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B-195775, Sep 10, 1979

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DIGEST: DIRECTOR, OPM QUESTIONS WHETHER STATUTORY PROVISIONS RESTRICTING APPROPRIATED FUND USE FOR OBJECTS NOT ORIGINALLY CONTEMPLATED AND PRECLUDING TRANSFER OF FUNDS FROM ONE APPROPRIATION ACCOUNT TO ANOTHER, WOULD PRECLUDE IMPLEMENTATION OF THE MERIT PAY SYSTEM UNDER THE CIVIL SERVICE REFORM ACT OF 1978 (5 U.S.C. SEC. 5401 ET. SEQ.) ON AN AGENCY WIDE BASIS INSTEAD OF AT THE APPROPRIATION UNIT LEVEL. ALTHOUGH LANGUAGE OF THE REFORM ACT IS UNCLEAR, IN VIEW OF APPARENT PURPOSE OF ACT TO GIVE AGENCY HEADS MAXIMUM FLEXIBILITY IN ADMINISTERING MERIT PAY PROGRAM, WE BELIEVE AGENCY-LEVEL IMPLEMENTATION AS PROPOSED BY OPM IS AUTHORIZED.

FUNDING THE MERIT PAY SYSTEM UNDER THE CIVIL SERVICE REFORM ACT:

THE DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT (OPM), REQUESTS OUR OPINION ON AN ISSUE THAT HAS ARISEN IN ITS IMPLEMENTATION OF THE MERIT PAY SYSTEM UNDER THE CIVIL SERVICE REFORM ACT OF 1978, PUB. L. NO. 95 454, TITLE V, SECTION 501 (5 U.S.C. SEC. 5401 ET. SEQ.). THIS ACT PROVIDES FOR A NEW SYSTEM OF MERIT PAY FOR FEDERAL MANAGERS AND SUPERVISORS IN GRADES GS-13 THROUGH 15, IN ORDER TO REWARD COMPETENCE RATHER THAN LONGEVITY IN DISPERSING FINANCIAL REWARDS. BRIEFLY, THE QUESTION IS WHETHER THE ACT AUTHORIZES TRANSFERS OF APPROPRIATIONS SO AS TO PERMIT IMPLEMENTATION ON AN AGENCY-WIDE BASIS. WE AGREE WITH OPM THAT IT DOES.

SECTION 501 OF THE ACT (5 U.S.C. SEC. 5402) PROVIDES THE FOLLOWING FUNDING ARRANGEMENTS FOR THE MERIT PAY SYSTEM:

"(B)(1) UNDER REGULATIONS PRESCRIBED BY THE OFFICE, THE HEAD OF EACH AGENCY MAY PROVIDE FOR INCREASES WITHIN THE RANGE OF BASIC PAY FOR ANY EMPLOYEE COVERED BY THE MERIT PAY SYSTEM.

"(3) FOR ANY FISCAL YEAR, THE HEAD OF ANY AGENCY MAY EXERCISE AUTHORITY UNDER PARAGRAPH (1) OF THIS SUBSECTION ONLY TO THE EXTENT OF THE FUNDS AVAILABLE FOR THE PURPOSE OF THIS SUBSECTION.

"(4) THE FUNDS AVAILABLE FOR THE PURPOSE OF THIS SUBSECTION TO THE HEAD OF ANY AGENCY FOR ANY FISCAL YEAR SHALL BE DETERMINED BEFORE THE BEGINNING OF THE FISCAL YEAR BY THE OFFICE ON THE BASIS OF THE AMOUNT ESTIMATED BY THE OFFICE TO BE NECESSARY TO REFLECT -

"(A) WITHIN-GRADE STEP INCREASES AND QUALITY STEP INCREASES WHICH WOULD HAVE BEEN PAID UNDER SUBCHAPTER III OF CHAPTER 53 OF THIS TITLE DURING THE FISCAL YEAR TO THE EMPLOYEES OF THE AGENCY COVERED BY THE MERIT PAY SYSTEM IF THE EMPLOYEES WERE NOT SO COVERED; AND

"(B) ADJUSTMENTS UNDER SECTION 5305 OF THIS TITLE WHICH WOULD HAVE BEEN PAID UNDER SUCH SUBCHAPTER DURING THE FISCAL YEAR TO SUCH EMPLOYEES IF THE EMPLOYEES WERE NOT SO COVERED, LESS AN AMOUNT REFLECTING THE ADJUSTMENT UNDER SUBSECTION (C)(1) OF THIS SECTION IN RATES OF BASIC PAY PAYABLE TO THE EMPLOYEES FOR THE FISCAL YEAR.

