



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MD 20910
THE DIRECTOR

JUL 26 1994

MEMORANDUM FOR: Executive Directors, Regional Fishery
Management Councils
FROM: *Gary MacLach*
for Rolland A. Schmitten
SUBJECT: Locality Pay

In my June 14, 1994, memorandum to you, I indicated that General Counsel for the Department of Commerce (DOC), after extensive consultations with the Office of Personnel Management (OPM), informed us that Council staff and members are not eligible to receive locality pay because they are not Federal employees. This memorandum is in response to several inquiries we have received since that time.

In determining Council staff pay, 50 CFR Section 605.25(e)(1) states "the principle of equal pay for equal work must be followed. Variations in basic rates of pay should be in proportion to substantial differences in the difficulty and responsibilities of the work performed." 50 CFR Section 605.25(e)(3) states "the annual pay for any staff position may not exceed the current rate for the top step of grade 15 of the Federal General Schedule at any time." Therefore, it is the Councils' responsibility to determine staff pay rates, and pay increases, as long as the rates conform to the above guidelines and do not include locality pay.

In determining Council members' pay, OPM has ruled that Council members are not entitled to locality pay; they are only entitled to a rate of pay that is 120% of the minimum rate (Step 1) for a GS-15. This is equivalent to the minimum Senior Level (SL) annual rate of \$79,931 (daily rate \$306.40), the rate Council members have been receiving, as determined by OPM, since the General Schedule rates for grades 16 and above were abolished. Since Federal employees did not receive a January 1, 1994, cost-of-living adjustment, you can use either the 1994 General Schedule for pay (the one without locality pay) or the 1993 General Schedule for determining your Council members' pay. Locality pay is not considered an updated version of the cost-of-living adjustment.

Attached are copies of the 1993 and 1994 General Schedules for pay, both without locality pay. I hope these attachments and this memorandum have addressed your questions on this issue.

Attachments

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MD 20910
THE DIRECTOR

JUN 14 1994

MEMORANDUM FOR: Executive Directors, Regional Fishery Management Councils
FROM: *R. A. Schmitt*
Roland A. Schmitt
SUBJECT: Locality Pay

We have been advised by Barbara S. Fredericks, Assistant General Counsel for Administration, Department of Commerce (DOC), after 5 months of research and numerous discussions with the Office of Personnel Management, Compensation Division, that Council staff and Council members are not eligible to receive locality pay, in accordance with the Federal Employment Pay Comparability Act of 1990.

The basis for this legal opinion is that an individual must be a Federal employee to receive locality pay. As noted in 50 CFR § 601.23, Council staff and members (except for Federal government officials) "are not Federal employees subject to Office of Personnel Management (OPM) regulations."

Thank you for being patient while awaiting an answer to the locality pay issue. Apparently, DOC General Counsel studied the question thoroughly and conducted extensive consultations because of its sensitivity.

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES





Using a locality pay compensation table to establish base pay would be permissible, but councils may not establish a base pay rate and then adjust that pay rate by adding a locality pay increase because Council staff are not eligible to receive such a "locality pay" increase. The resulting tables would have a top pay not to exceed the GS-15, step 10, including the appropriate locality pay in the base pay figure. Councils may wish to submit their proposed pay tables to NMFS and my office for review before finalizing.

I would like to expand further on this matter. Councils establish base pay rates for their staff and have the discretion to consider locality as well as cost of living differentials when they establish pay rates. See OMB Circular A-122, Attachment B, paragraph 6. Specifically, the circular provides compensation for personnel services including, but is not limited to, salaries, wages, director's and executive committee member's fees, incentive awards, fringe benefits, pension plan costs, allowances for off-site pay, incentive pay, location allowances, hardship pay, and cost of living differentials. However, the overall compensation for any staff position may not exceed the current rate for the top step of grade 15 of the Federal Government schedule.

In the past, some councils have improperly paid Council staff and members a locality pay adjustment in their compensation. Memoranda from Roland A. Schmitzen of June 14, and July 26, 1994, transmitted a legal opinion from Barbara S. Fredericks, Assistant general counsel for Administration, Department of Commerce, that the Councils' staff and their members are not eligible to receive locality pay under the provisions of the Federal Employees Pay Comparability Act of 1990, because they are not Federal employees.

