

DOCUMENT RESUME

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[Inclusion of Night Differential Pay in Establishing Rates of Basic Pay for Positions Converted from Wage Board to General Schedule]. B-186977. November 8, 1978. 3 pp.

Letter to Rep. Gunn McKay; by Milton J. Socolar, General Counsel.

Contact: Office of the General Counsel: Personnel Law Matters I.
Organization Concerned: Department of the Air Force: Hill AFB,
UT.

Congressional Relevance: Rep. Gunn McKay.

Authority: Classification Act (5 U.S.C. 5105). 5 U.S.C. 5534. =5
C.F.R. 539. 50 Comp. Gen. 332. 51 Comp. Gen. 641. Kramer, et
al. v. United States, Civ. No. C-74-0446-WTS (1976). United
States v. Testan, 424 U.S. 392 (1976).



COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

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In reply refer to:
B-186977

November 8, 1978

The Honorable Gunn McKay
House of Representatives

Dear Mr. McKay:

This is in further response to your letter to this Office of December 7, 1977, and to your letters of November 10, 1977, and December 7, 1977, to the Department of the Air Force which were subsequently referred to this Office by that Department. In the above-mentioned letters you refer to the concern of certain employees of the Hill Air Force Base that night differential pay received while working rotating shifts in the wage board positions was not included in establishing their rates of basic pay upon conversion of their positions from the wage board to the General Schedule. We furnished you an interim report on June 20, 1978, stating that this Office was reviewing our decisions in this area. We have completed our review of this matter and submit the following for your information.

In 50 Comp. Gen. 332 (1970) we held that night differential may be included in the rate of basic pay of a wage board employee who is working a night shift when his position is converted from the wage system to the General Schedule. In that decision we posed no objection to the view of the Civil Service Commission that basic pay in a wage board position includes night differential for the purpose of fixing the rate of pay in the General Schedule position to which the wage board position is converted. However, its application to employees on rotating shifts was the subject of 51 Comp. Gen. 641 (1972). In that decision, we stated that under 5 U.S.C. § 5534 the Civil Service Commission is authorized to prescribe regulations governing the rate of basic pay to which an employee is entitled. Pursuant to that authority the Commission issued the regulations contained at 5 C.F.R. Part 539 which provide for the fixing of rates of pay upon conversions between pay systems. Part 539 contains no provision whereby consideration may be given to rotating shift situations where the

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agency effects the conversion at a time when the employee is not receiving the night differential. In view of these regulatory provisions we found no authority to approve an agency proposal to prorate night differential in order to permit its inclusion in the computation of basic pay for employees who had previously performed night work under a schedule of rotating shifts but who were not actually receiving night differential at the time their wage board positions were converted to the General Schedule. See 51 Comp. Gen. 641, supra, questions 1 and 2.

This matter has been and continues to be the subject of litigation in various Federal courts. In two cases, plaintiffs (employees who were assigned to rotating shifts and whose positions were converted while they were assigned to other than the night shift) prevailed pursuant to stipulation of settlement agreement. Kramer, et al. v. United States, Civ. No. C-74-0446-WTS, decided February 4, 1976, by the U.S. District Court, Northern District of California, and, upon appeal, in United States v. McInnes, No. 76-1771, U.S. Court of Appeals, Ninth Circuit, filed June 23, 1977. Because of the manner of disposition in these cases, they are of little value as precedent. In Bocuist, et al. v. Hampton, Civil No. C 75-803M, decided by the U.S. District Court, Western District of Washington, June 23, 1976, plaintiff employees were awarded the additional pay each would have received had night differential been included in this rate of basic pay upon conversion to the General Schedule, notwithstanding that he was not receiving night differential on the day of conversion.

We find nothing in the Bocuist case which would compel us to reach a conclusion different from our prior holdings restricting inclusion of night differential in setting pay upon conversion to those employees actually receiving night differential at the date of conversion. Rather, we have serious reservations about the holding of the Bocuist decision, which was based on the "equal pay for equal work" principle set forth in the Classification Act, 5 U.S.C. §§ 5105 et seq. (1976). In the McInnes case, supra, while the Court of Appeals required the Government to comply with the terms of the settlement it had agreed to, it also rejected as a basis for

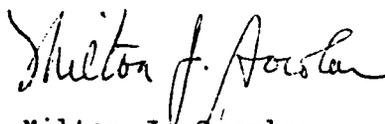
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payment the "equal pay for equal work" principle, citing United States v. Testan, 424 U.S. 392 (1976), to the effect that the Classification Act does not create a substantive right enforceable against the United States.

We recognize that the decision to stand by our prior decisions in this area may be considered by some to be a harsh one. However, we note that the Civil Service Commission has proposed a change to the applicable regulations which would go beyond our decision and prohibit any differential or allowance, including night differential, from being included in setting an employee's rate of basic pay upon the conversion of his position to the General Schedule. The proposed changes, if adopted, would avoid the "pyramiding" of the night differential that presently occurs and ensure that the "equal pay for equal work" principle is honored.

We trust that this responds to the questions presented by your constituents.

Sincerely yours,



Milton J. Socolar
General Counsel