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DECISION

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

FILE: B-170675

DATE: January 15, 1980

MATTER OF:

[Use of Averaging Method For]
Ralph G. Nail, et al. - *Computation of Highest
Previous Rate]*

DIGEST:

Federal Aviation Administration and Federal Aviation Science and Technological Association seek our approval of averaging method for computation of highest previous rate upon promotion from Wage Grade position to General Schedule position where employee has worked rotating shifts and has received night differential. The averaging method was arrived at in order to complete action on United States District Court's Consent Order of Remand requiring the agency to include night differential in computing the highest previous rate. We have no objection to proposed method since pay rates under that method would not exceed those authorized under 5 C.F.R. Part 531.

DLG 03584

The Federal Aviation Administration (FAA) requests our guidance in the implementation of our decision in Ralph G. Nail, et al., B-170675, August 8, 1979. That decision authorized the FAA to recompute certain employees' pay rates in the General Schedule positions to which they were promoted on the basis of their highest previous rates, determined by their wage board rates of pay, including night differential.

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The FAA says that our decision in the Nail case does not address situations where the employees received night differential while working on rotating shifts. The agency refers to its letter to us dated September 15, 1977, requesting an advance decision on several questions pertaining to promotions under 5 C.F.R. Part 531 when night differentials are involved. This Office did not answer the questions presented by the FAA at that time due to ongoing litigation instituted by certain FAA employees, including Mr. Nail, in the United States District Court for the Northern District of Georgia. See Ralph G. Nail v. United States, CA No. C77-1497A and related cases. The employees' cases were remanded by the District Court to our Office for a decision authorizing administrative settlement. Our decision of August 8, 1979, was then issued. The FAA now asks how to compute

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the rate of basic pay pursuant to Part 531 for employees who received night differential while working rotating shifts in Wage Grade positions.

The background of the case is as follows. During the period from 1969 to 1977, a number of FAA employees moved from Wage Grade positions to General Schedule positions under merit promotion plan announcements. Although all of the actions were governed by 5 C.F.R. Part 531, entitled "Pay under the General Schedule," the various FAA regional personnel offices did not treat the actions uniformly. While the majority of the regions excluded the night differential from the computation of basic pay, a few regions included the night differential based on an averaging method. Eventually, several FAA employees filed the Court cases involved herein. The District Court issued a Consent Order of Remand on May 10, 1979, to our Office. We then issued our decision holding that the FAA may administratively settle claims not barred by the statute of limitations consistent with our decision in Matter of Terry Ray Ashbaugh, B-189852, February 14, 1979.

In Ashbaugh, we referred to B-175430, June 1, 1972, and December 1973, in which we held that night differential should be included as part of the rate of basic pay of a former Wage Board employee for the purpose of determining his highest previous rate in setting his rate of pay upon transfer to a General Schedule position. Neither our Ashbaugh nor our Nail decision specifically addressed the problems that arise in situations involving night differential earned on rotating shifts. Accordingly, prior to administratively settling these claims, the FAA has requested our decision concerning the method to be used in computing these employees' rates of basic pay.

The FAA reports that it prefers a method whereby the night differential earned over a period of time is averaged and added to an employee's scheduled rate to arrive at his rate of basic pay for the purpose of Part 531. The FAA further states that it does not favor the method used in conversion actions under 5 C.F.R. Part 539 where the employee's rate earned in the last hour in a pay status is used to determine his rate of basic pay. In this connection the FAA refers to its letter of September 15, 1977. In that letter it points out that in a situation involving a promotion from a Wage Grade to a General Schedule position under 5 C.F.R. Part 531 and a retroactive pay adjustment, it could not determine an employee's highest previous

