

00697

DECISION



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

FILE: B-185458

DATE: October 5, 1976

MATTER OF: Kenneth J. Moore - request for waiver of erroneous payment of post differential and separate maintenance allowance

DIGEST:

1. Acceptance of payment of post differential and separate maintenance allowance, after notification of ineligibility therefor, precludes waiver of indebtedness under provisions of 5 U.S.C. § 5584 (Supp. IV, 1974).
2. Erroneous indications in Standard Forms 50 and 1190, to the effect that employee would be entitled to post differential and separate maintenance allowance payments, does not create authority to pay such allowances where employee did not meet requirement of statutory regulations that he be recruited in United States or other designated areas.
3. United States is not liable for erroneous actions of its officers, agents, or employees even though committed in performance of official duties. One entering into arrangement with Government takes risk of having ascertained that agent with whom he deals stays within limits of his authority, inasmuch as Government can neither be bound nor estopped by unauthorized acts of its agents. Federal Crop Insurance Corp v. Merrill, 332 U.S. 380 (1947); 44 Comp. Gen. 337, 339 (1964).

This action is in response to the request of Mr. Kenneth J. Moore, a former employee of the United States Army Central Finance and Accounting Office (USACF&AO), Vietnam, for reconsideration of the settlement of our Transportation and Claims Division (TCD), now Claims Division, on February 21, 1974, which denied in part a request for waiver of erroneous payment of foreign post differential and separate maintenance allowance made to Mr. Moore during the period from December 20, 1971, through August 5, 1972.

The record shows that as an employee of the Payroll Division, Civilian Payroll Branch, USACF&AO, Vietnam, Mr. Moore was paid post differential and separate maintenance allowance during the period from December 20, 1971, through August 5, 1972, in the amounts of \$1,648.12 and \$2,702.86 respectively. By letter dated August 5, 1972, Mr. Moore was notified that as a result of a post audit of allowances and differential authorizations it had been discovered that he did not meet the eligibility criterion set forth in section 031.12c, Department of State Standardized Regulations (Government Civilians, Foreign Areas), revised March 26, 1971, which required that prior to employment an employee be recruited in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States. Specifically since Mr. Moore had been a student in Saigon from July through November 1971, he did not meet the geographical recruitment criterion for eligibility. This notification was received by Mr. Moore on August 10, 1972.

Pursuant to authority contained in 5 U.S.C. § 5584 (Supp. IV 1974), TCD waived \$4,084.48 of the erroneous overpayments of post differential and separate maintenance allowance. The remainder of the debt, \$266.50, was not waived because the submission showed that the last payments, \$102 post differential and \$164.50 separate maintenance allowance, were for the payroll period ending August 5, 1972. Since the August 5, 1972, letter notifying Mr. Moore that such payments were erroneous was received by him on August 10, 1972, TCD concluded that Mr. Moore was or should have been aware of the erroneous nature of the payments before he actually received this portion of the post differential and separate maintenance allowance payments.

Mr. Moore has requested that our Office reconsider the action of TCD denying a waiver of the final erroneous payment of foreign post differential and separate maintenance allowance in the total amount of \$266.50.

During the period covered by the erroneous overpayments, section 031.12 of the Standardized Regulations provided in pertinent part that post differential and separate maintenance allowance could be granted an employee recruited outside the United States provided, among other things, that:

"* * * * *

"c. prior to appointment, the employee was recruited in the United States,

the Commonwealth of Puerto Rico, the
Canal Zone, or a possession of the
United States, by

- "(1) the United States Government,
including its Armed Forces;
- "(2) a United States firm, organization,
or interest;
- "(3) an international organization in
which the United States Government
participates; or
- "(4) a foreign government;

and had been in substantially con-
tinuous employment by such employer
under conditions which provided for
his return transportation to the
United States, the Commonwealth of
Puerto Rico, the Canal Zone, or a
possession of the United States
* * * (Emphasis added.)

Since Mr. Moore had been a student in Saigon immediately prior to his employment by the USACF&AO in Vietnam, he could not have been eligible for post differential nor for separate maintenance allowance unless section 031.17c had been waived due to unusual circumstances by the head of the employing agency in accordance with the provision therefor at section 031.12, of the Standardized Regulations. No waiver of the above-cited requirement was granted.

Moreover, even though the Standard Forms 50 and 1190, completed incident to Mr. Moore's employment with the USACF&AO, indicated that he was eligible for post differential and separate maintenance allowance, those erroneous statements could not create authority to pay such allowances where no authority existed under the statutory regulations in effect at the time. The well established rule in this regard is that the United States is not liable for the erroneous actions of its officers, agents, or employees even though committed in performance of official duties. 44 Comp. Gen. 337, 339

B-165458

(1964). Anyone entering into an arrangement with the Government takes the risk of having ascertained that the agent with whom he deals stays within the limits of his authority, inasmuch as the Government can neither be bound nor estopped by the unauthorized acts of its agents. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 389 (1947).

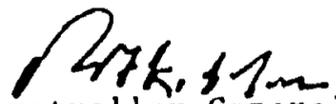
Our Office agrees with the TCD determination that Mr. Moore was not entitled to a waiver of that portion of the debt which represents the payment of post differential and separate maintenance allowance for the pay period ending August 5, 1972. Since Mr. Moore was sent notification of his ineligibility on August 5, 1972, which he received on August 10, 1972, it appears that he received the notification prior to actual receipt of the post differential and separate maintenance allowance payments. He has presented no evidence to the contrary.

Subsection (b) of 5 U.S.C. § 5584 (Supp. IV, 1974) prohibits exercise of waiver authority by the Comptroller General:

"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim * * *"

Although there is no indication of fraud or misrepresentation on the part of Mr. Moore, we have consistently held that where the employee was aware of the overpayment when it occurred, a request for waiver will be denied. Acceptance of the payments with knowledge of their erroneous nature constitutes "lack of good faith" and waiver is prohibited by law. See B-18355d, April 23, 1975, and B-167804, January 23, 1976.

For the foregoing reasons, the TCD settlement of February 21, 1974, granting only a partial waiver of erroneous post differential and separate maintenance allowance payments and holding Mr. Moore indebted to the United States for \$266.50 is affirmed.


Deputy Comptroller General
of the United States