

DECISION

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

FILE: B-210244**DATE:** July 13, 1983**MATTER OF:** Peter J. Dispenzirie - Temporary Duty vs.
Permanent Change of Station

DIGEST: The assignment of a Customs Service employee to a new duty station for 2 years under a rotational staffing program is held to be a permanent change of station rather than a temporary duty assignment. We have held that the duration of an assignment and the nature of the assigned duties are the vital elements in the determination of whether an assignment is temporary duty or permanent change of station. Although the assignment here is for a definite time period and further reassignment of the employee is contemplated, the duration of the assignment is far in excess of that normally contemplated as temporary. Moreover, the duties assigned are not those usually associated with temporary duty.

On May 12, 1982, the United States Customs Service initiated a rotational staffing program for certain of its Senior Executive Service (SES) employees, the stated purpose of which was to increase the number of opportunities for those employees to gain experience in various Customs positions and to enhance Customs' policy-making process. Assignments in the rotational staffing program are made for a 2-year period, although they are reviewed at the end of 1 year and may be canceled at that time. The Commissioner of Customs has requested our decision as to whether one of these assignments should be considered temporary duty or a permanent change of station. We conclude that the assignment in question is a permanent change of station. The basis for this conclusion is set forth below.

A directive implementing the rotational staffing program was issued on August 23, 1982. It sets forth procedures for the selection of participants and contains statements on the financial impact and ceiling implications of the program. The directive provides that at the beginning of each fiscal year, each Regional Commissioner and Assistant Commissioner is to compile a list of potential positions to be filled under this policy. When a position becomes vacant the Commissioner of Customs

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either approves or disapproves a personnel recruitment action. Up to 12 positions are to be identified each year for the program and, therefore, due to the 2-year duration of the assignments, the rotational staffing program could involve up to 24 positions at the same time. The directive provides, however, that unless and until a rotational staffing assignment is made permanent, no change of personnel ceiling is to occur in either the gaining or the losing organization.

The directive does not contain a set policy as to whether the rotational staffing assignments are to be considered temporary duty assignments or permanent changes of station, but instead provides as follows:

"* * * * To assure that the rotation is most cost-beneficial to the government, OFMPE [Office of Financial Management and Program Evaluation] will prepare a cost estimate for each employee selected for a rotational placement and recommend to management whether TDY or PCS is the appropriate procedure for relocation."

Under a section entitled "Impact on Employee" that directive provides further as follows:

"There are two ways, TDY and PCS, in which an employee can be reimbursed for expenses incurred in connection with the Customs new rotational policy. Each employee will be handled individually. Although a recommendation will be made by OFMPE as to the most beneficial reimbursement, the employees personal interests will be considered prior to the determination. Both methods have personal and financial impact including income tax implications. According to interpretations of IRS regulations, an employee on TDY status in an assignment expected to last a year or more is not on a temporary assignment and cannot deduct travel, meals, and lodging expenses for the assignment, but must report any reimbursements from the

government as income. Any employee desiring a TDY status should be aware of this regulation.

"When an employee accepts a PCS, a part of the amount is taxable for income tax purposes and is reported to the IRS as income. Any employee desiring a PCS should be aware of this."

Customs has informed us that the question posed to us arose in connection with the assignment of Mr. Peter J. Dispenzirie from New Orleans to Chicago, to act as Regional Commissioner from July 1982 to July 1984. The agency believes its determination to treat Mr. Dispenzirie's assignment as temporary duty is appropriate for it is in accord with our decisions. Customs further contends that the determination of whether an assignment is temporary duty or a permanent change of station is controlled by an examination of two factors--the intent of the agency in making the assignment and the benefit to the Government.

Citing 24 Comp. Gen. 667 (1945), Customs states that an agency's intent to make either a temporary duty or permanent duty assignment is revealed, respectively, by whether it contemplates a further assignment to a new station or a return to the old station, or by whether it is planning to indefinitely transfer the employee to the place in question. The agency states that Mr. Dispenzirie's assignment is for a finite period and a further assignment to a new station is contemplated as shown by the fact that Customs has promised the position to another employee.

