



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

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October 4, 1973

The Honorable David S. Parker
Governor of the Canal Zone
Balboa Heights, Canal Zone

Dear Governor Parker:

Reference is made to your letter of July 12, 1973, requesting a decision from our Office concerning the payment of tropical differential to certain female employees of the Panama Canal Zone Government.

You state that the United States citizen employees of the Canal Zone Government generally have permanent status, as distinguished from a limited tour of duty, and may remain in the Canal Zone during all or most of their working lives. As a result, their families and those of United States military personnel in the Canal Zone form a pool of United States citizens from which appointments to the positions in the Canal Zone may be made without the need of recruitment from the United States. Obviously the dependent who reaches majority, is employed, and establishes his or her own household in the Canal Zone may occupy a job that is the reason for the family in the area, because persons who are the immigration responsibility of the United States can remain there only so long as they are employed by the Government.

You submit the following list of married female employees of the Canal Zone Government, all of whom are United States citizens, with a resume of their employment history which you state is representative of the types of claims received in your office for payment of tropical differential:

<u>Name</u>	<u>Married to</u>
"(1) Arboleda, Renata M.	Panamanian sculptor and official in Panama's ministry of education
"(2) Dymond, Ray R.	U.S. citizen employee of Ford Motor Co. based in Panama
"(3) Jurado, Sue M.	Panamanian who is self-employed manufacturers' representative

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<u>Name</u>	<u>Married to</u>
"(4) Kwai Ben, Beatrice	Panamanian employed by private company in Panama
"(5) Hakibhin, Shirley S.	U.S. citizen who is self-employed in Panama
"(6) Zeineta, Margaret	U.S. citizen who is owner and general manager of a steamship agency operating in the Canal Zone and Panama"

The Arboleda Claim

Dr. Arboleda is employed by the Canal Zone Government as director of its Mental Health Center. Her pay is fixed administratively at a grade equivalent to GS-15. Pursuant to our decision B-173954, dated September 26, 1972, Dr. Arboleda was paid the tropical differential for a period prior to January 10, 1971, which she had been considered ineligible to receive under the terms of section 253.135 of title 35 of the Code of Federal Regulations (CFR) as the regulation then read. Dr. Arboleda was recruited by the Canal Zone Government for work in the Canal Zone when she was residing in the United States at which time she was separated from her husband. She came to the Canal Zone from the United States in 1965 and was divorced in November of that year. In January 1966 she married a Panamanian citizen residing in the Republic of Panama adjacent to the Canal Zone. Her husband is employed by the ministry of education of the Government of Panama as director of an arts and culture center. He is also a well-known sculptor and is understood to have been commissioned from time to time to execute important public monuments. Dr. Arboleda brought to the Canal Zone with her a child by her prior marriage and she now resides with her family in Canal Zone quarters assigned to her by the agency on the basis of her position as director of the Mental Health Center.

The Dymond Claim

Mrs. Ray R. Dymond is employed by the agency's police division as a youth officer at a grade equivalent to GS-7. She came to Panama in September 1971 with her husband, Mr. W. J. Anthony Dymond, who is a United States citizen employed by the Ford Motor Company. Mrs. Dymond

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was hired locally by the Canal Zone Government in November 1971. She contends that her husband has only temporary immigration status and has been unable to obtain permanent residence in the Republic of Panama. She states that his job requires him to spend a substantial portion of his time traveling throughout Latin America and that he continues to work from a base in Panama primarily because of her employment in the Canal Zone.

The Jurado Claim

Mrs. Sue M. Jurado is employed as an elementary teacher in the division of schools. She is paid at a grade equivalent to class 15-C on the teachers' pay schedule for the District of Columbia. She was recruited from the continental United States and commenced work in the Canal Zone in September 1960. On March 25, 1961, she married Rosendo Jurado, a Panamanian citizen. Mrs. Jurado resides with her husband in Panama City, Republic of Panama, where he is self-employed as a manufacturer's representative.

