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[Claims for Backpay on the Basis that Night Differential Was Not Considered in Determining Previous Salaries]. B-170675(LLH). November 18, 1977. 23 pp.

Letter to Barbara Allen Babcock, Assistant Attorney Gener. Department of Justice: Civil Div.; by Leslie L. Wilcox, Sen.or Attorney, Office of the General Counsel.
Attention: Howard G. Slavit, Court of Claims Section.

Issue Area: Personnel Management and Compensation: Compensation (305).
Contact: Office of the General Counsel: Civilian Personnel.
Budget Function: General Government: Central Personnel Management (805).
Organization Concerned: Federal Aviation Administration; Department of Transportation.
Authority: Federal Employees Pay Act of 1945, sec. 301, as amended (P.L. 763). Wayne M. Helland v. United States, U.S.D.C. M.D. Fla, CA 77-665. John W. Sharpe v. United States, U.S.D.C. M.D. Fla., CA 77-666. Norman B. Sharp v. United States, U.S.D.C. M.D. Fla., CA 77-669. Russell J. Spear v. United States, U.S.D.C. M.D. Fla., CA 77-667. Wiley E. Webb v. United States, U.S.D.C. M.D. Fla., CA 77-668. Otto Whigam v. United States, U.S.D.C. M.D. Fla., CA 77-664.

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO: B-170675(LLW)

NOV 18 1977

The Honorable Barbara Allen Babcock
Assistant Attorney General
Civil Division
U.S. Department of Justice

Attention: Howard G. Slavit, Esq.
Court of Claims Section

Dear Ms. Babcock:

Subject: Wayne M. Helland v. United States
U.S.D.C. M.D. Fla., CA 77-665-Civ-J-M

John W. Sharpe v. United States
U.S.D.C. M.D. Fla., CA 77-666-Civ-J-M

Norman B. Sharp v. United States
U.S.D.C. M.D. Fla., CA 77-669-Civ-J-M

Russell J. Spear v. United States
U.S.D.C. M.D. Fla., CA 77-667-Civ-J-M

Wiley E. Webb v. United States
U.S.D.C. M.D. Fla., CA 77-668-Civ-J-M

Otto Whigam v. United States
U.S.D.C. M.D. Fla., CA 77-664-Civ-J-M

Your letter of October 27, 1977, requests our report on the above-entitled actions whereby plaintiffs seek backpay on the basis that their salaries in the General Schedule positions to which they were promoted were improperly determined on the basis of their previously earned wage board salaries excluding night differential pay. Plaintiffs contend that the Federal Aviation Administration's (FAA) failure to consider night differential as a component of the basic rates of pay of its wage board employees was made on a nationwide basis and that, while corrections of that error have been made in certain instances, their salary rates have not been redetermined.

While none of the plaintiffs have filed claims with this Office arising out of the subject matter of the suits, we do have records of claims filed by four other FAA employees involving the same problem of setting pay rates upon promotion from wage board to General Schedule positions. In June of 1976, our Claims Division received claims from Messrs. Charles D. Hall, Robert C. Holbrook, William E. Limbrick, and Ralph G. Nail. The four claimed that the personnel actions placing them in General Schedule positions were conversion actions rather than promotions and hence that their rates of pay in the General Schedule positions should have been determined under 5 C.F.R. Part 539 on the basis of their rates of basic pay in the wage board positions, inclusive of night differential. The contents of those claimants' files are forwarded as Enclosure 1.

On August 19, 1977, Messrs. Hall, Holbrook, Limbrick, and Nail were issued Settlement Certificates Z-2629563, Z-2639565, Z-2639564, and Z-2639562, respectively, denying their claims on the basis that the personnel actions were not conversions, but were promotions subject to the highest previous rate rule set forth at 5 C.F.R. Part 531. Those Settlement Certificates, copies of which are forwarded as Enclosure 2, offer the following explanation:

> "Since the instant action cannot be considered a conversion it does not come under the provisions of 5 CFR, Part 539; but, as a promotion to a general schedule position, it comes under the provisions of CFR, Part 531; and, therefore, the highest previous rate rule under that part is for application. Under that rule differentials and allowances are not included in rate of basic pay in order to prevent pyramiding of those differentials and allowances for no reason other than a change in pay system. 52 Comp. Gen. 695 (1973); 45 id. 88 (1965). It should be clear that a general schedule employee who works at night is not so entitled. To include such a differential in the base pay of an employee regardless of whether he works at night or not, and to give said employee an additional differential if he does work at night clearly remunerates the employee for a service not received. We know of no statutory basis for such remuneration."

On August 28, 1977, Messrs. Hall, Holbrook, Limbrick, and Nail requested reconsideration of the negative disposition of their claims. Inasmuch as we understand that they have now filed complaints in the Federal District Court for Atlanta, we have declined to consider their appeals and have so advised their attorney by letter of this date.