The second factor Customs discusses is the benefit to the agency. Robert E. Larrabee, 57 Comp. Gen. 147 (1977), is cited for the proposition that an agency must make a cost comparison between temporary duty and permanent change-of-station status to determine which is more beneficial to the Government. The submission includes a cost comparison showing that it is less expensive for Customs to treat Mr. Dispenzirie's assignment as a

temporary duty assignment. Although we feel that some of the assumptions Customs has made in connection with determining the cost of the two methods of reimbursement are questionable, the result of the cost comparison is not dispositive of this case.

We disagree with Customs' analysis of our decisions and the conclusion it reaches. The Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), do not contain a formal definition of a temporary duty assignment, but under the provisions of FTR para. 1-7.6a, an employee may not be paid per diem at his permanent duty station or at the place of abode from which he commutes daily to his official station. In this connection, in 31 Comp. Gen. 289 (1952) we stated the following rule, which we had enunciated as early as 1924:

"* * * the authority to determine and designate the post of duty of an officer or employee of the Government includes only the authority to fix the place at which the employee should actually establish official headquarters, and from which he should in fact operate, which, ordinarily is the place where the employee would be required to spend most of his time. The designation of any other place, for the purpose of giving the employee a subsistence allowance for the greater portion, or all, of his time is not within the authority vested in the head of a department or other administrative official charged with the duty of designating posts of duty of Government employees, and does not entitle an employee to per diem when absent therefrom and performing duty at another place, which latter place is in fact his post of duty. 27 Comp. Gen. 657; 19 id. 347, 18 id. 423, 10 id. 469; 4 id. 320." 31 Comp. Gen. at 291.

We have long held that the location of an employee's official duty station is a question of fact, not limited by the agency's designation, to be determined from the orders directing the assignment and from the nature and

duration of the assignment. See Frederick Welch, B-206105, December 8, 1982, 62 Comp. Gen. _____; and cases cited therein. We have stated that the duration and nature of the duties assigned are of particular importance in making the determination of whether an assignment to a particular duty station is a permanent change of station. 33 Comp. Gen. 98 (1953); 36 Comp. Gen. 757 (1957). In 38 Comp. Gen. 853 (1959) we described the duration of an assignment as a vital element in that determination. We explained our basis for that statement as follows:

"A permanent station, or designated post of duty, is defined in paragraph 1150-10 of the Joint Travel Regulations as the post of duty or official station to which a member is assigned or attached for duty other than 'temporary duty or temporary additional duty.' That is, it is the place of the principal basic duty assignment. Prolonged absences from such assignment for temporary duty, or for other purpose, are inconsistent with the continuity of performance ordinarily contemplated and required in such basic assignment, and consequently as a general proposition, a foreseeable absence for the performance of another duty for more than a short period is considered to break that continuity with the effect that the assignment loses its characteristics of being the basic duty assignment, and there are established in the substituted duty the characteristics of a basic assignment. * * *" 38 Comp. Gen. at 856.

Instead of focusing on the duration of an assignment as determinative of its character, Customs focuses on the terminable nature of the assignment. As we indicated above, Customs cites 24 Comp. Gen. 667 (1945) for the proposition that employees assigned under conditions which contemplate a further assignment to a new station or a return to the old station are in a temporary duty status. In that case we held that certain assignments of military personnel to replacement pools, schools, or similar stations for an indefinite period could be considered

as permanent changes of station. We qualified that holding, stating that such assignments could be treated as permanent assignments:

"* * * unless the facts and circumstances in a particular case reasonably indicate an assignment to temporary duty, that is, where the facts and circumstances in a particular case indicate an assignment for a definite period of relatively short duration--a further assignment to a new station, or return to the old permanent station being contemplated by the orders. * * *"
38 Comp. Gen. at 671.

Despite the authority which this language appears to lend to Customs' view that Mr. Dispenzirie's assignment is temporary duty because it is to end on a certain date and his further assignment is certain, we do not believe it supports that view. We believe a proper reading of that language is that a brief assignment to be terminated on a certain date and followed by further assignment or return to a previous assignment is a temporary duty assignment rather than a permanent change of station. In other words, simply because an assignment will be terminated at a certain time and will be followed by a further assignment does not make it temporary duty when its duration is longer than that usually associated with a temporary duty assignment.