MEMORANDUM FOR: Directors, Regional Fishery Management Councils
 FROM: Michael N. Nelson, Chief, NOAA Grants Management Division
 SUBJECT: Council Staff and Member Compensation

UNITED STATES DEPARTMENT OF COMMERCE
 National Oceanic and Atmospheric Administration
 OFFICE OF ADMINISTRATION



Attachment 2 (Page 2)

I apologize for the delay in responding and hope that we have addressed this issue satisfactorily. Please feel free to contact Rimas Liogys (301) 713-0922, Commander Thomas Meyer (301) 713-2337, or me (301) 713-0926 to discuss this or any other issues related to your grant. Thank you for your patience and cooperation.

cc: F - Rolland A. Schmitten
F/CM - Richard H. Schaefer
F/BP - John E. Oliver, Jr.
GCF - Mariam McCall
F/CM1 - Thomas Meyer

DGM

1-6065

FORMAL LEGAL OPINION
OFFICE OF THE GENERAL COUNSEL
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

NO. 50

Fringe Benefits and COLA for Council
Members and Staff

Statutes Interpreted: F.C.M.A., 5 U.S.C. 5308

Written by: Margaret Frailey

Date: 27 October 1977

Summary: COLA and fringe benefits may be paid to Council staff. COLA but not fringe benefits may be paid to Council members.

Questions Presented: Can COLA and fringe benefits be paid above established salary levels for (1) top grade of GS-15 for executive directors, and (2) top grade for GS-18 for Council members?

Conclusions:

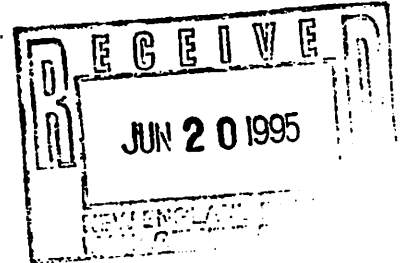
(1) Payment of COLA is not barred by the statutory ceiling on basepay (5 U.S.C. §5308) for Council members nor by NOAA regulations on pay for staff members (50 CFR §601.23). Members and employees whose residence in a COLA area is attributable to Council employment are eligible for COLA payments.

(2) Fringe benefits may not be paid to Council members, because their compensation is specifically fixed by statute (16 U.S.C. §1852(d)). Reasonable fringe benefits may be paid to Council staff, because NOAA regulations prohibit only the payment of base pay in excess of the top level of GS-15 (50 CFR §601.23).

Discussion:

(1) the Comptroller General has ruled that employees in Alaska of the Federal Railroad Administration, whose pay is fixed administratively, may receive payments in lieu of the territorial cost-of-living allowance. The statutory provisions limiting their salaries to amounts not in excess of salaries of specified grades under the General Schedule refer to basic compensation rates, not to allowances such as COLA. The requirement of the COLA statute, 5 U.S.C. §5941, that COLA is available for employees whose rates of basic pay are fixed by statute, is read to include employees whose pay is set administratively. The rationale is that Congress did not intend to treat employees subject to the Classification Act more favorably than those not subject to it. 55 Comp. Gen. 196 (1975); see also 40 Comp. Gen. 628 (1961).

Under the Comptroller General's opinion, both members and employees of the Councils may receive COLA, if they are otherwise eligible, because the limitations on their "pay" (5 U.S.C. §5308 and 50 CFR §601.23) apply only to their "base pay", exclusive of payment such as COLA.



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Executive Order 10,000 (at 5 U.S.C. §5941, note) governs the eligibility of employees for a territorial cost-of-living allowance. Residence in the COLA area must be fairly attributable to employment by the U.S. Residence in the COLA area during the period prior to federal employment must not be fairly attributable to reasons other than employment by the U.S. or by U.S. firms, interests or organizations.

(2) Council members are paid at a daily rate for GS-18; no fringe benefits are specifically provided for by statute. Therefore, the payment of fringe benefits to Council members would cause their statutorily-set pay rate to be exceeded and is thus prohibited by the FCMA.

The administrative staffs of the Councils may be provided reasonable fringe benefits, because their pay is not set by statute. The payment of fringe benefits comparable with Federal benefits is not prohibited by 50 CFR §601.23. That section only limits the maximum amount of base pay (salary).