On September 15, 1977, the Department of Transportation requested a ruling by the Comptroller General on precisely the issue involved in the six cases before the U. S. District Court for the Middle District of Florida. The decision request, a copy of which is furnished as Enclosure 3, indicates that FAA has had difficulty in gleaning any definitive guidance in this area from either the controlling regulations or decisions of this Office. That submission indicates further that because of confusion in terminology in the various pay systems, pay determinations upon promotions from wage board to General Schedule positions have been made in inconsistent manners by its 14 regions. The Department of Transportation's questions include that presented by plaintiffs of whether night differential is to be considered as part of the basic pay of the wage board position from which the employee is promoted, but extend to the more difficult problem, apparently not anticipated by plaintiffs, of the salary in the General Schedule position that is to be used for comparison purposes under 5 C.F.R. Part 531.

We have reviewed the precedents in this area and understand both FAA's confusion in the matter and plaintiff's concern that night differential pay they received as wage board employees has been improperly excluded from consideration in determining their rates of pay upon promotion to the General Schedule positions. We find that even our own Claims Division has misapplied the rationale of our decisions in this area.

The issue presented by the suits is whether "pyramiding" of night differential pay is permissible in establishing an employee's salary when he moves from one position under the wage board system to another position under the General Schedule. The potential for pyramiding is a direct result of the fact that differentials and allowances, including night differential, that are part of the basic rates of pay of wage board employees whose salaries are established on the basis of prevailing wage rates under 5 U.S.C. § 5343, are not part of the basic rates of pay of General Schedule employees. Simply put, when an employee moves from a wage board to a General

Schedule position, if his basic rate of pay in the wage board position, inclusive of differentials and allowances, is required to be preserved, his wage board rate, inclusive of differentials and allowances, can be compared to the closest General Schedule rate of pay not resulting in a loss. Since the basic pay of the General Schedule position does not include differentials and allowances, the employee may be entitled to substantially the same differentials and allowances on top of that General Schedule rate so that, in effect, he may receive double the differential or allowance by virtue of his move between pay systems.

Thus, pyramiding results when a wage board rate of pay, without exclusion of differentials and allowances, is compared directly to rates of basic pay under the General Schedule. Theoretically, pyramiding can be avoided by excluding identifiable differentials and allowances from the wage board rate and then making a direct comparison of that net wage board rate with rates of basic pay under the General Schedule. Pyramiding can also be avoided by comparing the basic rate of pay in the wage board position, inclusive of differentials and allowances, with the General Schedule pay rates as increased by similar differentials and allowances that the employee will receive under the General Schedule system and selecting the basic rate of pay in the General Schedule that, when increased by General Schedule differentials and allowances, will not result in his receiving an aggregate amount of pay less than he did in the wage board position. This method of avoiding the problem of pyramiding is sometimes referred to as the "aggregate rate method."

Whether pyramiding is permissible and, if it is not, whether it is to be avoided either by excluding differentials and allowances from the wage board rate or by use of the aggregate rate method depends upon the nature of the personnel action taken. While the suits involve application of the highest previous rate rule under 5 C.F.R. Part 531, there appears to be a good deal of confusion as to whether principles applicable to other actions requiring salary adjustments based on comparison of wage board and General Schedule pay rates apply as well to actions within the purview of Part 531. The following will, hopefully, clarify application of pyramiding and antipyramiding principles to these different actions that require pay adjustment.

CONVERSION ACTIONS, PYRAMIDING SANCTIONED

When an employee, together with his wage board position, is brought under the General Schedule, the personnel action is termed

a "conversion" and is subject to the following pay retention mandate at 5 U.S.C. § 5334(d):

> "(d) The Commission may prescribe regulations governing the retention of the rate of basic pay of an employee who together with his position is brought under this subchapter and chapter 51 of this title. If an employee so entitled to a retained rate under these regulations is later demoted to a position under this subchapter and chapter 51 of this title, his rate of basic pay is determined under section 5337 of this title. * * *"

The Civil Service Commission's implementation of 5 U.S.C. § 5334(d) appears at 5 C.F.R. Part 539 as follows:

> "§ 539.201 Applicability.
>
> "This subpart applies in fixing the rate of basic pay of each employee initially brought into a position subject to the General Schedule by converting his position to a position subject to the General Schedule.
>
> "§ 539.202 Definitions.
>
> "In this subpart:
>
> "(a) 'Agency' has the meaning given that word by section 5102 of title 5, United States Code.
>
> "(b) 'Employee' means an employee of an agency to whom this subpart applies.
>
> "(c) 'Rate of basic pay' means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind.