Our view is supported by 36 Comp. Gen. 757 (1957) where we held that the assignment of members of the uniformed services to Antarctica incident to Operation "Deepfreeze II" for an 18-month period, after which time they were to return to their permanent duty station, was far in excess of the duration which could reasonably be considered temporary duty. In that case, the argument was made that since the assignment was terminable, it should be considered temporary duty in light of a similar case in which the terminable nature of a duty assignment was held to be indicative of its temporary nature. We responded to that argument as follows:

"* * * The terminable nature of the duty assignment involved in the decision of September 1, 1953, [33 Comp. Gen. 103] to which you referred,

was considered to be indicative of a temporary assignment only because that feature distinguished it from the indefinite time element ordinarily associated with permanent duty assignments. It was not intended to convey the impression that such feature would indicate a temporary duty assignment in a case where the termination date set in the orders established a duty period prolonged to a point where other considerations required a determination that the assignment was permanent in nature." 36 Comp. Gen. at 758.

We further stated in that decision that:

"* * * If a member's immediate duty assignment extends beyond that point, [reasonable temporary duty limitations] it becomes his paramount assignment-his permanent duty assignment-and the one indicated as that which he should resume or assume upon its completion becomes so remote that it loses its characteristics of being his basic duty assignment. Where such circumstances occur, it is concluded that the orders in fact direct a permanent change of station from the beginning." 36 Comp. Gen. at 758.

We do not believe that an assignment expected to last for 2 years can be considered to be of the short duration contemplated by the term temporary duty. Customs argues that for us to find that the 2-year period is temporary duty would be in accord with and not substantially different from our decisions in Robert E. Larrabee, 57 Comp. Gen. 147 (1977) and in 3 Comp. Gen. 907 (1924), where we approved an agency's designation of temporary duty status for assignments of 17 months in the former case and almost a year in the latter. We approved the agency's designation in those cases because in each the assignment was originally intended to last for a much shorter time and was extended after the employee began performing the duties of the assignment. We explained our reasoning in Larrabee as follows:

* * * While the location of an employee's permanent station presents a question of fact and is not limited by the administrative designation, and while the length of Mr. Larrabee's assignment to Richardson is of such duration as to raise a question concerning the validity of its designation as his temporary duty station, under the circumstances we take no exception to that designation for the purpose of claims which have heretofore accrued. In this regard, we find particularly persuasive the fact that the assignment was initially intended to cover only a 5-month period and that the assignment was extended for no more than 6 months at a time. At the time the initial orders were issued it appears that the assignment was intended to be of sufficiently short duration to constitute a legitimate temporary duty assignment. As a matter of hindsight, given the total duration of the assignment as twice extended, it would appear that Mr. Larrabee should have been given permanent change of station orders at the outset. However, assuming that the orders were twice extended on the legitimate expectation that the assignment would terminate at the end of each extension period, we find no basis to question the Navy's designation of Mr. Larrabee's assignment as for temporary duty insofar as that designation affects the claims submitted. * * * 57 Comp. Gen. at 149.

Absent the special circumstances of the Larrabee case, we would have considered temporary duty status an inappropriate designation for an assignment of 17 months. Similarly, as previously mentioned, we held in 36 Comp. Gen. 757 that an assignment of 18 months was far in excess of the reasonable duration of a temporary duty assignment. And in Peck and Snow, B-198887, September 21, 1981, we held that an assignment for 2 years and 9 months was, in fact, a permanent change of station rather than a temporary duty assignment.