The Kwai Ben Claim

Mrs. Beatrice Kwai Ben is employed in the health bureau as a personnel assistant at a grade equivalent to GS-9. She resides in the Republic of Panama with her husband, Oliver Kwai Ben, a Panamanian citizen employed by Franorco, Inc., a private company. Mrs. Kwai Ben was born in the Republic of Panama and at the time of her marriage in 1958 she was employed by the American Embassy in Panama City. Her employment by the Embassy terminated in November 1960 and in January 1961 she was employed in the Canal Zone by the Panama Canal Company. Her transfer to the Canal Zone Government in January 1967 was accomplished with no break in service.

The Makibbin Claim

Mrs. Shirley S. Makibbin is employed as a supervisor of elementary schools in the division of schools. She is compensated at a grade equivalent to class 8-C on the teachers' pay schedule for the District of Columbia. Mrs. Makibbin resides in Panama where her husband, George D. Makibbin, a United States citizen, is self-employed. Both Mrs. Makibbin and her husband were born in the Canal Zone and she has no legal residence in the United States. At the time of her marriage in June 1950 she was

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employed by the Canal Zone Government. In December 1956 she resigned in order to accompany her husband to Honduras where he had been transferred by his employer. She returned to Panama in August 1960 and was reemployed by the schools division of the Canal Zone on September 7, 1960. It is understood that her husband was then unemployed due to poor health. She has been continuously employed since 1960 and was promoted to her present position on August 4, 1969.

The Zaimetz Claim

Mrs. Margaret Zaimetz is employed as a secretary in the civil affairs bureau at a grade equivalent to GS-6. She was born in the Republic of Panama and has been continuously employed in the Canal Zone by the United States Government since 1945. In 1948 she married Frank X. Zaimetz, a United States citizen. He is presently owner and general manager of a private steamship agency that functions in both the Canal Zone and the Republic of Panama.

It is stated that the claim of Renata Arbolada was forwarded to our Office by the claimant and bears Claim No. 2-2475150. You state you have not submitted an administrative report to our Office and request that it be adjudicated on the basis of your submission, together with the five other representative cases. Of the five additional cases, settlements were issued by our Office on December 1, 1971, and September 25, 1972, in the cases of Sue M. Jurado and Shirley S. Makibbin. These settlements were for tropical differential for the period prior to January 10, 1971, and prior to the amendment to paragraph (b) of section 253.135, title 35 of the Code of Federal Regulations, pertaining to the payment of tropical differential in the Canal Zone.

Your doubt in the matter arises from the contention being made by some claimants that the provisions of section 253.135 of 35 CFR are in violation of section 3 of Public Law 92-187, 85 Stat. 644, or of section 717 of the Equal Employment Opportunity Act of 1972, Public Law 92-261, 86 Stat. 111.

Section 3 of Public Law 92-187 provides as follows:

"SEC. 3. Section 7152 of title 5, United States Code, relating to the prohibition on discrimination in employment because of marital status, is amended--

"(1) by inserting '(a)' immediately before 'The President'; and

"(2) by adding at the end thereof the following new subsections:

"(b) Regulations prescribed under any provision of this title, or under any other provision of law, granting benefits to employees, shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children.

"(c) Notwithstanding any other provision of law, any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family."

Regarding the intent and effect of the above section, House Report No. 92-415, 92d Cong., 1st sess., states the following:

"Section 3 of the bill amends section 7152 of title 5, United States Code, by adding a new subsection (b) thereto. The new subsection (b) requires that regulations issued under any provision of law granting benefits to employees (as defined in section 2105 of title 5) shall provide the same benefits for married female employees as are provided for married male employees. The intent of this provision is to prohibit discrimination because of sex in regulations which govern the granting of various benefits to employees. All persons who are employed under identical circumstances should be entitled to the same employee benefits.

"The Committee understands that certain regulations (particularly ones issued by the Department of State and the Department of Defense) governing payment of various allowances and differentials which are viewed primarily as recruitment incentives do not authorize the payment of such allowances and differentials to a married male or female employee whose presence in a foreign area is primarily attributable to a desire to be with his or her spouse rather than to his or her Federal employment. The

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Committee does not intend to alter such practice and this provision should not be construed as requiring a change in the existing practice.