"(C)(1) EFFECTIVE AT THE BEGINNING OF THE FIRST APPLICABLE PAY PERIOD COMMENCING ON OR AFTER THE FIRST DAY OF THE MONTH IN WHICH AN ADJUSTMENT TAKES EFFECT UNDER SECTION 5305 OF THIS TITLE, THE RATE OF BASIC PAY FOR ANY POSITION UNDER THIS CHAPTER SHALL BE ADJUSTED BY AN AMOUNT EQUAL TO THE GREATER OF -

"(A) ONE-HALF OF THE PERCENTAGE OF THE ADJUSTMENT IN THE ANNUAL RATE OF PAY WHICH CORRESPONDS TO THE PERCENTAGE GENERALLY APPLICABLE TO POSITIONS NOT COVERED BY THE MERIT PAY SYSTEM IN THE SAME GRADE AS THE POSITION; OR

"(B) SUCH GREATER AMOUNT OF SUCH PERCENTAGE OF SUCH ADJUSTMENT IN THE ANNUAL RATE OF PAY AS MAY BE DETERMINED BY THE OFFICE. ***"

THE ABOVE-QUOTED PROVISIONS CONTEMPLATE THAT THE HEAD OF EACH AGENCY WILL ADMINISTER THE PROGRAM WITH FUNDS AVAILABLE TO HIS AGENCY BASED ON THE PRESCRIBED FORMULA. IN THIS CONNECTION, THE TERM "AGENCY" AS USED IN THESE PROVISIONS IS DEFINED IN 5 U.S.C. SEC. 105 AS AN EXECUTIVE DEPARTMENT, A GOVERNMENT CORPORATION, AND AN INDEPENDENT ESTABLISHMENT. HOWEVER, SALARIES AND EXPENSES ARE FREQUENTLY APPROPRIATED FOR UNITS WITHIN AGENCIES, BELOW THE AGENCY LEVEL. FOR EXAMPLE, OPM ADVISES THAT THE DEPARTMENT OF TRANSPORTATION RECEIVES APPROXIMATELY 60 SEPARATE APPROPRIATIONS WHILE THE GENERAL SERVICES ADMINISTRATION RECEIVES APPROXIMATELY 19. WHILE MOST OF THESE DO NOT INVOLVE FUNDS FOR SALARIES, THE FACT REMAINS THAT THERE IS CONSIDERABLE VARIATION IN THE WAY FUNDS ARE APPROPRIATED TO THE VARIOUS DEPARTMENTS AND AGENCIES.

OPM DESIRES TO IMPLEMENT THE MERIT PAY SYSTEM ON AN AGENCY-WIDE BASIS AND EXPECTS THAT THE SYSTEM WOULD FUNCTION IN THE FOLLOWING MANNER. OPM WOULD ADVISE EACH AGENCY HEAD OF THE AMOUNT OF MERIT PAY FUNDS AVAILABLE FOR A GIVEN FISCAL YEAR. THE AGENCY HEAD WOULD THEN SET ASIDE THE APPROPRIATE PORTION OF EACH APPROPRIATION WITHIN HIS ORGANIZATION TO FUND MERIT INCREASES FOR ELIGIBLE EMPLOYEES. THESE RESERVED FUNDS WOULD BE COMMITTED TO AN AGENCY-WIDE MERIT PAY FUND. IN THIS MANNER, THE FUNDS OF A SPECIFIC APPROPRIATION WOULD BE PLACED IN A COMMON FUND OR POOL AND USED FOR THE PURPOSE OF ALLOWING EMPLOYEES COVERED BY SPECIFIC APPROPRIATIONS TO PARTICIPATE IN THE MERIT PAY SYSTEM.

