not to inform the grievant that he had the option to request the deferral of his transfer until he qualified for a within-class increase as an FSSO and directed that he receive such an increase in accordance with the 1972 instructions.

3 F/M 222.3 provides in pertinent part as follows:

A within-class increase is effective retroactively to the date it was properly due in cases where:

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a. Such increase is delayed beyond its proper effective date solely through administrative error, delay or oversight, \* \* \*

The following is the chronology of events leading to the grievant's FSO appointment:

- February 21 - promoted to FSO-2
- April 1 - applied for lateral transfer to FSO-4
- May 14 - certified for appointment by agency
- June 25 - closing of nomination list on which name was included
- July 13 - list submitted to the President
- July 28 - list forwarded to the Senate
- Aug/Sept. 8 - Senate adjournment
- November 4 - list considered by Senate
- November 28 - appointed FSO-4, step 1, with no change in salary

The above chronology indicates that two significant delays occurred incident to the grievant's transfer to FSO. The first delay was from May 14 to July 13 which was caused by the Department's policy of deferring the transmittal of nomination lists to insure that they are not forwarded to the Senate more frequently than every 2 or 3 months. We cannot say that such policy is unreasonable. Also, since the list was forwarded to the President within 3 weeks after the closing of the nomination list, there does not appear to be an undue delay in its transmittal. The second delay from July 28 to November 4 occurred as a result of the Senate adjournment over which the Department had no control. In view of the above it does not appear that the grievant's transfer was unduly delayed through administrative error, delay, or oversight.

At the time the grievant was transferred to FSO he was approximately 3 months away from a within-class increase. If his transfer had been

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delayed until February 1972 he would have earned the necessary length of time to become eligible for a within-class increase as an FSSO. However, the decision to transfer an employee is in the discretion of the Department and we are not aware of any Departmental regulation or instruction in effect in November 1971 to defer an otherwise proper transfer so that an employee's prospective within-class increase would not be delayed. The fact that the Department issued instructions subsequent to the grievant's transfer to insure that FSSOs transferred to FSO positions would not suffer delays in receiving within-class increases does not enlarge the grievant's rights. This is so since policy changes may not invalidate prior administrative determinations which were proper and in conformity with governing regulations when they were made.

In view of the above there is no authority to make a retroactive salary increase to the grievant.

Sincerely yours,

PAUL G. DEWING

For the Comptroller General  
of the United States