

DOCUMENT RESUME

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[Compensation of Consultants]. B-90867. November 21, 1978. 7 pp.

Decision re: Jerome E. Hass; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel; Personnel Law Matters I.
Organization Concerned: Department of Energy.

Authority: Federal Salary Act of 1967 (P.L. 90-206). Federal Employees Salary Increase Act of 1958 (72 Stat. 214). Federal Employees Pay Act of 1945, as amended (5 U.S.C. 944; 5 U.S.C. 5504). Farm Credit Act. P.L. 93-275. 5 U.S.C. 51. 5 U.S.C. 53. 5 U.S.C. 3109. 5 U.S.C. 5332. 5 U.S.C. 5307. 5 U.S.C. 5305. 5 U.S.C. 5308. 5 U.S.C. 5541. 5 U.S.C. 5547. 5 U.S.C. 5584. 41 U.S.C. 5. 28 U.S.C. 548. 2 U.S.C. 60a. Executive Order 12087. 46 Comp. Gen. 667. 28 Comp. Gen. 328. 27 Comp. Gen. 776. 56 Comp. Gen. 375. B-131259 (1976). B-50870 (1958).

The pay entitlement of a consultant employed on a per diem basis was questioned. Although a consultant is not entitled to overtime compensation, he may be paid his rate of basic compensation for work on days outside his prescribed tour of duty, provided his compensation within any biweekly pay period does not exceed the rate of basic pay for level V of the Executive Schedule. Compensation of experts and consultants is set by administrative action and is subject to the statutory limitation on compensation applicable on a pay-period basis.
(RTW)

DECISION

R. Wilson
PLM I
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540

8406

FILE: B-90867

DATE: November 21, 1978

MATTER OF: Jerome E. Hass - Compensation of
Consultants

DIGEST: Although an expert or consultant is not entitled to overtime compensation, if he is employed on a per diem basis, he may be paid his rate of basic compensation for work on days outside his prescribed tour of duty, provided his compensation within any biweekly pay period does not exceed the rate of basic pay for level V of the Executive Schedule. Since the compensation of experts and consultants under 5 U.S.C. § 3109 is set by administrative action under 5 U.S.C. § 5307, it is subject to the limitation on compensation imposed by 5 U.S.C. § 5308 which, by virtue of 5 U.S.C. § 5504, is applicable on a pay-period basis.

By letter dated November 7, 1977, an authorized certifying officer for the Department of Energy has raised a question concerning the pay entitlement of Mr. Jerome E. Hass.

On July 2, 1977, Mr. Hass was appointed as a consultant to the Federal Energy Administration (FEA). He was given a temporary appointment with a regular tour of duty at a rate of pay of \$161 per day. During the period of his appointment, Mr. Hass worked in excess of 10 days per pay period and claims compensation for each day worked at the rate of \$161 per day. We are asked whether Mr. Hass is entitled to compensation for work in excess of 10 days per pay period.

The authority of the FEA to secure the services of experts and consultants is contained at section 7(b) of Pub. L. No. 93-275:

"(b) The Administrator may employ experts, expert witnesses, and consultants in accordance with section 3109 of title 5 of the United States Code, and compensate such persons at rates not in excess of the maximum

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daily rate prescribed for GS-18 under section 5332 of title 5 of the United States Code for persons in Government service employed intermittently."

The basic authority of 5 U.S.C. § 3109 which that provision implements is as follows:

"(b) When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to--

"(1) the provisions of this title governing appointment in the competitive service;

"(2) chapter 51 and subchapter III of chapter 53 of this title; and

"(3) section 5 of title 41, except in the case of stenographic reporting services by an organization.

However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title only when specifically authorized by the appropriation or other statute authorizing the procurement of the services."

While subsection 7(b) of Pub. L. No. 93-275 gives the FEA authority to compensate experts and consultants at the maximum rate of pay for grade GS-18, the FEA set Mr. Hass' pay at a rate \$21.72 per day below the maximum daily rate of pay for GS-18.