There is additional information which leads us to the conclusion that an assignment of 2 years is longer than is normally contemplated for a temporary assignment. As pointed out in Customs' directive on the Rotational Staffing Policy, the Internal Revenue Service (IRS) views a temporary assignment for income tax purposes as one which lasts for less than 1 year. In Revenue Ruling 60-189, 1960-1 CB 60, the IRS stated as follows:

"Although neither the Service nor the courts have attempted to prescribe any specific length of time as representing the usual line of demarcation between temporary and nontemporary periods for traveling expense purposes, an employment or stay of anticipated or actual duration of a year or more at a particular location must be viewed by the Service as strongly tending to indicate presence there beyond a temporary period, and cases involving such an employment or stay will normally for that reason alone be subjected to close scrutiny. Cases involving anticipated or actual periods of almost a full year may, as a factual matter, be open to question in nearly the same degree, especially since there might be little real difference between a taxpayer's expectations in such a case and one in which his employment or stay at a particular location is expected to continue for a year or more. Nevertheless, in the interest of practical and fair administration, in cases involving substantially the same facts as Case (1) the Service will normally raise no question concerning the temporary nature of an employment or stay at a particular location if both its anticipated and actual durations are for less than one year, unless the facts concerning the frequency of employments away from the city where business contacts are maintained disclose a pattern suggesting that the taxpayer may have sought without real business justification to take advantage of an assumed lenience on the part of the Service concerning tax avoidance abuses in this area."

The conclusion that a year is the determinative time period can also be drawn from the fact that FTR para. 2-1.5a(1)(a) requires a signed agreement for 12 months service in connection with each permanent change of station. Furthermore, although the FTR provides no guidance concerning the maximum duration of a temporary duty assignment, paragraph C4455 of Volume 2 the Joint Travel Regulations (2 JTR) directs that consideration should be given to changing an employee's permanent duty stations when a period of temporary duty at one location will exceed 2 months, unless there is reason to expect that the employee will return to his permanent duty station within 6 months.

It is not only the duration of an assignment, but also the nature of the duties assigned which reveal its character. Mr. Dispenzirie was assigned to act as the head of the Chicago Regional Office for 2 years. This does not seem to be the type of assignment which is normally made on a temporary basis.

Customs has stated that the benefit to the Government is the second factor which should be examined to determine the status of a particular assignment. Customs equates benefit with cost savings and cites Larrabee for the proposition that an agency should effect an assignment based on the results of a cost comparison. In that case we upheld the agency's designation of an assignment as temporary duty. The employee was originally assigned for a 5 month period which was extended for two additional 6-month periods. We held that under the circumstances, the agency's designation of the assignment as temporary duty rather than as a permanent change-of-duty station was not clearly improper, and we allowed payment of per diem for the claims accrued. The employee was continuing to perform duties at that site, however, and it was in connection with his further assignment that we directed a cost comparison between retaining the employee in a temporary duty status and permanently transferring him. During the assignment the employee had purchased a residence at the temporary duty site and had relocated his family so he would not have been entitled to residence

purchase expenses or to a significant portion of the expenses ordinarily associated with a permanent change of station. If the additional assignment was to be of any significant length, our direction to the agency to make a cost comparison was, in effect, a direction to transfer the employee on a permanent basis. We do not agree with Customs that this case directs agencies to make a cost comparison at the time of an original assignment.

In 36 Comp. Gen. 757 (1957), where we held that 18-month temporary duty assignments to the Antarctica were improper, we noted the agency's argument for temporary duty status as follows:

"* * * Also, there were noted as factors in the determination to administer the operation on a temporary duty basis the fact that the costs of transportation of dependents, dislocation allowances, and shipments of household effects that would be payable were the operation conducted on a permanent change of station basis would probably offset the per diem allowances payable on the temporary duty basis. You indicate that the temporary duty basis would offer more satisfaction to the members involved in the mission in that the necessity for disrupting their families, with the attending inconveniences, broken school years, and expenses would be removed." 36 Comp. Gen. at 757.

Although we noted these arguments, they did not affect our decision that the assignments were not in fact temporary assignments for which the payment of per diem was authorized.

Because the duration of the assignment made under Customs' rotational staffing policy and the nature of the duties assigned are so far removed from what is ordinarily contemplated as temporary duty, we must conclude that Mr. Dispenzirie's assignment to Chicago is not a temporary duty assignment for which the payment of per diem or actual expenses is authorized.

Harry R. Van Cleave
for Comptroller General
of the United States