"§ 539.203 Rate of basic pay in conversion actions.

"When an employee occupies a position not subject to the General Schedule and the employee and his position are initially brought under the General Schedule pursuant to a reorganization plan or other legislation, an Executive order, a decision of the Commission under section 5103 of title 5, United States Code, or an action by an agency under authority of § 511.202 of this chapter, the agency shall determine the employee's rate of basic pay as follows:

"(a) When the employee is receiving a rate of basic pay below the minimum rate of the grade in which his position is placed, his pay shall be increased to the minimum rate.

"(b) When the employee is receiving a rate of basic pay equal to a rate in the grade in which his position is placed, his pay shall be fixed as that rate.

"(c) When the employee is receiving a rate of basic pay that falls between two rates of the grade in which his position is placed, his pay shall be fixed at the higher of the two rates.

"(d) When the employee is receiving a rate of basic pay above the maximum rate of the grade in which his position is placed, he is entitled to retain his former rate as long as he remains continuously in the same position or in a position of higher grade in the same agency, or until he receives a higher rate of basic pay by operation of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, and Part 531 of this chapter. The employee may retain his former rate on subsequent reassignment as defined in § 531.202 of this chapter. If the employee is subsequently demoted to a position subject to the General Schedule, the agency shall determine his rate of basic pay in accordance with § 531.203(c) or Subpart E of Part 531 of this chapter, as appropriate."

Prior to enactment of 5 U.S.C. § 5344(d) in 1962, pay retention provisions had been contained in specific acts providing for conversion of positions between prevailing rate and General Schedule positions. Our decision at 34 Comp. Gen. 708 (1954) (Enclosure 4) involved the savings provision at section 114, 68 Stat. 1108, requiring that nothing in that Act be construed to decrease the existing rate of basic compensation of any then employee. With respect to treatment of night differential upon conversion under that Act from a prevailing rate system to the General Schedule, we there approved use of the aggregate rate methods for determining the appropriate General Schedule rate of pay:

> "The night rate of compensation of an employee occupying a prevailing rate position constitutes his basic compensation. See 31 Comp. Gen. 48, id. 391; and unpublished decision of November 10, 1950, B-97721. Hence, if at the time of conversion from a prevailing rate to a classified position the night rate of compensation of the converted (prevailing rate) position exceeds the basic compensation of the new (classified) position plus the 10 percent night differential applicable thereto, section 114 of Public Law 763 operates to save the entire night rate of compensation of the converted (prevailing rate) position. However, we are of the view that section 301 of the Federal Employees Pay Act of 1945, as amended by Public Law 763, providing for the payment of premium compensation for night work at the basic rate plus 10 percent does not contemplate the payment of the 10 percent differential in any case where the night rate received by an employee as saved compensation already includes a night-time differential.
>
> "Referring to those cases where the compensation of the converted (prevailing rate) position is less than the basic compensation of the new (classified) position plus the 10 percent night differential, the savings provision of section 114 is not regarded as being applicable and the employee should be paid at the classified rate plus the 10 percent night differential. See the answer to question 3."

In 1963, the Civil Service Commission first issued Part 539, in substantially the form it now appears. The first construction of Part 539 of which we are aware is contained in 1969 correspondence between the National Aeronautics and Space Administration (NASA) and the Commission (Enclosure 5) wherein the Commission adopted the aggregate rate method of 34 Comp. Gen. 708, supra, and advised NASA as follows:

> "Under Part 539 of the Commission's regulations and 34 Comp. Gen. 708, when an employee and his position are brought under the General Schedule in a conversion action, and the basic pay for the wage position (including night differential) exceeds the maximum rate for the General Schedule position plus 10 percent night differential, the General Schedule position plus 10 percent night differential, the employee will be paid the 'saved' basic pay of the wage position; however, he may not be paid the 10 percent night differential authorized for the General Schedule position. When the basic pay for the wage position does not exceed the maximum rate for the General Schedule position plus 10 percent, his pay will be fixed at the lowest rate of the General Schedule grade which, when the 10 percent night differential is added to the General Schedule rate, will guarantee him no loss of pay. In the latter case, if he performs night work, he is entitled to the 10 percent night differential authorized for General Schedule employees."

In the following year, the Commission changed its construction of Part 539, abandoning the aggregate rate method of determining pay and adopting a straight rate comparison of General Schedule rates with rates in wage board positions inclusive of night differential. The Commission requested our concurrence in that construction. The digest of our decision 50 Comp. Gen. 332 (1970) (Enclosure 6), indicates our concurrence in that construction and states the rule of that case as follows:

> "When an employee's wage board position is changed by agency action to the General Schedule while he is working a night shift, the basic rate of pay preserved to the employee under section 539.203 of the Civil

> Service Regulations includes the night differential, as it is a 'rate of pay fixed by * * * administrative action' within the contemplation of section 539.202(c), defining 'rate of basic pay.' The inclusion of the night differential in establishing the employee's General Schedule rate of pay does not preclude the receipt of the prescribed 10 percent night differential so long as he remains on the night shift, but the differential is not to be included in the employee's retirement and life insurance base."