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An expert or consultant is not entitled to overtime compensation but, when employed on a per diem basis, is entitled to the daily rate prescribed in his appointment documents for each day of service regardless of the number of hours worked. 46 Comp. Gen. 667 (1967), 28 Comp. Gen. 328 (1948), and 27 Comp. Gen. 776 (1948). The designation of a regular tour of duty in his appointment documents does not necessarily preclude an expert's or consultant's receipt of compensation at the agreed daily rate for work performed outside of that tour of duty. However, there are aggregate compensation considerations that may limit the flexibility to use expert and consultant services for more than 10 days in any pay period.

Pay rates for the statutory pay systems, including the General Schedule, are fixed and adjusted under the pay comparability provisions contained at chapter 53, subchapter I, of title 5 of the United States Code. Section 5308 limits the amount of compensation that employees may receive as follows:

"Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule."

That language was adopted in conference with the broad purpose noted in the conference report, No. 91-1685, December 9, 1970, as follows:

"Section 5308 of the conference substitute provides that an employee whose rate of pay is adjusted under the provisions of sections 5301-5307 may not be paid at a rate in excess of the rate of pay for level V of the Executive Schedule (now \$36,000)."

Among others, the limitation of section 5308 applies to individuals paid under the major statutory pay systems, including those in the uniformed services and the Foreign Service. See Executive Order No. 12087, October 7, 1978.

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Section 5307 referred to in the conference report and contained in chapter 53, subchapter I, provides for the pay of employees whose rates of pay are fixed by administrative action to be adjusted based on increases in the General Schedule rates of pay. The following language from the conference report, cited above, makes it clear that, with the very precise exceptions of certain congressional employees and wage board employees, 5 U.S.C. § 5307 applies to all pay set by administrative action:

"The first feature of section 5307(a) is that it authorizes adjustments to be made in the rates of pay of employees of the legislative, judicial, and executive branches of the Government of the United States and of the government of the District of Columbia (except employees whose pay is disbursed by the Secretary of the Senate or the Clerk of the House) whose rates of pay are fixed by administrative action pursuant to law, and are not otherwise adjusted by the President under section 5305 of title 5, United States Code, as enacted by the conference substitute.

* * * * *

"The provisions of section 5307(a) are general in nature and all inclusive insofar as applicable administrative pay-fixing authorities are concerned, except as to certain employees of the Senate and the House of Representatives and wage board employees. Similar provisions in prior pay legislation were general in nature and, in addition, contained authorizations relating to specific administrative pay-fixing authorities.

"To illustrate, section 211 of the Federal Salary Act of 1967, Public Law 90-206, included a specific authorization under subsection (a) to adjust the rates of pay of U.S. Attorneys and Assistant U.S. Attorneys whose salaries are fixed by administrative action of the Attorney General under 28 U.S.C. 548."

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Thus, the limitation of section 5308 is imposed not only upon individuals paid under the statutory pay systems, but upon individuals whose pay is set by administrative action and subject to adjustment under 5 U.S.C. § 5307. We note that the pay of those congressional employees excepted from section 5307 is otherwise limited by a separate statute. See 2 U.S.C. §§ 60a-1 and 60a-2. In 56 Comp. Gen. 375 (1977) we recognized that the limitation of section 5308 extends to employees whose rates of pay are derived from the General Schedule. In that case the pertinent section of the Farm Credit Act provided that the compensation of Deputy Governors "shall not exceed the maximum scheduled rate of the General Schedule." Since, under that section, the pay of Deputy Governors is set by administrative action and subject to adjustment under the provisions of 5 U.S.C. § 5307, it is paid by reason of a provision within subchapter I of chapter 53 and is within the purview of 5 U.S.C. § 5308. Similarly, we have recognized that the pay of an expert or consultant hired pursuant to 5 U.S.C. § 3109 is fixed by administrative action and subject to adjustment under 5 U.S.C. § 5307. Matter of Carlyle P. Stallings, B-131259, July 6, 1976. For this reason it, too, is within the scope of the limitation upon pay imposed by 5 U.S.C. § 5308.

