



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

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B-178428

June 28, 1973

The Honorable William P. Rogers
The Secretary of State

Dear Mr. Secretary:

We refer to the letter of the Acting Assistant Administrator for Program and Management Services, Agency for International Development (AID), Department of State, dated April 12, 1973, concerning the entitlement of two former employees of that agency to the inclusion of foreign post differential in their lump-sum leave payments incident to their separation from Federal service in Vientiane, Laos. The two employees involved, Robert and Ruth Penters (husband and wife), were separated on March 14 and March 3, 1973, respectively, while in Vientiane. Apparently they departed Vientiane subsequent to the dates on which they were finally separated having no excess annual leave to be used as terminal leave.

A question arises with regard to the lump-sum payments involved under certain Department of State and AID regulations which appear to be in conflict with decisions of this Office. The Department of State regulation in question is 3 Foreign Affairs Manual 372 which provides:

372 Effect on Other Payments

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Post differential shall not be included in any lump-sum leave payment, except for settlement of a deceased Foreign Service employee's accounts.

Similarly, AID Manual Order 761.4, VI. C. of June 6, 1962, which authorizes the separation of employees at foreign posts and the payment for lump-sum leave in connection therewith, provides that such payments "may not include differential." The Comptroller General's decisions which are cited in the submission and others not cited therein established the rule that cost-of-living allowances and post differentials paid under section 207 of the Independent Offices Appropriation Act, 1949, and Parts I and II of Executive Order 10002, September 16, 1948, are to be included in the lump-sum leave payments of employees who are separated at their overseas posts. See 38 Comp. Gen. 594 (1959); 33 id. 287 (1954); 32 id. 323 (1953); 29 id. 10 (1949); 28 id. 465 (1949); and 28 id. 377 (1948).

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58 Comp. Gen. _____

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Authority for payment of a lump sum for an employee's accumulated leave at the time of separation is contained in 5 U.S.C. 5551, which was derived from the act of December 21, 1944, 58 Stat. 845. That statute provides that the "lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave."

In the cited decisions this Office had for consideration the provisions of the law and regulations cited above which included in sections 106(a)(1) and 208(a)(1) of Executive Order 10000, provisions authorizing the payment of foreign differentials and territorial allowances and differentials from the date of arrival at the post on assignment, transfer or detail to the date of departure from the post for separation, transfer or detail. Under those provisions an employee whose right to a differential or allowance had not terminated under the controlling regulation prior to separation was allowed to include such differential or allowance in his lump-sum payment based apparently on the presumption that he would have continued to serve at the overseas post but for his separation.

On the other hand State Department implementation of the authority to pay differentials to Foreign Service employees under section 443 of the Foreign Service Act of 1946, and the delegation in Part IV of Executive Order 10000, provided specifically that differentials paid thereunder would not be included in lump-sum payments of employees separated at foreign posts. See section 374.8, Volume 1, part 4, Foreign Service Manual, in effect from 1950 to 1953 and section 373.2 of that part in effect until April 3, 1961. That provision was recognized by this Office as precluding payment of foreign post differentials to Foreign Service employees separated at their foreign posts. See our letter B-111734, January 14, 1953, copy enclosed. This decision was reached even though the Standardized Regulations in force at the time did not provide specifically for the exclusion of foreign differentials from lump-sum payments.

The post differential here in question is paid under 5 U.S.C. 5925 which was derived from the Overseas Differentials and Allowances Act, Public Law 86-707, September 6, 1960, and the Standardized Regulations (Government Civilians, Foreign Areas) issued by the Department of State pursuant thereto. That act consolidated various authorities for paying cost-of-living allowances and post differentials to employees at foreign

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posts including section 207 of the Independent Offices Appropriation Act, 1949, under which the cited decisions and the regulations involved therein had been issued, and section 443 of the Foreign Service Act of 1946.

It is noted at this point that the inclusion of an allowance or differential in a lump-sum payment is dependant upon the allowance or differential being additional pay and not in the nature of reimbursement for expenses incurred. Thus, cost-of-living allowances paid to nonforeign service personnel at foreign posts under the authority of section 204 of the Independent Offices Appropriation Act, 1949, were not to be included in a lump-sum payment. 28 Comp. Gen. 465, supra. However, the Overseas Differentials and Allowances Act continued treatment of post differentials as additional pay which would be subject to lump-sum leave payments in appropriate circumstances. See S. Rept. 1047, 86th Cong., 2d sess., page 10, and the implementation thereof in section 51a of the Standardized Regulations.

Thus, post differentials paid under the current provisions are for consideration in determining an employee's lump-sum payment if otherwise authorized by the controlling regulation. The pertinent regulation, section 532 of the Standardized Regulations, provides in effect that the employee's entitlement to a differential terminates as of the close of business on the date of separation if not terminated earlier for some other reason listed in that section, such as departure from the post for return to the United States under transfer orders. That language does not specifically prohibit the payment of differentials as part of an employee's lump-sum payment as was the case in the former State Department regulations; however, it is not identical to the wording of Executive Order 10000 which was considered in our decisions under that regulation.

The wording of the current Civil Service Commission regulation with respect to the termination of nonforeign differentials and allowances is similar to that contained in the Standardized Regulations. That wording as contained in section 591.401(c) of the Code of Federal Regulations provides that "payment of an allowance or differential shall cease on separation, or as of the date of departure or transfer to a new post of regular assignment." It is significant that our Office interpreted that provision as being subject to the same interpretation as the regulations considered in the cited decisions in that individuals separated at posts where they were receiving an allowance or a differential under that

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regulation were found to be entitled to have the allowance or differential included in their lump-sum payments. See B-155978, February 9, 1965; B-155356, November 20, 1964, copies enclosed.

It is also of note that although a specific provision denying inclusion of foreign differentials in the lump-sum computation of employees separated at foreign posts was not included in the Standardized Regulations either before or after the enactment of the Overseas Differentials and Allowances Act such a provision was retained in the administrative provisions of the Foreign Affairs Manual and the pertinent AID regulations as cited in the submission and quoted above.

The question, then, is whether the rule applicable under Part I of Executive Order 10000 pertaining to differentials for nonforeign service employees is to be applied subsequent to the consolidation of those authorities under the Overseas Differentials and Allowances Act or whether the rule applicable under Part IV of that order pertaining to differentials for Foreign Service personnel is the one which should be applied. In that connection it does not appear that it would be practical to require agencies to include differentials in lump-sum payments based on determinations in each case as to the length of time the employee concerned would have remained at the foreign post but for separation.

There is no indication that when the Department of State incorporated 3 FAM 372 in the Foreign Affairs Manual any consideration was given as to whether the Foreign Service rule denying differential in lump-sum payments made to employees separated at foreign posts should be continued in the light of the consolidated statute, particularly since, as indicated above, no mention thereof was made in the Standardized Regulations issued after 1960. Further, we note that Civil Service Commission instructions in section S2-3f, book 550, FPM Supp. 990-., reflect that the rule applicable under Part I of Executive Order 10000, as stated in decisions of this Office, continued to be in force permitting the inclusion of differentials in lump-sum payments made to individuals separated at foreign posts.

Although the matter is not entirely free from doubt, we feel that the better view is that an employee separated at a foreign post should have his lump sum computed on the basis of continued service at the foreign post for the period covered by the lump-sum payment.

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Therefore, the differential applicable to service in Vietnam should be included in the lump-sum leave payments made to Robert and Ruth Pectern. You may wish to take the actions necessary to revise the regulations concerned in accordance with this decision.

Sincerely yours,

Paul G. Denbling

For the Comptroller General
of the United States

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