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rate if it had to be based on the rate that he was receiving immediately prior to the effective date of the personnel action. This inability would arise because the FAA has no records showing the shifts on which employees served in prior years when they were promoted. We believe that it is necessary to distinguish between the situation where an employee's position is converted from the Wage Grade to the General Schedule and the situation where a Wage Grade employee is transferred or promoted to a position in the General Schedule. The former action is controlled by 5 C.F.R. Part 539 and the latter is controlled by 5 C.F.R. Part 531. Because of the particular language of 5 C.F.R. § 539.203, this Office has held that under Part 539 an employee's rate of basic pay is determined at the time of conversion. See 51 Comp. Gen. 641 at 643 (1972). Part 531 does not contain similar language. Rather, section 531.203 clearly does not contemplate computing the highest previous rate on the basis of the rate of basic pay received immediately prior to the personnel action. Thus, in 26 Comp. Gen. 601 (1947), we stated that the highest previous rate rule permits:

"an initial salary rate to be based upon the salary rate attained in any prior Government position rather than being limited to the maximum salary rate attained in the position last occupied."

The record contains many arguments on behalf of both the employees and the FAA arguing against the use of Part 539 or the "last hour in a pay status" rule. In view of the above discussion concerning the inapplicability of that rule, we will not specifically address those arguments or the questions presented in the September 15, 1977, letter from the FAA.

The issue remaining is whether the averaging method is a proper method for setting these employees' rates of basic pay under 5 C.F.R. Part 531. Mr. Paul E. Trayers, Assistant General Counsel, Federal Aviation Science and Technological Association (FASTA), has submitted a proposed averaging method. The FAA has concurred in the proposed method. That method submitted by FASTA is as follows:

"* * * when a wage grade employee works a rotating shift and his shift cannot be administratively discerned,
* * * /the FAA/ used an averaging basis utilizing 75 midnight shifts (0000-0800 A.M.) and 75 evening shifts (1600-2400 A.M.) per year.

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"Wage grade employees are paid a night differential of 7 ½% of their scheduled rate (per hour) for 8 hours of work during the evening shift. They are also paid a night differential of 10% of their scheduled rate (per hour) for 8 hours of work during the midnight shift. (5 USC, 5343, (f)).

* * * * *

"Example: an employee with a scheduled rate of \$9.00 per hour would make \$18,720 per year (\$9 x 2080 hrs.)

this employee works a rotating shift of 75 midshifts (75 x 8 hours = 600 hrs.) and 75 evening shifts.

for the evening shifts he is entitled to a 7 ½% night differential (7 ½ of \$9 = \$.675). Therefore, his evening shift differential can be determined as 600 hours x \$.675 or \$405.00.

for the midshifts he is entitled to a 10% night differential (10% of \$9. = \$.90). Therefore, his midshift differential can be determined as 600 hours x \$.90 or \$540.00.

the rate of basic pay would then be the scheduled rate of pay (\$9 per hour/\$18,720 per year) plus night differentials.

\$18,720.00	— scheduled rate
405.00	evening shift differential
540.00	midshift differential
<u>\$19,665.00</u>	<u>rate of basic pay</u>

"This rate of basic pay would be the rate used in determining the new step rate when that employee was promoted to the General Schedule."

The figures representing the number of shifts worked in the above example are estimates that will vary with the particular facts of each employee's work schedule.

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The regulations contained in 5 C.F.R. Part 531 govern the determination of an employee's rate of basic pay for certain specified personnel actions. Section 531.203(c) states that:

"* * * when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate * * *."

While we have been unable to find any decisions dealing with the legality of permitting averaging to arrive at a rate of basic pay for the purposes of Part 531, in interpreting the regulations governing the highest previous rate rule we have held that an employee's salary:

"could be fixed at any rate in the salary range of the grade in which the position to which transferred or reappointed has been allocated not to exceed the maximum rate of compensation attained * * *."
(Emphasis added.) 26 Comp. Gen. 601, 603 (1947).

Thus, agencies have authority under 531.203(c) to set an employee's salary at any step in the grade which does not exceed the employee's highest previous rate. There is no requirement that it be set at the highest previous rate attained. It is self evident that any rate attained by means of an averaging formula would not exceed the maximum rate authorized under Part 531. Accordingly, for the purposes of permitting the FAA to implement the Consent Order of Remand issued by the District Court in the Nail case, we have no objection to the averaging method agreed to by both parties.



For the Comptroller General
of the United States