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DECISION

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

FILE: B-189031 DATE: March 31, 1978

MATTER OF: John H. Agee, et al. - Cost-of-living allowance in Alaska

DIGEST: 1. The legal issue presented is the validity of the Civil Service Commission's action in reducing the cost-of-living allowance of five employees in Alaska. This issue is the subject of a class action lawsuit in Federal court. Even though none of the five claimants are named plaintiffs in the lawsuit, its outcome will resolve or affect their rights. Accordingly, the General Accounting Office will follow its general policy of declining to rule on matters in litigation.

2. While the General Accounting Office would normally hold in abeyance actions on claims pending outcome of litigation which would seriously affect the resolution of such claims, we will close our file without action where it appears that such litigation will be protracted, preserving the agency's right to resubmit the claim if, in their view, the litigation does not fully resolve the matter.

This action is in response to a request dated May 5, 1977, from the Office of the Comptroller of the Army, reference DACA-FAF-C. Lieutenant Colonel W. E. Murray of that Office forwarded to us a letter of March 30, 1977, from Major E. N. Matthis, Finance and Accounting Officer, Headquarters, 172D Infantry Brigade (Alaska), Department of the Army, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $1,578, representing additional cost-of-living allowances (COLA) to five General Schedule employees at Fort Richardson, Alaska.

The request letter states that, as published in the Federal Personnel Manual Letter No. 591-17, November 19, 1976, the Civil Service Commission's revised regulations governing COLA in Alaska and other non-foreign areas provide, in section 591.20 thereof, that the rate of COLA will be reduced where the recipient is accorded the privilege of occupying Federal housing or special purchase privileges. Authority for that action is stated to be section 205(b)(2) of Executive Order No. 10,000, September 16, 1948.

As a result of that revision, each of the five claimants, John H. Agee, Ernest L. Smith, G. Mary Johnson, Loren M. Elgin, and Delores S. Barrios, all of whom were General Schedule employees of the Department of the Army at Fort Richardson, Alaska, was placed in a reduced allowance category on the basis that they had commissary and post exchange privileges. Each claimant admits having such privilieges, but they all argue that they are not "furnished" such privileges in the sense that the word is used in section 205(b)(2) of Executive Order 10,000 and that the privileges they enjoy are in no way connected with their employment.

Three of the claimants state that their privileges stem from their status as retired military members, one states that her privileges exist by virtue of her status as an unremarried widow in recognition of her deceased husband's military service, and the last states that her privileges were granted on the basis of her husband's present active military service.

The request letter goes on to state that there are no Federal employees at Fort Richardson who are furnished or who have military housing or are authorized post exchange or commissary privileges by virtue of their employment. As a result, the application of the FPM almost exclusively affects General Schedule employees who are dependents of active duty service personnel, retired members of the uniformed services and their dependents, Congressional Medal of Honor holders, disabled veterans, and war widows. This, coupled with the fact that the FPM, as a document, only governs General Schedule employees, raises doubt as to whether the FPM faithfully carries out the intent of the Executive order and its authorizing legislation.

In that connection, the request letter indicates that there is little doubt as to the intent of the language of the FPM. The definition of allowance categories contained on page 19 of the attachment to the FPM uses the term "those Federal employees who have commissary * * *", rather than the words "when quarters or subsistence, commissary or other purchase privileges are furnished", which are contained in the cited Executive order.

In addition to the before-mentioned group of employees, there is another group which is affected. It is the General Schedule

employees who were recruited from another area, and are serving a definite period of time on a transportation agreement. and who also have commissary and exchange privileges by virtue of other than employment status and who at the time of recruitment were offered a specific cost-of-living allowance.

Based on the foregoing, Major Matthis requests answers to the following questions:

"a. Is it proper in view of circumstances to certify for payment all or any of the claims submitted herewith?

"b. Is it proper to certify for payment a claim based upon a transportation agreement for employees who were offered a cost-of-living allowance at the time of recruitment as specified in the employment instrument?

"c. If the answer to a and/or b above is yes, is it proper to pay cost-of-living allowance at the full rate for Alaska (25%) to all General Schedule employees having privileges extended under the same circumstances as the claimants, provided they are otherwise entitled to allowances?

"d. If the answer to c is yes, is it proper to make such payment retroactive to the date their allowance was reduced by implementation of the FPM?"

Executive Order No. 10, 000, supra, provides in section 205(b) thereof that:

"(b) The Civil Service Commission shall, (1) in designating places under section 205(a) hereof, consider the relative consumer price levels in the area and in the District of Columbia, and give due consideration to the differences in goods and services available, and to the manner of living of persons employed in the areas concerned in positions comparable to those of United States employees in the areas, and (2) in fixing the Territorial cost-of-living allowance pursuant to such subsection, make appropriate deductions when quarters

or subsistence, commissary or other purchasing privi-liges are furnished at a cost substantially lower than the prevailing local costs."

Section 591.208 of FPM 591-17 provides:

"Deductions from allowances are made where warranted because of Federal housing or special purchasing privileges in accordance with the provisions of section 205(b)(2) of Executive Order 10,000, as amended. The listing in Appendix A to this subpart shows the allowance rates, which includes the appropriate deductions, for each category of affected employees."

For the purpose of this reduction in COLA, page 19 of the attachment to FPM 591-17, defines commissary and post exchange privileges, as being "unlimited access to military commissary and exchange facilities."

Subsequent to receipt of this request, we were informed by the Civil Service Commission that the legal issues in the present case are in major part the subject matter of litigation in the case of Joseph E. Curlott, et al., v. Robert E. Hampton, et al., a class action filed in the United States District Court, District of Alaska, Civil Action No. A-77-10.

The two major issues raised in that case involved whether the Civil Service Commission's use of the phrase "have access to," is a reasonable interpretation of the phrase "are furnished" as used in Executive Order No. 10,000, supra. The second is whether the manner in which the COLA and reduction for services furnished were established met the requirement of procedural due process.

By decision of the district court in that case (Curlott v. Hampton, 438 F. Supp. 505 (1977)), it was concluded: (1) that the agency interpretation was reasonable and that since the court must accord some deference to the agency, its interpretation would be upheld; and (2) that the requirements of procedural due process, in failing to permit hearings and presentations, were not met. We have been advised that the plaintiffs in that action have appealed the decision's

first conclusion 1 and that the Department of Justice still under advisement the question of a cross-appeal on the se[illegible] sion.

It is a longstanding rule that this Office will not act on matters which are in the courts during pendency of such litigation. While none of the five claimants before us are listed as plaintiffs in the Curlott case, that case is a class action on the same issues and as such would either resolve the issues or affect the rights of the five claimants. Additionally, we understand that there are other district court actions pending involving the same legal issues, two in Hawaii and one in Puerto Rico. It appears, therefore, that the litigation will be protracted, and since the eventual outcome of such litigation may fully resolve these claims, we are closing our file at this time. If, at such time as these court cases have been finally decided, it is the view of the agency that the rights of the claimants listed in the submission have not been fully resolved, those claims may be resubmitted to this Office for decision.

The voucher accompanying the submission will be retained here.

Deputy Comptroller General
of the United States