

DECISION

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

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FILE: B-212483**DATE:** February 23, 1984**MATTER OF:** Cuban and Haitian Refugee Program
Employees - Within-Grade Salary Increases**DIGEST:**

1. In May 1980, employees of the Cuban and Haitian Refugee Program, Department of Health and Human Services, were appointed to Schedule A excepted service positions under the General Schedule for periods not to exceed September 30, 1983. Employees whose appointments were for more than one year, and employees whose initial appointments were not-to-exceed one year or less, with a single extension of more than one year, are eligible for within-grade salary increases under 5 U.S.C. § 5335 (Supp. IV 1980), on the same basis as term employees since they occupied permanent positions as defined in OPM regulations.
2. Employees of the Cuban and Haitian Refugee Program whose initial appointments were not-to-exceed one year or less, with extensions for periods not-to-exceed one year or less, are not eligible for within-grade salary increases since they did not hold permanent positions as defined in OPM regulations. Their initial appointments, and extensions, were, singularly, not for periods of more than one year. Any overpayments of pay resulting from granting of within-grade increases to these employees may be considered for waiver under the provisions of 5 U.S.C. § 5584 (1982).

This decision is in response to a request by Mr. Thomas S. McFee, Assistant Secretary for Personnel Administration, Office of the Secretary, on behalf of the Secretary, Department of Health and Human Services. A decision is requested as to whether certain employees, appointed to a staff assigned to activities associated with the settlement of Cuban and Haitian refugees, are

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eligible for within-grade salary increases under the provisions of 5 U.S.C. § 5335 (Supp. IV 1980). For the reasons hereafter stated, the employees in categories I and II are entitled to within-grade increases, while the employees in category III are not entitled to such increases.

Under the provisions of the Refugee Education Assistance Act of 1980, Pub. L. 96-422, 94 Stat. 1799, individuals were appointed to a staff assigned to activities related to the settlement of Cuban and Haitian entrants. In May 1980, the Office of Personnel Management (OPM) authorized the appointment of a limited number of employees to this staff. The employees were given Schedule A excepted service appointments. The termination date for such service was September 30, 1983.

Some of the employees on the Cuban and Haitian Refugee Program staff were given appointments of more than one year. Other employees were initially appointed for a period of not-to-exceed one year and received a single extension of more than one year. On the other hand, most of the employees appointed to the staff were given initial appointments of not-to-exceed one year or less. Some employees in this latter group had their appointments extended in additional increments for periods not-to-exceed one year or less which made their total appointment time exceed one year.

Section 5335, Title 5, United States Code, provides that an employee paid on an annual basis, and occupying a permanent position within the scope of the General Schedule, shall, following the completion of certain enumerated requirements, receive periodic step increases.

CATEGORY I

Initial Appointment of More Than One Year

Employees on the staff assigned the activities associated with the settlement of the Cuban and Haitian refugees who were given appointments of more than one year are entitled to receive within-grade increases. The implementing regulation, 5 C.F.R. § 531.402(d) (1981), issued by OPM, defines a permanent position as "one filled on a permanent basis, that is by an appointment not designated as temporary by law and not having a definite time limitation." The regulatory provision was amended January 1, 1982, to state that a "permanent position means a position filled by an employee whose appointment is not designated as temporary by

law and does not have a definite time limitation of one year or less." 5 C.F.R. § 531.403 (1982). Guidelines issued by OPM clarify that the term, permanent position, does not include a position filled by an employee whose appointment is limited to one year or less and subsequently extended so that the total time of the appointment exceeds one year. Federal Personnel Manual (FPM) Supplement 990-2, Book 531, Subchapter S4-3. Thus, appointments for more than one year are permanent positions since they do not have a definite time limitation of one year or less.

Accordingly, employees who were given appointments of more than one year (but less than four years) are entitled to periodic step increases under 5 U.S.C. § 5335 on the same basis as term employees. See Indochinese Refugee Program Employees, B-193803, February 14, 1979.

CATEGORY II

Initial Appointments of Not-to-Exceed One Year With a Single Extension of More Than One Year

Employees who were given initial appointments of not-to-exceed one year, with a single extension of more than one year, are entitled to within-grade increases on the same basis as those employees who were given appointments of more than one year, as explained earlier. Although the initial appointment was for one year or less, the single extension granted was for more than one year. Consequently, this subsequent appointment of more than one year comes within the provisions of 5 C.F.R. § 531.403 (1982), quoted above. See also 5 C.F.R. §§ 316.305 and 316.301, and Indochinese Refugee Program Employees, cited above. The employees are entitled to periodic step increases on the same basis as term employees. Further, the time spent under the initial appointment counts as creditable service when the employee becomes eligible for a within-grade increase. 5 C.F.R. § 531.404 (1981); FPM Supplement 990-2, Book 531, Subchapter S4-5c.

CATEGORY III

Initial Appointments Not-to-Exceed One year or Less With Extensions in Increments for Periods Not-to-Exceed One Year or Less

Employees who were granted initial appointments of not-to-exceed one year or less and who received extensions in increments for periods not-to-exceed one year or less,

are not entitled to within-grade increases. The positions filled by these employees were not "permanent positions" under the 1981 and 1982 regulatory provisions, 5 C.F.R. §§ 531.402(d) and 531.403, inasmuch as they had a definite time limitation of September 30, 1983, and were for periods of one year or less. Such employees do not come within the ambit of 5 C.F.R. §§ 316.305 and 316.301 and our decision, Indochinese Refugee Program Employees, cited earlier, since their appointments, both initial and the extensions, were, singularly, not for periods of more than one year. There is no regulatory authority which would permit "tacking on" the subsequent extensions to the initial appointment so as to make the total period of the appointments for a period of more than one year. This is evidenced by the prohibition against such "tacking" contained in the guidelines set forth in FPM Supplement 990-2, Book 531, Subchapter S4-3, cited previously.

Accordingly, employees of the Cuban and Haitian Refugee Program in categories I and II are entitled to within-grade salary increases under the provisions of the controlling law and regulations.

Employees of the refugee program in category III are not entitled to within-grade salary increases. In this connection, we would point out that overpayments of pay which have resulted from the granting of within-grade increases to employees in category III may be considered for waiver of repayment under the provisions of 5 U.S.C. § 5584 (1982), and 4 C.F.R. §§ 91.1-91.5 (1983).



Acting Comptroller General
of the United States