While the decision discusses with specificity only the subject of inclusion of night differential in the wage board basic rate of pay, the Commission's proposal was made for the principal purpose of preserving the differential factor in the base rate of pay for the General Schedule position for purposes of establishing the employee's retirement and life insurance base. That purpose cannot be accomplished under the aggregate rate comparison method. From the record of that case it appears that the decision does not point out that the Commission's proposal rejects the aggregate rate method because we were not at the time aware of the existence of the earlier NASA correspondence or the fact that the Civil Service Commission had ever construed Part 539 in a manner consistent with 34 Comp. Gen. 708, supra.

The fact that 50 Comp. Gen. 332 abandoned the aggregate rate method is further confused by our subsequent holding in 51 Comp. Gen. 641 (1972) (Enclosure 7). That decision purports to hold that 50 Comp. Gen. 332, supra, is consistent with the Commission's 1969 letter to NASA. The decision, which deals primarily with a problem peculiar to conversion of wage board employees assigned to rotating shifts, includes the following rather misleading discussion:

> "* * * you forwarded a copy of a letter dated December 16, 1969, from the Bureau of Policies and Standards, United States Civil Service Commission, addressed to the Personnel Management Branch, National Aeronautics and Space Administration (NASA). The letter was in response to a question from NASA of what constitutes basic pay for wage employees. After stating that night differential paid to a wage employee is considered basic pay for all purposes, it was explained that:

"Under Part 539 of the Commission's regulations and 34 Comp. Gen. 708, when an employee and his position are brought under the General Schedule in a conversion action, and the basic pay for the wage position (including night differential) exceeds the maximum rate for the General Schedule position plus 10 percent night differential, the employee will be paid the 'saved' basic pay of the wage position; however, he may not be paid the 10 percent night differential authorized for the General Schedule position. When the basic pay for the wage position does not exceed the maximum rate for the General Schedule position plus 10 percent, his pay will be fixed at the lowest rate of the General Schedule grade which, when the 10 percent night differential is added to the General Schedule rate, will guarantee him no loss of pay. In the latter case, if he performs night work, he is entitled to the 10 percent night differential authorized for General Schedule employees. [Italic supplied.]

"The above paragraph is a statement of the procedure to be used under section 539 of the regulations and 34 Comp. Gen. 708 (1954). It should be noted that the first sentence concerns only those cases wherein the basic pay for the wage position, including differential, exceeds the maximum rate for the General Schedule position plus 10 percent night differential. The question to which 50 Comp. Gen. 332 was addressed related to the step within the General Schedule grade, and whether the night differential should be used in determining the step. The decision concurred in the view of the Civil Service Commission, which view was consistent with the advice furnished NASA in the second and third sentences of the paragraph quoted above from the December 16, 1969, letter. In such circumstances no change was effected by 50 Comp. Gen. 332 * * *."

Upon a very thorough consideration of the matter, we have now concluded that the above-quoted discussion from 51 Comp. Gen. 641, supra, is simply incorrect, with respect to the conclusion reached concerning the next to last sentence, quoted above, from the Commission's letter of December 16, 1969.

In the context of conversion actions, we have clearly sanctioned pyramiding, not only of night differential, but of cost-of-living allowances, 52 Comp. Gen. 695 (1973), 51 Comp. Gen. 656 (1972), and B-175124, June 2, 1976, and environmental differential, 56 Comp. Gen. 624 (1977). Copies of these four decisions are provided as Enclosure 8. The illustrations and discussions in those decisions are perhaps more helpful in understanding the manner in which pyramiding operates and the fact that it is sanctioned under Part 539. The following discussion from 52 Comp. Gen. 695, supra, while directed specifically to treatment of the cost-of-living allowance, is more broadly applicable to treatment of night differential under Part 539:

> "* * * The third decision is 51 Comp. Gen. 656 (1972), which involved the proper method of determining an employee's salary rate in Hawaii whose wage board position was converted to the General Schedule. Under the General Schedule the employee receives a cost-of-living allowance which is not a part of basic compensation. It was held that the salary rate of the employee was for determination under Part 539 of the Commission regulations rather than Part 531. While not specifically so stated that decision recognized that the regulations in Part 539 precluded any consideration of the principle expressed in B-154096 of September 23, 1964, and referred to in 45 Comp. Gen. 88. Thus, as far as concerns the application of Part 539 of the regulations the pyramiding of cost-of-living allowances cannot be avoided and an employee is assured of retaining his basic compensation for retirement purposes."

