

DECISION

11 Shorter
119154

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

FILE: B-208274**DATE:** August 9, 1982**MATTER OF:** Overpayments of Pay for Senior
Executive Service Members

- DIGEST:**
1. Employees who are members of the Senior Executive Service who were awarded bonuses under 5 U.S.C. § 5384 in December 1981, and whose base pay and physician comparability allowance if received in full during the remainder of the fiscal year will cause them to be paid in excess of the Executive Schedule level I pay rate are not entitled to any pay in excess of the rate for level I. Subsection § 5383(b) of title 5 specifically precludes such payment during a fiscal year if it exceeds the rate of pay for level I at the end of such fiscal year.
 2. Employees who are members of the Senior Executive Service who were awarded bonuses under 5 U.S.C. § 5384, in December 1981, and whose base pay, bonuses, and physician comparability allowance if received in full during the remainder of fiscal year 1982 will exceed the maximum amount they are authorized to be paid (level I of the Executive Schedule) prescribed by 5 U.S.C. § 5383(b), are not entitled to waiver of the excess under 5 U.S.C. § 5584, since only erroneous payments may be waived and the payments involved here were proper when made.

This decision responds to the request of the Assistant Secretary for Personnel Administration, Department of Health and Human Services, for a waiver of overpayments which will be made to 13 physicians, who are members of the Senior Executive Service of that agency, as a result of the payment of salary, allowances and awards in excess of the statutory aggregate limit. After careful consideration of the questions and issues of this case, we have concluded that payments in excess of the statutory limit may not be authorized by this Office,

B-208274

and that a grant of waiver under 5 U.S.C. § 5584 in the circumstances presented would not be proper. This situation was precipitated by the circumstances that follow.

During Fiscal Year 1982, in addition to their basic pay, these senior executives received bi-weekly compensation in the form of a Physicians Comparability Allowance, based on their agreements negotiated with the agency prior to the beginning of the fiscal year, under the authority of 5 U.S.C. § 5948, as amended. They have also received in fiscal year 1982 (December 1981) a Senior Executive Service performance award authorized by 5 U.S.C. § 5384, which is statutorily required to be paid in a lump sum. However, on January 1, 1982, their basic pay was raised pursuant to the Executive Pay Increase as provided by the Act of December 15, 1981, Pub. L. No. 97-92, which increased the maximum rate of basic pay for the Senior Executive Service from \$50,112.50 to \$58,500.

The increase in their rate of basic pay, when combined with the performance award and the physicians comparability allowance, results in an aggregate amount that will exceed \$69,630 (the annual rate payable under Executive Schedule, level I, during Fiscal Year 1982) if the entire amount of unpaid basic pay is paid. However, 5 U.S.C. § 5383(b) provides that:

"(b) In no event may the aggregate amount paid to a senior executive during any fiscal year under sections * * * 5382, 5384, and 5948 of this title exceed the annual rate payable for positions at level I of the Executive Schedule in effect at the end of such fiscal year."

Assistant Secretary McFee states that the proximate cause of the future overpayments is the payment of the bonuses in December 1981, and that neither the individuals involved nor the agency knew that the pay cap would be raised. He indicates that if the agency had known, it would have adjusted the bonuses so the overpayments would not occur later. Thus, the Department of Health and Human Services is requesting a waiver of the amount of pay to these employees that would exceed the statutory limit.

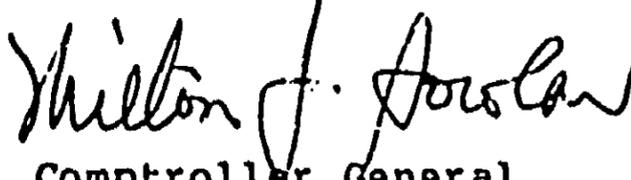
B-208274

Our authority to grant waiver, 5 U.S.C. § 5584, applies only to claims of the Government arising out of erroneous payments. The payments that have been made to these employees are statutorily authorized. Although the bonuses paid in December 1981 might have been reduced had the agency known that these employees would receive a pay raise in January, the record indicates that the total payments that have been paid to date do not exceed the aggregate limit. Since, the payments that have been issued were legal and proper when made, there have been no erroneous payments and the waiver statute is not applicable in these circumstances. See Matter of Tischer, B-205775, March 9, 1982, and Matter of Edynak, B-200113, February 13, 1981.

The agency contends that the awards were paid for employee performance in Fiscal Year 1981, and that to reduce the bonus or recoup overpayment at this time would be inequitable and "inconsistent with the spirit of the Senior Executive performance award" provision. The plain language of the statute provides no exception with regard to the aggregate amount of pay that may be paid to a senior executive within a fiscal year on the basis of the period of performance for which the employee receives an award. Furthermore, our review of the legislative history of the senior executive pay provisions indicates the specific intent of Congress to so limit the aggregate amount of compensation received by senior executives in salary, performance pay and physicians comparability allowance. See House Report No. 95-1403, 95th Cong., 2d Sess. 150 (1978), and House Report No. 96-633, 96th Cong., 1st Sess. 4 (1979). Moreover, subsequent to the enactment of the Senior Executive Service legislation, when the Federal Physicians Comparability Allowance Act was amended to include Senior Executive Service physicians, 5 U.S.C. § 5383 was also amended to include the payment of physicians comparability allowance in the aggregate limit. See Public Law 96-166, approved December 29, 1979, 93 Stat. 1273. Therefore, it is clear that Congress did not intend that employees receiving the payments these employees received would be allowed to exceed the level I limitation.

E-208274

However, we recognize as the Assistant Secretary points out that to discontinue payment of basic pay when the pay limit is reached may cause a hardship to some of these employees. In this regard, 5 U.S.C. 5383(b) provides that the aggregate amounts payable in a fiscal year shall not "exceed the annual rate payable for positions at level I of the Executive Schedule in effect at the end of such fiscal year." (Underscoring supplied.) We do not view this provision as requiring an agency to wait until the end of a fiscal year to make a determination concerning the aggregate limitation, and ordinarily we would expect an agency to make appropriate reductions in pay well in advance to preclude exceeding level I. However, in the particular circumstances of this case where hardship may occur if the entire projected excess is collected in this fiscal year, we will not object to continued payments to those individuals with collection being made in installments continuing into the next fiscal year. See 5 U.S.C. 5514.

for 
Comptroller General
of the United States