OPM, HOWEVER, IS CONCERNED THAT SUCH A PROCEDURE MIGHT BE INTERPRETED TO CONSTITUTE AN IMPROPER EXPENDITURE FOR AN OBJECT FOR WHICH THE FUNDS WERE NOT APPROPRIATED, IN VIOLATION OF 31 U.S.C. SEC. 628, OR AN IMPROPER TRANSFER OF FUNDS BETWEEN APPROPRIATION ACCOUNTS IN VIOLATION OF 31 U.S.C. SEC. 628-1.

31 U.S.C. SEC. 628 PROVIDES AS FOLLOWS:

"EXCEPT AS OTHERWISE PROVIDED BY LAW, SUMS APPROPRIATED FOR THE VARIOUS BRANCHES OF EXPENDITURE IN THE PUBLIC SERVICE SHALL BE APPLIED SOLELY TO THE OBJECTS FOR WHICH THEY ARE RESPECTIVELY MADE, AND FOR NO OTHERS."

THIS STATUTE RESTRICTS THE EXPENDITURE OF APPROPRIATED FUNDS SOLELY TO THE PURPOSES FOR WHICH THEY WERE APPROPRIATED UNLESS OTHERWISE PROVIDED BY LAW, AND PRECLUDES THEIR USE FOR PURPOSES NOT INTENDED IN THE APPROPRIATION. SEE, E.G., 55 COMP.GEN. 346, 347 (1975); 37 COMP.GEN. 472,474 (1958). HENCE, THIS STATUTORY

PROVISION WOULD BAR THE USE OF FUNDS APPROPRIATED FOR THE SALARIES OF ONE GROUP OF EMPLOYEES FROM BEING USED TOWARD OTHER EMPLOYEES WHO RECEIVE THEIR SALARIES UNDER A SEPARATE APPROPRIATION UNLESS SOME OTHER LAW OVERRIDES THIS RESTRICTION.

ALSO, 31 U.S.C. SEC. 628-1 PROVIDES THAT:

"NO FUNDS MADE AVAILABLE BY THIS OR ANY OTHER ACT SHALL BE WITHDRAWN FROM ONE APPROPRIATION ACCOUNT FOR CREDIT TO ANOTHER, OR TO A WORKING FUND, EXCEPT AS AUTHORIZED BY LAW: PROVIDED, THAT, EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED BY LAW, ANY FUNDS SO WITHDRAWN AND CREDITED SHALL BE AVAILABLE FOR THE SAME PURPOSES, AND SUBJECT TO THE SAME LIMITATIONS, CONDITIONS, AND RESTRICTIONS, AS PROVIDED BY THE ACT APPROPRIATING SUCH FUNDS ***."

THIS PROVISION RESTRICTS THE TRANSFER OF FUNDS FROM ONE APPROPRIATION ACCOUNT TO ANOTHER OR FROM AN APPROPRIATION ACCOUNT TO A WORKING FUND UNLESS SOME OTHER STATUTE PROVIDES AUTHORITY FOR SUCH FUND TRANSFERS. SECTION 628-1 WOULD NORMALLY RESTRICT THE TRANSFER OF FUNDS FROM AN AGENCY UNIT APPROPRIATION ACCOUNT TO A WORKING FUND AT AGENCY LEVEL.

IT IS CLEAR FROM THE FOREGOING THAT THE STATUTES CITED WOULD OPERATE TO PRECLUDE ESTABLISHMENT OF THE PROPOSED OPM IMPLEMENTATION PLAN FOR THE MERIT PAY SYSTEM UNLESS THE CIVIL SERVICE REFORM ACT OF 1978 AUTHORIZES THE TRANSFER OF FUNDS FROM SEVERAL APPROPRIATIONS TO A COMMON FUND WHICH WOULD OTHERWISE BE FORBIDDEN BY THESE STATUTES.