Presumably, it is plaintiffs' contention that their rates of pay in the General Schedule positions to which they were promoted should have been determined by the method sanctioned for conversion actions under Part 539, with a compounding or pyramiding of the night differential factor. It is noted that plaintiffs do not contend, as did the four claimants whose claims were considered by our Claims Division, that the personnel actions effecting their movements from wage board to General Schedule positions were in fact conversion actions.

PAY ADJUSTMENTS FOR SUPERVISORS - PAY RETENTION - No pyramiding by exclusion of night differential from wage board pay rate.

Pay adjustments for General Schedule employees supervising wage board employees are provided for by 5 U.S.C. § 5333(b):

> "(b) Under regulations prescribed by the Civil Service Commission, an employee in a position to which this subchapter applies, who regularly has responsibility for supervision (including supervision over the technical aspects of the work concerned) over employees whose pay is fixed and adjusted from time to time by wage boards or similar administrative authority as nearly as is consistent with the public interest in accordance with prevailing rates, may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised, or at the maximum rate for his grade, as provided by the regulations. * * *"

The Civil Service Commission's regulations implementing 5 U.S.C. § 5333(b) specifically provide for exclusion of night differential from the wage board employee's rate of basic pay in adjusting the rate of pay of the General Schedule supervisor. Insofar as pertinent, 5 C.F.R. Part 531, subpart C, provides:

> "§ 531.301 Authority of agency.
>
> "This subpart authorizes an agency to make a special adjustment in the pay of a supervisor in a General Schedule position who regularly has responsibility for supervision over one or more wage board employees. In making this pay adjustment, an agency is governed by section 5333(b) of title 5, United States Code and this subpart.
>
> "§ 531.302 Definitions.
>
> "In this subpart:

* * * * *

"(b) 'Rate of basic pay' means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind.

* * * * *

"§ 531.304 Requirements for entitlement.

* * * * *

"(d) Rate of basic pay. (1) In comparing the rate of basic pay for a supervisor with the rate of basic pay for a wage board employee supervised by him, an agency shall exclude from the wage board employee's rate (i) any irregular prevailing rate, such as a retained rate not related to his current position, and (ii) night differential.

* * * * *

"§ 531.305 Adjustment of rates.

"(a) Rate payable to supervisor. (1) Except as provided in subparagraph (2) of this paragraph, when an agency decides to adjust the rate of pay for a supervisor under section 5333(b) of title 5, United States Code, and this subpart, it shall adjust his rate of pay to the nearest rate (but not above the maximum rate) of his grade which exceeds the highest rate of basic pay (excluding night differential) paid to any wage board employee for whom the supervisor regularly has responsibility for supervision."

The Commission's regulation on pay adjustments for General Schedule supervisors thus avoids the problem of pyramiding by the simplistic method of excluding the night differential factor from the wage board rate of pay. In this context, exclusion of night differential would appear to be appropriate as there is no concern for perserving a particular rate of basic pay for the General Schedule

supervisor since the special rate authorized by 5 U.S.C. § 5333(b) is higher than he has been receiving and in no event involves a lessening of benefits already received.

Under the pay retention provisions of 5 U.S.C. § 5337(c) applicable to demotions for other than cause and other than at the employee's request, when an employee is reduced to a grade of the General Schedule from a wage board position, he is entitled to saved pay on the basis of his scheduled rate of pay:

> "(c) Under regulations prescribed by the Civil Service Commission consistent with the provisions of subsections (a) and (b) of this section, an employee who is reduced to a grade of the General Schedule from a position to which this subchapter does not apply is entitled to a retained scheduled rate of pay."

While the Commission's regulations at 5 C.F.R. Part 531, subpart E, set forth formulas for determining retention rates geared to the employee's rate of basic pay, that term is defined as the "scheduled rate of pay exclusive of separately stated pay of any kind." The definition of rate of basic pay at 5 C.F.R. § 531.503(c) is as follows:

> "(c) 'Rate of basic pay' means the scheduled rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of separately stated pay of any kind."

By so defining the term "rate of basic pay," night differential is excluded from the wage board salary, and pyramiding of differentials is avoided.

It appears that many of the FAA regions used this method of determining the rates of pay of its employees upon promotions from wage board to General Schedule positions.

HIGHEST PREVIOUS RATE RULE - No pyramiding by considering night differential payable in the General Schedule position.

