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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Office of Compliance—Retroactive Salary Increase

File: B-317034

Date: October 21, 2008

DIGEST

As authorized by statute, the designated official at the Office of Compliance, on February 1, 2008, increased the compensation level of certain officers. The official states that she intended to increase these salaries to the applicable statutory cap, but because of erroneous information, salaries were set at a level below the actual statutory cap. However, because there is no contemporaneous documentation establishing with certainty the actual salary increase intended by the official at the time of her determination, the designated official may not adjust the pay level retroactively.

DECISION

The Chair of the Board of Directors of the Office of Compliance has requested our decision on whether she may adjust the rate of compensation of the Executive Director and General Counsel on a retroactive basis. Letter from Susan S. Robfogel, Chair, Office of Compliance, to Gary L. Kepplinger, General Counsel, GAO, Aug. 21, 2008 (Request Letter). As authorized by law, the Chair, as the designated official at the Office of Compliance, increased the compensation level of these officers on February 1, 2008. However, these pay determinations were made, in part, on the basis of erroneous information as to the maximum compensation level allowed under the statute. The Chair seeks our advice on whether she may now, having discovered the error, adjust the salaries to the actual statutory cap on a retroactive basis. For the reasons discussed below, we conclude that she may not.

Our practice when issuing decisions or opinions is to obtain the views of the relevant agency to establish a factual record and to establish the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. The record in this case consists of the Office of

Compliance's request letter as well as relevant factual material provided at our request.

BACKGROUND

The Office of Compliance is an independent office within the legislative branch of the federal government. 2 U.S.C. § 1381(a). The Office has a five-member Board of Directors, including a Chair, who, like the other board members, is appointed jointly by the Speaker of the House of Representatives, the Majority Leader of the Senate, and the Minority Leaders of the House of Representatives and the Senate. 2 U.S.C. §§ 1381(b), (c). The Chair, subject to the approval of the Board, has authority to appoint an Executive Director, two Deputy Executive Directors, and the General Counsel. 2 U.S.C. §§ 1382(a), (b), (c). The Chair has authority to fix the compensation of these officers, subject to a statutory cap. *Id.* When the Office was established, the rate of pay for these individuals, by law, could not exceed the annual rate of pay prescribed for level V of the Executive Schedule under section 5316 of title 5, United States Code. Congressional Accountability Act of 1995, Pub. L. No. 104-1, title III, § 302, 109 Stat. 3, 26 (Jan. 23, 1995). In 2007, the law was amended to increase the cap to a rate of pay not to exceed “the lesser of—(i) the highest annual rate of compensation of any officer of the Senate; or (ii) the highest annual rate of compensation of any officer of the House of Representatives.” Pub. L. No. 110-161, div. H, title I, § 1101(b), 121 Stat. 1844, 2237 (Dec. 26, 2007); 2 U.S.C. § 1382. As had been the case with the prior cap, the compensation level of the Deputy Directors could not exceed 96 percent of the pay cap. *See* Pub. L. No. 110-161, § 1101(b)(3).

On January 22, 2008, the Chair appointed an Executive Director, and acted to increase the salaries of the Executive Director and General Counsel to \$163,000. Request Letter, at 1. According to the Chair, the Board's action was based on the mistaken belief that the statutory cap was \$163,000. *Id.* The effective date of the personnel action was February 1, 2008.

The Chair states that subsequently, the Board learned that the actual salary cap was almost \$5,000 higher. *Id.*, at 2. The Chair states that it has now increased the salaries of these officers to the cap. However, the Chair asks whether, because the Board's intent on January 22, 2008 was to increase the salaries to the statutory cap, those increases may be made retroactive. *Id.*

DISCUSSION

In past GAO case law, we have stated that, as a general rule, a personnel action relating to compensation that results from an administrative determination is not effective retroactively. 58 Comp. Gen. 51 (1978). We have under some circumstances, however, allowed for retroactive adjustments to correct administrative or clerical errors, such as where, through a clerical error, a personnel action was not effected as originally intended. B-168683, Jan. 22, 1970 (allowing retroactive pay adjustment in accordance with official notification that employee had

been selected for promotion to a particular position at a specified pay level). In such cases, we allow correction to effectuate the expressed intent of the administrative official as documented by a written pay determination or other documentation establishing the intended pay level. *Id.* Retroactive increases of pay are permitted where the intent of the administrative official regarding the pay action is conclusively established and no further action from the official is necessary. *See* 58 Comp. Gen. 51; 44 Comp. Gen. 153 (1964); *see also* 34 Comp. Gen. 380 (1955). For similar reasons, we would not object to a retroactive pay adjustment if an administrative or clerical error prior to the pay determination prevented execution of the determining official's clearly expressed intent. We have neither case here, however.

While the Chair states that she intended to set the compensation levels of the Executive Director and General Counsel at the maximum allowable level and would have done so but for the mistaken advice concerning that level, this is not a case where an administrative official has clearly made a definitive pay determination and a subsequent error delays the determination or prevents it from taking effect. Furthermore, there is no contemporaneous documentation demonstrating an intended or "correct" pay level different from the actual pay level set.¹ Exercising her discretion in January 2008, the Chair determined that the salaries of these officers would be \$163,000, and in fact the salaries were set at \$163,000. Under these circumstances, retroactive adjustment is not available.

CONCLUSION

An increase in compensation resulting from the exercise of discretionary administrative authority is effective on the date the official approves the increase and is not retroactive. The Chair's reliance on erroneous information in exercising her discretion does not provide a basis to retroactively adjust the determination using accurate information in the absence of documentation establishing with certainty the precise pay action intended.



Gary L. Keplinger
General Counsel

¹ For example, had the Board, at the request of the Chair, formally resolved that the Chair could set the pay of the Executive Director and General Counsel at a rate equal to the applicable pay cap, we would have relied on such documentation to establish the "correct" pay level for purposes of a retroactive adjustment.