THE CIVIL SERVICE REFORM ACT DOES NOT SPECIFICALLY ADDRESS THIS PROBLEM. IT PROVIDES MERELY THAT THE AGENCY HEAD IS LIMITED "TO THE EXTENT OF THE FUNDS AVAILABLE FOR THE PURPOSE OF THIS SUBSECTION." 5 U.S.C. SEC. 5402(B)(3). ON THE ONE HAND, IT IS POSSIBLE TO CONSTRUE THIS AS MEANING FUNDS AVAILABLE TO THE ENTIRE AGENCY WITHOUT REGARD TO THE NUMBER AND STRUCTURE OF SEPARATE APPROPRIATIONS MADE TO THAT AGENCY. ON THE OTHER HAND, IT IS EQUALLY POSSIBLE TO CONSTRUE IT AS MEANING FUNDS AVAILABLE AS APPROPRIATED BY CONGRESS, THAT IS, AVAILABLE WITHIN THE LIMITS OF THE INDIVIDUAL APPROPRIATIONS ENACTED BY CONGRESS. WE HAVE REVIEWED THE LEGISLATIVE HISTORY OF THE ACT AND HAVE FOUND NO SPECIFIC GUIDANCE ON THIS ISSUE.

HOWEVER, READING THE LANGUAGE OF THE ACT IN THE LIGHT OF THE APPARENT PURPOSE OF THE MERIT PAY SYSTEM, WE AGREE WITH OPM THAT ITS PROPOSED AGENCY-LEVEL POOL OF FUNDS IS PERMISSIBLE. TITLE V AS A WHOLE SEEMS TO CONTEMPLATE A PROGRAM ADMINISTERED AT THE AGENCY LEVEL WITH AGENCY HEADS HAVING MAXIMUM FLEXIBILITY IN ADMINISTERING THE PROGRAM. SUCH LEGISLATIVE HISTORY AS THERE IS TENDS TO SUPPORT THIS. SEE, E.G., S. REP. NO. 95-969, 95TH CONG., 2D SESS. 90 (1978) ("FURTHER, IT IS CONSIDERED DESIRABLE TO GIVE INDIVIDUAL AGENCIES INCREASED AUTHORITY TO ADMINISTER THEIR OWN PROGRAMS.") THIS PURPOSE IS BEST ACCOMPLISHED IF THE PROGRAM IS ADMINISTERED ON AN AGENCY WIDE RATHER THAN UNIT LEVEL. INDEED, THE THRUST OF OPM'S POSITION IS THAT THE PURPOSE OF THE PROGRAM WOULD BE SUBSTANTIALLY FRUSTRATED IF UNIT APPROPRIATION LEVELS MUST BE RIGIDLY FOLLOWED.

IN ADDITION, WE NOTE THAT THE ACT (5 U.S.C. SEC. 5401(B)(2)(A)) DOES PROVIDE FOR THE EXCLUSION OF A UNIT OR SUBDIVISION OF ANY AGENCY FROM THE SYSTEM UNDER CERTAIN SPECIFIED CONDITIONS, BUT DOES NOT INDICATE THAT THE MERIT PAY SYSTEM MAY BE ESTABLISHED AT THE UNIT OR SUBDIVISION LEVEL. SINCE CONGRESS PROVIDED FOR AGENCY UNIT EXCLUSION, IT SEEMS REASONABLE THAT CONGRESS WOULD ALSO HAVE PROVIDED FOR IMPLEMENTATION OF THE SYSTEM AT THE UNIT LEVEL IF THAT HAD BEEN INTENDED.

IN SUM, CONSTRUING TITLE V IN LIGHT OF ITS APPARENT PURPOSE, AND ACCEPTING OPM'S ASSERTION THAT AGENCY-LEVEL IMPLEMENTATION IS NECESSARY TO ACCOMPLISH THIS PURPOSE (AN ASSERTION WHICH IS NOT ENTIRELY FREE FROM DOUBT), WE CONCUR THAT AGENCY-LEVEL IMPLEMENTATION IS OTHERWISE "AUTHORIZED BY LAW" FOR PURPOSES OF 31 U.S.C. SECS. 628, AND 628-1. THEREFORE, WE WOULD NOT OBJECT TO THE MERIT PAY SYSTEM IMPLEMENTATION PROCEDURES AS OUTLINED BY THE DIRECTOR OF OPM.