Under its general authority at 5 U.S.C. § 5334 to prescribe regulations governing the rate of basic pay to which an employee is entitled upon change of position or type of appointment, the Civil

Service Commission has promulgated regulations at 5 C.F.R. Part 531, subpart B. The pertinent definitions contained at 5 C.F.R. § 531.202 are as follows:

> "(f) 'Highest previous rate' means the highest rate of basic pay previously paid to an individual while employed in a position in a branch of the Federal Government (executive, legislative, or judicial), a mixed ownership corporation, or the government of the District of Columbia, irrespective of whether or not the position was subject to the General Schedule.
>
> * * * * *
>
> "(i) 'Rate of basic pay' means the rate of pay fixed by law or administrative action for the position held by an employee beforee any deductions and exclusive of additional pay of any kind."

The regulations at 5 C.F.R. § 531.203(c) establish what is commonly referred to as the highest previous rate rule for application to position or appointment changes:

> "(c) Position or appointment changes. Subject to §§ 531.204, 531.515, 539.201 of this chapter, and section 5334(a) of title 5, United States Code, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. * * *"

In the context of this rule, the problem of pyramiding arises from the necessity to determine the highest previous rate. Paragraph 531.203(d)(4) sets forth the following rules for computing the highest previous rate earned in other than a General Schedule position. Those rules apply to promotions from wage board to General Schedule positions:

"(4) * * * If the highest previous rate was earned in a position not subject to the General Schedule, it is computed as follows:

"(i) The actual rate earned at the time of service computed on an annual basis is compared to the annual rates under the General Schedule as of the time of service to select an equivalent annual rate. When the actual rate is the same as a rate under the General Schedule, the rate under the General Schedule is the equivalent annual rate. When the actual rate is the same as a rate under the General Schedule and that rate occurs within two or more grades under the General Schedule, the rate which gives the employee the maximum benefit when it is converted under subdivision (ii) of this subparagraph is the equivalent annual rate. When the actual rate falls between two rates under the General Schedule, the higher rate is the equivalent annual rate. When the actual rate falls between two rates within the range of two or more grades under the General Schedule, the rate which gives the employee the maximum benefit when it is converted under subdivision (ii) of this subparagraph is the equivalent annual rate.

"(ii) The equivalent annual rate determined under subdivision (i) of this subparagraph is converted to the equivalent rate under the current General Schedule and that rate is the employee's highest previous rate."

The Commission's 1969 correspondence with NASA (Enclosure 5) explains that for purposes of applying the highest previous rate rule, the basic pay of a wage board employee includes night differential, but, in view of agency discretion not to apply the highest previous rate, night differential may be excluded from consideration:

"If the employee moves from a wage position to a General Schedule position, as opposed to moving with his position in a conversion action, his pay is fixed under the 'highest previous rate' rule--section 531.203(c) of the Commission's regulations. His

basic pay as a wage employee still includes any night differential that he might be paid; however, the agency by administrative regulation may disregard the night differential in fixing his pay under the 'highest previous rate' rule."

Our only decision specifically addressing the question of whether night differential is part of the rate of basic pay in the wage board position similarly concludes that it is. See discussion of B-175430, June 1, 1972, and December 19, 1973, infra.

It should be understood that the highest previous rate rule only establishes a maximum rate at which an employee may be paid upon change of position or appointment. An agency may determine whether or not to pay an employee at his highest previous rate. The Department of Transportation's decision request indicates that the FAA's regulations are written in a manner that would nominally appear to mandate that the employee be paid at his highest previous rate. However, for the purposes of those regulations, the submission states that the term "rate of basic compensation" is defined as excluding night differential. The possibilities posed by the FAA's redefinition of the term basic rate of compensation to exclude night differential will be discussed below.

The question of pyramiding of differentials and allowances under the highest previous rate rule has been addressed by this Office principally in decisions concerning treatment of cost-of-living allowances received by wage board employees. Based upon the particular manner in which wage rates are determined, the cost-of-living factor may or may not be identifiable. As of 1965, our decisions had established that where the wage board rate includes an identifiable cost-of-living allowance, the highest previous rate is to be determined under the aggregate rate method, i.e., the wage board rate inclusive of the cost-of-living allowance is to be compared to General Schedule rates as increased by any applicable General Schedule cost-of-living allowance. Where the wage board rate, though based on prevailing area rates, does not include an identifiable cost-of-living factor, we have permitted pyramiding by a straight comparison of the gross rate payable in the wage board positions to General Schedule rates, as in the manner used upon conversion under Part 539.

