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DECISION

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

FILE: B-199722 **DATE:** September 15, 1981

MATTER OF: State Department Severance Pay Plan

DIGEST: State Department severance pay plan for foreign service national employees at United States Embassy in Jordan to which both United States and Embassy employees would contribute may be implemented under authority in 22 U.S.C. § 889(a)(1) so long as moneys are maintained in United States depositary bank and their handling otherwise complies with applicable fiscal requirements since State has determined that plan is consistent with prevailing local compensation practices and in public interest.

This responds to a Department of State inquiry concerning the propriety of the United States Embassy in Amman, Jordan, adopting a severance pay plan for its foreign service national employees. For the reasons given below we conclude that Jordanian foreign service national employees may be compensated for severance pay in the manner suggested by the State Department pursuant to 22 U.S.C. § 889(a)(1), which permits compensation of foreign service national employees in a manner consistent with prevailing local compensation practices where in the public interest. However, control of employer and employee contributions must be in accordance with applicable fiscal statutes and regulations.

The United States Embassy in Amman, Jordan, requested authority from State to establish a provident fund as a type of severance pay plan for its foreign service national employees. (A provident fund generally consists of employer and employee contributions used to provide various benefits to employees.) The plan would require employee and employer contributions for each pay period of 7 percent and 10 percent of employee base pay respectively. These moneys would be deposited in local currency into two separate interest-bearing bank accounts, each in the name of "U.S. Embassy FSN Provident Fund Account." Upon termination either by resignation or retirement, employees would receive all of their contributions plus accrued interest, together with either 100 percent, 50 percent, 25 percent, or none of the corresponding employer's contributions and accrued interest based upon a service formula of up to 20 years or more employment. The Department of State asserts that the proposed plan is fully supported by prevailing locality compensation practice and in the public interest, and, thus, is authorized by section 444 of the Foreign Service Act of 1946, as amended, 22 U.S.C. § 889(a)(1).

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State also has informed us that it intends to establish similar plans in other countries should we approve the plan under consideration. State maintains that the adoption of such plans is consistent with the recommendation in FPCD-78-81 (January 8, 1979) that "the Secretary of State give more emphasis to phasing out civil service and replacing it with whatever practice is followed in each country."

Initially, State submitted the severance pay plan proposal to the Treasury Department for advance approval. However, Treasury was unable to conclude that 22 U.S.C. § 889(a)(1) provided sufficient authority to overcome the fiscal problems raised by the plan and recommended that State seek Comptroller General approval both because of the absence of definite guidance in the area and because the Jordanian provident fund could become a model plan for other embassies.

Subsequently, the State Department submitted the matter to us requesting that this Office answer several questions concerning the plan's implementation. The questions, and brief answers which are discussed in greater detail in the following discussion, are set out below.

RE EMPLOYER CONTRIBUTION ACCOUNTS

1. May the employer contributions be deposited in a non-United States Government Account (i.e. "U.S. Embassy, FSN Provident Fund Account") and not be subject to withdrawal by the CDO or a United States Disbursing Officer? Note, that the FSN employees potentially would be entitled ultimately to most if not all of the funds upon termination.

Answer: No. Employer contributions may be deposited in Treasury designated depositaries but remain United States funds until severance payment entitlement vests in the foreign service national employees.

2. May the bank interest accrue in such accounts for eventual payment to participating employees?

Answer: Interest may be paid to provident fund beneficiaries to the extent required to conform to the prevailing local practice. The earning of interest on provident funds in Treasury designated depositaries and its use to defray State's cost in compensating foreign national employees for vested severance payments must be in accordance with applicable Treasury requirements.

3. If an FSN employee resigns before 20 years of service or before age 60, whichever is earlier, thus not being eligible for 100 percent

of the employer contribution deposited in his/her behalf, how should the remainder of the employer contributions for that employee be accounted for? May we assume that such funds should be credited to Miscellaneous Receipt Account ____ 1099, ____ 3099, or other General Fund Account? Each account symbol would, of course, be preceded by the two digit Code of the employing agency.

Answer: Deposits should be made in the applicable Treasury account pursuant to 31 U.S.C. § 484.

4. Upon the assumption that unused employer contributions must be returned to the U.S. Government concurrently with employee resignations, as indicated in 3, *supra*, would the bank account in the name of the Provident Fund be acceptable since until an employee's resignation date is known all moneys in the subject account would represent valid expenditures (obligations) of the U.S. Government?

Answer: Control of employer and employee contributions must comply with applicable fiscal statutes and regulations.

RE EMPLOYEE CONTRIBUTION ACCOUNTS

5. To what extent would or may the U.S. Government be liable to employees for loss of moneys in the *employee* contribution accounts? If prevailing compensation practices and/or host country (Jordanian) law imposes such liability upon employers, would the USG liability be authorized by 22 U.S.C. § 889(a)?

Answer: Although the Government would be liable to foreign service national employees for employee contributions pursuant to contractual agreement, protection against loss of employee contributions and other provident fund amounts would be provided by Treasury's normal depositary controls.