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"★ ★ ★ The Committee believes that no additional cost to the Government will result from the enactment of section 3 of the bill, since the committee is advised that current regulations granting employee benefits do not distinguish between female and male employees."

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000a et seq., was amended by Public Law 92-261, approved March 24, 1972, by adding section 717. Subsection 717(a) provides as follows:

"SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

This subsection provides that all personnel actions affecting employees or applicants for employment in the competitive service of the United States or in positions of the District of Columbia government covered by the Civil Service Retirement Act shall be made free from discrimination based on race, color, religion, sex, or national origin.

Regarding the denial of the tropical differential to certain married women, 35 CFR 253.135 provides in pertinent part as follows:

"(b) The tropical differential shall be paid to employees who are U.S. citizens except as provided in the following subparagraphs:

"(1) When a U.S. citizen employee is married to another U.S. citizen employee, the differential may be paid to one spouse only.

"(2) When a U.S. citizen employee is married to a person not employed by a department such employee is eligible to receive the differential only if such employee is the member of the family whose job may reasonably be deemed to be the job which determines the location of the family in the area. The spouse of a person serving in the U.S. military forces in the area shall not be deemed to be a person whose job determines such location."

The first subsection cited above does not appear to violate the intent of the statutes in question since it merely limits the allowance to one spouse only and does not distinguish between female and male employees. The second provision denies the allowance to a married woman only when her job is not the one determining the presence of the family in the Canal Zone. This is in accord with the legislative intent as expressed in the report cited above. The regulations, as amended on January 10, 1971, are equally applicable to males as well as females and from that date would not appear to be susceptible to any allegation of discrimination because of sex.

Dr. Arboleda came to the Canal Zone with her daughter in 1965, for the sole reason of employment and was assigned housing in the Canal Zone because of her employment. Her husband who had spent the majority of his adult life in Europe had returned to Panama in 1962 because of the illness of his father. At the time she met her husband-to-be he was on the point of leaving for Mexico as Panama proved financially unrewarding for an artist. Dr. Arboleda states that her husband stays in Panama because of her employment since her annual salary amounts to four times the annual income received by her husband. Under these circumstances we find that Dr. Arboleda's job in the Canal Zone is the one which determines the location of her family in that area and she is entitled to tropical differential from January 10, 1971. As noted above you have not submitted a report to our Transportation and Claims Division.

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Accordingly, we have no financial data upon which to issue a settlement. In order to expedite settlement we hereby authorize your agency to compute the tropical differential due under this decision and pay Dr. Arboleda the sum found due.

In Mrs. Dymond's case the record indicates that she accompanied her husband to Panama solely because of his employment with the Ford Motor Company and she subsequently was hired locally. Therefore, it cannot be said that it is her job which determines the location of the family in the Canal Zone area. In this regard there is a rebuttable presumption that the job of a locally hired employee is not the determinative factor in the location of a family. Accordingly, on the facts presented, her claim for tropical differential is for disallowance.

Mrs. Jurado was recruited in the U.S. and after arrival in Panama and while still employed she married a Panamanian citizen who is self-employed in Panama City. On the basis of these facts alone it is not clear whose job is determinative of the location of the family. However, if it be true as you indicate that the claimant's job produces a significantly smaller percentage of total family income we see no basis for questioning your determination on the present record.

In none of the remaining cases was the claimant recruited for duty in the United States and no facts are set forth sufficient to support a conclusion that their jobs were the primary reason for their presence in the Canal Zone. Thus for reasons similar to those expressed above in the Dymond case, we are of the opinion that on the facts submitted the jobs of Mrs. Kwai Ben, Mrs. Makibbin, and Mrs. Zeimetz are not the ones present determining their presence in the Canal Zone and they are not eligible to receive tropical differential.

As to providing guidelines that may be utilized generally in determining the right to tropical differential, we must point out that each case will have to be determined on its own merits in view of varying factual circumstances therein.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States