In 37 Comp. Gen. 285 (1957) we held that the cost-of-living allowance saved upon prior conversion of the employee, together with his position, from the General Schedule to the prevailing rate system was not to be regarded as part of basic compensation upon subsequent promotion of the employee from the wage board position to a General Schedule position. While that decision involved considerations of saved pay not present in most cases of promotion from wage board to General Schedule positions, it held that the cost-of-living allowance saved on the initial conversion must be deducted from the basic rate established under the prevailing rate system in determining the basic rate in the General Schedule position in order to avoid pyramiding:

> "In the case of Bay Ridge Company v. Aaron, 334 U.S. 446, 464, the Supreme Court expressed a philosophy which we believe to be controlling here. It said:
>
> 'When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay. To permit overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium--a pyramiding that Congress could not have intended.
>
> A similar pyramiding of cost-of-living allowances would in fact occur should the procedure proposed in the Assistant Secretary's letter be authorized in this case.
>
> "We are led to conclude therefore that 'premium compensation' saved by other than express statutory provision cannot be overlooked in determining basic rates of compensation when employees converted with their positions from the Classification Act to the prevailing rate system are later reconverted or promoted to positions under the Classification Act. Premium compensation saved on the initial conversion must be

deducted from the basic rate established under the prevailing rate system in determining the basic rate under the Classification Act."

In B-154096, September 23, 1964 (Enclosure 11) we addressed the specific subject of pyramiding of cost-of-living allowances under the highest previous rate rule and held that the General Schedule rate of pay of an employee moving from a wage board position, where the wage rate includes a cost-of-living allowance, is to be determined under the aggregate rate method consistent with antipyramiding principles discussed in 37 Comp. Gen. 285, supra. Thus, we held that the maximum basic rate which the employee under the General Schedule could be paid would be that grade rate which, when increased by the applicable 25 percent cost-of-living allowance payable in the General Schedule position, would not cause him to suffer a loss of salary.

The rule of B-154096, supra, was modified in 45 Comp. Gen. 88 (1965) (Enclosure 12), to permit the use of other than an aggregate rate comparison where the elements of "cost of living, differential, etc.," included in the wage board rate of basic pay are not identifiable.

"In line with the Commission's suggestion, the rule expressed in our decision of September 23, 1964, is hereby modified to the extent that where wage rates are derived from prevailing rates and the elements of cost of living, differential, etc., included therein are not discernible the gross rate of compensation of a particular position may be regarded as an employee's basic compensation (highest previous rate) for comparison with basic Classification Act rates. However, we stress that an agency operating in Alaska should (and we are asking the Commission to emphasize this in its regulations) limit the use of a highest previous rate thus determined so as to take into consideration gross compensation received in the wage board position and gross compensation in the Classification Act position to which transferred."

Thus, even under the exception recognized by that decision, agencies are cautioned not to apply the highest previous rate so determined

where, as in Alaska, use of other than the aggregate rate method would result in undue pyramiding of differentials and allowances. Although that decision deals mainly with cost-of-living allowances, it should be noted that the holding speaks also of the treatment of "elements of * * * differential, etc."

The holding in 45 Comp. Gen. 88, supra, was clarified in 52 Comp. Gen. 695 (1973) (Enclosure 13). The Civil Service Commission's submission in that case dealt primarily with the conversion rules of Part 539. However, the Commission's reference to 45 Comp. Gen. 88, supra, prompted the following discussion:

> "The second decision referred to is 45 Comp. Gen. 88 (1965) which permitted an exception to our holding in B-154096, September 23, 1964. The latter cited decision had indicated that when an employee under the prevailing rate (wage board) system moves--but not his position--to a position under the General Schedule his basic salary should be fixed at a rate which when increased by a 25 percent cost-of-living allowance (payable to GS employees in Alaska) would not cause him to suffer a loss in salary. That holding was designed to avoid the pyramiding of rates occasioned only by a change in pay system. See 37 Comp. Gen. 285 (1957). The exception set forth in 45 Comp. Gen 88 is to the effect that where wage rates are derived from prevailing rates and the elements of cost-of-living differentials and the like included therein are not discernible it would not be necessary to compare the gross rate of compensation of a wage board position (basic compensation) with the gross compensation of the GS position (basic compensation plus cost-of-living allowance) for purposes of determining the employee's basic salary rate in the GS position. We thus recognized that in certain situations a basic rate in the GS position could be selected comparable to the salary received in the wage board position and that an employee would then be entitled to a cost-of-living allowance on the basic rate of the GS position.
>
> "We stress that 45 Comp. Gen. 88 involves an application of the Commission's highest previous rate

rule under Part 531 of the Commission regulations rather than Part 539 conversion regulations. * * *"

The single situation in which this Office has specifically addressed the treatment of night differential in applying the highest previous rate rule, is that of Mr. McDonough, B-175430, June 1, 1972, and December 19, 1973 (Enclosure 14), a Navy employee transferred from a wage wage board to a General Schedule position. That decision deals specifically with the construction of the term "rate of basic pay" as used in 5 C.F.R. § 531.202(e) for purposes of the highest previous rate rule and, drawing from the construction of that same term under 5 C.F.R. Part 539 on conversions, fairly well disposes of any tenable argument that the term does not include night differential:

