

## HAWAII AND ALASKA EXCLUSION FROM FEDERAL LOCALITY PAY CONSTITUTIONAL, COURT RULES

The exclusion of federal employees in Alaska and Hawaii from locality pay under the Federal Employees Pay Comparability Act (FEPCA) of 1990 is not unconstitutional as it does not burden a fundamental right and is rationally related to legitimate government purposes, a federal judge in Hawaii rules.

Judge Philip M. Pro of the district court for the District of Nevada, sitting by designation in the district court for the District of Hawaii finds that *Califano v. Gautier Torres*, 435 U.S. 1 (1978), “rejected the proposition that the right to interstate travel requires the federal government to provide to a citizen all federal benefits for which he was eligible by reason of his residence in one state when that citizen moves to another state within which he becomes ineligible for the federal benefit.” Thus, “the fact that a federal employee may receive locality pay in one state of residence and lose that locality pay when he moves to Hawaii or Alaska does not burden the right to interstate travel, Pro rules.

As no fundamental right or suspect class was implicated, the court uses rational basis review to uphold the FEPCA as constitutional. While it was unclear why Congress excluded Alaska and Hawaii from locality pay, the FEPCA was presumed constitutional and, given that the plaintiffs failed to meet their burden of overcoming the presumption, it was up to Congress and not the courts to rectify any disparities. “FEPCA’s exclusion reflects a policy choice by the politically accountable branches of government. While the court acknowledges the inequities resulting from Plaintiffs’ exclusion from the locality pay system, the proper venue for resolving the issue remains with Congress,” the court states.

A group of federal employees brought a class action lawsuit alleging that the FEPCA violates the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution and their substantive due process rights under the Fifth Amendment. The court certifies two classes: (1) federal employees in the contiguous United States who cannot move to Alaska or Hawaii without losing locality pay, and (2) current or former federal employees living and working in Alaska or Hawaii who are not or were not eligible for locality pay. The court also dismisses their cost-of-living adjustment claims. In its current ruling, the court first dismisses the employees’ substantive due process claim. “Here, a federal employee could not have a reasonable expectation of entitlement to locality pay in Hawaii or Alaska because FEPCA specifically precludes locality pay in those locations....Furthermore, while a federal employee has a property interest in payment of wages for service already performed, Congress may reduce prospectively federal employees’ pay.”

The court also rejects the employees’ argument that strict scrutiny under the Equal Protection Clause was appropriate based on the FEPCA’s burden on the fundamental right to travel. Judge Pro says that, contrary to the government’s argument, the right to travel limits the federal government’s power as well as that of the states. But the employees’ challenge did not implicate any of the recognized aspects of this right: (1) the right of a citizen of one state to enter and leave another, (2) the right to be treated in a welcome manner when temporarily in another state, and (3) the right to be treated like other citizens of a state when becoming a permanent resident of that state.

The government offered four rational bases for excluding Hawaii and Alaska from locality pay: (1) Congress could have decided that such employees did not need locality pay because they were receiving tax-free COLAs, (2) conservation of the public fisc, (3) “legislative convenience,” and (4) Congress could have decided that locality pay was unnecessary to recruit and retain federal employees in Alaska and Hawaii.

At the same time, however, rational basis review does not permit the courts to question the wisdom of the legislature, finding that the employees failed to overcome the presumption of the FEPCA’s constitutionality. “Congress has a legitimate interest in creating and managing compensation packages for its employees to compensate employees adequately, to recruit and retain employees, and to allocate limited resources among employees. That Congress may have discharged its legislative responsibilities imperfectly does not give this Court fiat to rewrite the legislation to rectify the current disparity. It suggests strongly instead that Congress should correct the incongruity made so evident by this case,” Judge Pro states.

The full text of the opinion is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-7bzs8b>.

(Source: *Matsuo v. United States*, D. Haw., No. 05-00389 PMP-LEK, January 30, 2008, as reported in BNA, *Government Employee Relations Report*, Vol. 46, No. 2244, February 26, 2008, pp. 242-244.)