In the case of experts and consultants, we find that the limitation on pay imposed by 5 U.S.C. § 5308 is to be applied on a pay-period basis just as it is applied to the broad spectrum of employees whose pay is adjusted by reason of the pay comparability provisions of title 5 of the United States Code. Subsection 5504(b) of title 5 sets forth the computational rules to be used when it is necessary to convert an annual rate of basic pay to a basic hourly, daily, weekly, or biweekly rate. Because 5 U.S.C. § 5504(a) provides that the pay period for an employee subject to that subsection covers two administrative workweeks, payroll units throughout the Government were advised by the Comptroller General's memorandum B-50870, November 17, 1958, as follows:

"Section 15 of the Federal Employees Salary Increase Act of 1958, 72 Stat. 214, amended section 604(d) of the Federal

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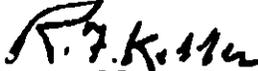
Employees Pay Act of 1945, as amended, 5 U.S.C. 944 [now 5 U.S.C. § 5504] by providing a new method of computation of pay. For all pay computation purposes affecting officers and employees, subject to section 604(d) * * * the annual basic rate of pay is divided by 2080 * * * to derive an hourly rate. The hourly rate is multiplied by 80 to derive a biweekly rate."

Experts and consultants are not within the category of individuals excluded from the definition of "employee" in 5 U.S.C. § 5541(2) so as to be exempt from either the pay period requirements or the computational rules of 5 U.S.C. § 5504. Since they are required to be paid on a biweekly basis, the limitation imposed upon their pay by 5 U.S.C. § 5308 is applicable to them on a pay-period basis. While it could be argued that the language of 5 U.S.C. § 3109 authorizing experts and consultants to be paid at a "rate not in excess of the daily equivalent of the highest rate payable under 5 U.S.C. 5332," requires application of the limitation only on a daily basis, the effect of that language is merely to permit experts and consultants to be paid at a daily rate regardless of the number of hours worked within any one day. It does not exempt experts and consultants from the biweekly limitation upon pay imposed by 5 U.S.C. § 5308. To hold otherwise would single out experts and consultants as the only category of employees within the purview of 5 U.S.C. § 5308 not limited on a biweekly or monthly basis to the pay for level V of the Executive Schedule and would permit them to be compensated considerably more per year than other employees whose pay is adjusted on the basis of the pay comparability provisions of title 5. Such a result would be clearly at odds with the broad congressional intent to limit the pay of the vast majority of Federal employees to the rate of basic pay for level V. We note that the result of this decision is to treat experts and consultants in much the same manner as regular employees whose receipts of compensation for work in excess of 10 days per pay period are limited by virtue of the biweekly limitation imposed upon their pay by 5 U.S.C. § 5547.

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For the reasons stated above, an expert or consultant may only be compensated an amount which does not cause his total compensation for any biweekly pay period to exceed the biweekly rate of pay for level V of the Executive Schedule. In Mr. Hass' case, he may be paid his full salary of \$161 for the 11th day of work performed within any pay period. If he should work a 12th day within any pay period he may be paid only such amount as does not cause his biweekly pay to exceed the biweekly pay for level V, and he may not be paid any amount should he work on the 13th or 14th day within any pay period. For the same reason, an expert or consultant compensated at the maximum daily rate for GS-18 would not be entitled to any compensation for work in excess of 10 days within any pay period.

Because the question of application of 5 U.S.C. § 5308 to experts and consultants has not been previously addressed by decisions of this Office, payments made to an expert or consultant prior to the date of this decision in excess of the biweekly amount payable for level V of the Executive Schedule need not be collected. Such overpayments are waived under the authority of 5 U.S.C. § 5584.


Deputy Comptroller General
of the United States