"As a general rule, night differential is considered part of basic pay of wage board positions. See 46 Comp. Gen. 200 (1966); 36 id. 482 (1957); 34 id. 708 (1955). In 50 Comp. Gen. 332 (1970), we held that the phrase, 'rate of basic pay,' as it is used in section 539.203 of the regulations to compute the salary of an employee whose wage board position is converted to a General Schedule position, does include night differential. Although the procedure used for computing the new salary in conversions under section 539.203 is not exactly the same as the procedure used in transfers under section 531.203, the definitions of 'rate of basic pay' used in the two cases are identical. See sections 531.202(i) and 539.202(c) of the regulations. Since the same language is used in both situations and since the situations are similar to the extent that the salary under a wage board position is used as the basis for establishing either a permissible or a required salary under the General Schedule position, we conclude that the phrase 'rate of basic pay,' as used in sections 531.202(i) and 539.202(c) should be given a consistent interpretation. Therefore, for the purposes of determining the highest previous rate in a wage board position where the employee is transferring from the wage board position to a General Schedule position, the night differential of the wage board position should be included as part of the rate of basic pay."

The cases do not specifically discuss the fact that the aggregate rate method is to be used to determine the highest previous rate for the specific reason that the Navy's regulations precluded the use of that rate insofar as it may have been other than the employee's last earned rate. Based on the grade, step, and salary figures given in that decision, it may seem to confuse the issue of whether the aggregate rate method or the conversion rules are to be used under the highest previous rate rule. We refer, in this regard, to the statement at page 3 of the earlier decision and at the first page of the later decision to the effect that the agency had authority to place Mr. McDonough at a salary of grade GS-9, step 8, rather than step 7. While that language may suggest that the conversion rules apply, the record in that case indicated that Mr. McDonough was promoted to a General Schedule position not involving night work. When the aggregate method is applied to a change of position from a wage board position involving night work to a General Schedule position not involving night work, application of the aggregate rate method would result in a calculation much like that which is used under the conversion rules since the night differential factor added to the General Schedule rate is $0. While our decisions in B-175430, supra, may be somewhat confusing for this reason, they may suggest a line of argument to support the action taken by FAA.

POSSIBLE LINE OF ARGUMENT

In B-175430, supra, the pertinent Navy regulation provided for the pay of an employee in a reduction-in-force action or a transfer-of-function placement to be fixed at a step rate which preserves his last earned rate. The Navy construed the term "last earned rate" as meaning the scheduled rate for the wage grade and step, exclusive of night differential and/or environmental pay. The particular Navy regulation is upheld by those decisions as a proper exercise of administrative discretion under the highest previous rate rule. The net effect of the Navy's regulation is to exclude night differential from the basic rate of the wage board position and to compare that net wage board rate with the General Schedule rate, much in the manner authorized for setting supervisory rates under 5 U.S.C. § 5333(b) and for pay saving under 5 U.S.C. § 5337, discussed above. This is also the manner in which FAA's various regions appear to have established the rates of pay for its employees. We do not have a copy of the applicable FAA regulations, but insofar as they define rate of basic compensation to exclude night differential it could be argued that FAA, in exercising its discretion under the

highest previous rate rule, determined not to use the highest previous rate determined by the aggregate rate method but adopted Navy's approach of looking to the scheduled rate of pay of the wage board position, exclusive of night differential. This result would clearly be permissible.

This line of argument may be difficult to sustain in view of the fact that the language of the FAA regulations otherwise sounds as though the highest previous rate rule is adopted as a mandatory policy, and since the FAA's regulation on treatment of cost-of-living allowances specifically adopts the aggregate rate method to avoid pyramiding--an impossibility when the term "basic rate of pay" in the wage board position is defined as excluding cost-of-living allowances. Moreover, the national unions representing FAA employees were furnished copies of the Department of Transportation's submission (Enclosure 3) for comments by this Office. The general tone of that letter may make it difficult to argue that the FAA intended not to apply the highest previous rate rule on a mandatory basis. We refer specifically to paragraph 12 of that submission.

We understand that the law suits brought by Messrs. Hall, Holbrook, Limbrick, and Nail, referred to above, are being handled by your Department's General Litigation Section. However, we have not been asked to furnish litigation reports in those cases. Inasmuch as the identical issue is involved in those cases and since it is not unlikely that additional suits will be brought, we assume that the Government's position in these actions will be coordinated in view of the complexity of the issues involved.

We have no record of any matter that would furnish the basis for a cross complaint or counterclaim against any of the six plaintiffs. If you have any questions concerning this matter, I will be glad to assist you. I can be reached on 275-6410.

Sincerely yours,

/s/

Leslie L. Wilcox
Senior Attorney
Civilian Personnel Law

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