Authority for the Plan

Section 889(a)(1) of title 22 of the United States Code, as amended, provides that:

> "(a)(1) The Secretary shall, in accordance with such regulations as he may prescribe, establish compensation plans for alien employees of the Service * * *. Such compensation plans shall be based upon prevailing wages rates and compensation practices for corresponding types of positions in the locality, to the extent

> consistent with the public interest. Compensation plans established pursuant to this section may include provision for leave of absence with pay for alien employees in accordance with prevailing law and employment practices in the locality of employment, without regard to section 6310 of Title 5."

This Office has rendered a number of decisions on the subsection's application. In a case which involved the purchase by the Secretary of Defense of plans that would provide both life insurance, pension, and medical and hospital benefits to Department of Defense employed foreign service national employees, we said:

> "[B]efore an employment practice is adopted by an agency operating in a foreign area the practice should be substantially followed by local employers in the area. The adoption of the practice should be consistent with the public interest as determined by the head of the agency and the matter of adopting such practice should be coordinated with other agencies operating in the locality so that the same or a substantially similar practice will be followed by each of the other agencies operating in that area. 40 Comp. Gen. 650, 652 (1961).

Subsequently, pursuant to the authority in 22 U.S.C. § 889(a)(1), we have permitted adoption of other compensation plans. For example, in B-192511, February 5, 1979, we approved a plan providing for advances of severance pay to foreign service nationals employed by the United States Embassy in Colombia. In that case, we also concluded that the plan complied with 31 U.S.C. § 200(a), which requires the recording of valid obligations and with 31 U.S.C. § 529, which precludes advance payments in specified circumstances.

Plan's Implementation

In Treasury's view the United States would be trustee both of the employer and employee provident fund accounts. Although title to employee contributions would remain with the employee, the moneys transferred as employer contributions from appropriations to the trust accounts would remain public moneys of the United States until they vest in the employee. Consistent with 31 U.S.C. §§ 495 and 521, public moneys are required to be maintained in the Treasury or in certain circumstances with a public depositary designated as such by the Secretary of the Treasury pursuant to 31 U.S.C. § 473.

Treasury also states that the employer contributions would represent expenditure transfers from appropriations to an account maintained

for foreign service national employees with Treasury or a public depositary. Actual disbursements would require certification by a State Department certifying officer and payment pursuant to the certification by a State Department disbursing officer. Treasury points out that this is the manner in which Civil Service retirement payments are disbursed.

While recommending that approval for the severance pay plan be sought from our Office, it is Treasury's position that 22 U.S.C. § 889(a)(1) does not provide authority to disregard "generally applicable fiscal precepts and practices."

Discussion

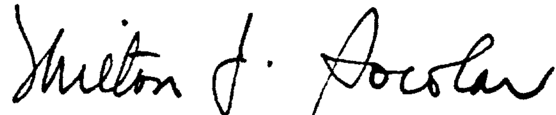
We agree that Treasury fiscal rules must govern the plan. 22 U.S.C. § 889(a)(1) merely permits the establishment of compensation plans which are consistent with those in the locality. This will result on occasion in compensation for foreign service national employees which is not in accord with what otherwise would be required by statute for Government employees. The section does not, however, speak to fiscal or fund control requirements and therefore provides no basis for their waiver.

State appears to be concerned that a plan which does not totally remove Government control over funds contributed as the employer's share to the provident fund would not conform to the local practice. However, so long as the Government is contractually bound to pay severance pay in accordance with the described plan, control of the funds prior to vesting of rights in the employees would appear to be of little consequence as far as the plan's conformity with local practice is concerned. As Treasury points out, Civil Service retirement funds remain within the Government's control until they are disbursed to eligible persons. We can see no reason why provident fund contributions should be treated differently.

Accordingly, we conclude that the severance pay plan proposed by State, including the payment of interest to beneficiaries, may be implemented under the authority of 22 U.S.C. § 889(a)(1) so long as applicable fiscal statutes and Treasury requirements are complied with. This apparently would permit deposit of severance pay contributions in a Treasury designated depositary trust or deposit fund account by means of expenditure transfers from appropriations for the employer contributions and deposit of amounts withheld from employees. Payments to beneficaries would be made through normal State disbursing procedures. Employer contributions not paid out would be deposited in the applicable Treasury account pursuant to 31 U.S.C. § 484. Moreover,

the earning of interest on provident funds in Treasury designated depositaries and its use to defray State's cost in compensating foreign national employees for vested severance payments must be in accordance with applicable Treasury requirements.

Although the Government would be liable to foreign service national employees for earned severance amounts or at least for return of employee contributions by contract, protection against loss of the provident fund amounts would be provided by Treasury's normal depositary controls. In this regard, Treasury has informed us that deposits in foreign branches of U.S. depositaries are normally fully collateralized by collateral held within the United States in Federal Reserve banks.



Acting Comptroller General
of the United States