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

In reply refer to
B-191419 (ELF)

MAR 30 1978

The Honorable Robert N. C. Nix, Chairman
Committee on Post Office and Civil Service
House of Representatives

Dear Mr. Chairman:

Further reference is made to your letter dated February 28, 1978, with enclosures, regarding [redacted] and the difficulties he has experienced with respect to return rights to his home of legal residence after employment overseas.

The record indicates that [redacted] was employed in Japan by J. F. International, Inc., a Japanese firm, prior to accepting an appointment with the Pacific Stars and Stripes, a nonappropriated fund activity, effective June 24, 1974. However, prior to working for J. F. International, [redacted] had been employed by Lear Siegler, Inc., a United States contractor, which had recruited him in the United States for a position in Japan.

[redacted] initial appointment with Stars and Stripes was for temporary full-time employment, but on July 23, 1974, this time limitation was removed. Since [redacted] was at first only a temporary employee, the local civilian personnel office had initially determined that he was ineligible for either a living quarters allowance (LQA) or a transportation agreement. Yet, upon the removal of the time limitation, the civilian personnel office reconsidered its earlier decision and granted [redacted] both a LQA and a transportation agreement. Relying on this, [redacted] in September 1974, released his previous employer, J. F. International, from its contractual obligation to return him to the United States.

Unknown to [redacted] at this time was that the civilian personnel office had found him eligible for the LQA and transportation agreement based under the provisions of Volume 2 of the Joint Travel Regulations (JTR). A later message from the Department of the Army informed the civilian personnel office that JTR, Volume 2, did not apply to nonappropriated fund

employees, but was only to be used for guidance. The controlling regulations were actually to be found in Army Regulation 230-2 para. 3-8 (change 1, February 17, 1971) which provided that the allowances and differentials available to appropriated fund employees overseas were only authorized for nonappropriated fund employees who had been recruited in the United States by nonappropriated fund activities or recruited overseas for assignment to other overseas areas.

On the basis of this Department of the Army message, [redacted] entitlements were again reviewed, and the civilian personnel office made a redetermination that he was ineligible for a transportation agreement because he was a nonappropriated fund employee who had not been recruited for his position in the United States. Moreover, [redacted] was also found ineligible for LQA because as a nonappropriated fund employee recruited overseas he did not meet the conditions set out in subsection 031.12b of the Department of State Standardized Regulations.

These determinations were made in October 1974, and since that time [redacted] has been seeking redress through administrative channels. Meanwhile, [redacted] was appointed to an appropriated fund position on February 6, 1976, but was again found ineligible for both LQA and a transportation agreement because now he did not meet the requirements of the JTR, Volume 2.

However, effective November 4, 1976, the Department of the Army did decide to authorize the payment of LQA to [redacted], although it still would not authorize a transportation agreement. The basis for this decision was the waiver provision of the Standardized Regulations § 031.12 (TL:SR-226, November 11, 1972) which granted the head of an agency the authority to waive the LQA requirements of the Standardized Regulations § 031.12b upon the determination that unusual circumstances in an individual case justified such action. However, since the Department of the Army could find no authority that would allow it to waive the regulatory requirements for granting a transportation agreement, it once again denied [redacted] request. Upon learning of this development, [redacted] raised some additional arguments. First, that the starting date of his LQA should not be November 4, 1976, the date of the letter granting the exception, but some earlier date closer to the date of his original request thus making up for the administrative delay due to the slow appeals process.

Second, since his original transportation agreement had been executed in good faith effective June 24, 1974, and prior to the civilian personnel office's receipt of Change 104 to JTR, Volume 2, dated June 1, 1974, the provisions of JTR believed by the parties to be in effect at the time the transportation agreement was executed (Change 85, November 1, 1972) should be controlling. (Under this earlier provision, [redacted] argues that waiver of some of the requirements for a transportation agreement was possible.) Finally, that JTR, Volume 2, para. 3a precludes cancellation of a transportation agreement once negotiated.

In response to these arguments, the Army states that it is Army policy to make LQA authorized by a waiver of the Standardized Regulations effective as of the date of the approval letter. The Army further states that this policy was established as the most equitable since each waiver case must be forwarded through command channels for approval and because a waiver case is not analogous to a case involving the correction of an erroneous decision.

As to [redacted] argument that Change 104 of JTR, Volume 2, was not effective until the civilian personnel office received it, the Army maintains that Change 104 was effective June 1, 1974, regardless of the date actually received, and any agreement negotiated after June 1, 1974, based on a rescinded provision of JTR, Volume 2, was void.

Finally, the Army denies that JTR precludes cancellation of a transportation agreement once it has been negotiated, but holds instead that an erroneous determination may be properly declared void.

The statutory authority for the entitlements in dispute is found in chapters 57 and 59, title 5, of the United States Code. The regulations which implement these statutes and are of interest here are: Volume 2 of the Joint Travel Regulations, the Standardized Regulations, and Army Regulation 230-2.

The general rule is that a construction given to a law or regulation by those responsible for carrying it out is entitled to great weight and ought not to be overruled without good reason

and unless plainly erroneous. Mountain States Telephone to Tel. Co. v. United States, 204 Ct. Cl. 482, 499 F.2d 611 (1974); Barrington Manor Apartments Corp. v. United States, 198 Ct. Cl. 298, 459 F.2d 499 (1972). Moreover, where an exercise of administrative discretion is involved, an agency action will only be disturbed if it is established that it is so clearly wrong as to be arbitrary. United States v. Shimen, 367 U.S. 374 (1961); Drucker v. United States, 195 Ct. Cl. 335, 498 F.2d 1352 (1974).

When the Army authorized LQA for [redacted], it was basing its action on the Standardized Regulations § 031.12 (TL:SR-226, November 26, 1972) which grants LQA to those employees recruited outside of the United States who meet certain criteria. [redacted] however, did not meet these criteria. Yet, the Standardized Regulations § 031.12 also provide:

> "Subsection 031.12 may be waived by the head of agency upon determination that unusual circumstances in an individual case justify such action." (Emphasis added.)

Thus, under this waiver provision the Army was able to exercise its discretion and grant [redacted] a LQA.

The Army, therefore, has the discretion to invoke this waiver provision or not as it sees fit. It follows then that it is also within the Army's administrative discretion to determine the effective date for any entitlement that might be authorized by waiver.

Consequently, the Army has established the policy of making any such entitlement effective as of the date of the letter of approval. This is a reasonable policy even if not the only one possible. Since this policy has been established through the exercise of administrative discretion and does not appear to be "so clearly wrong as to be arbitrary," it controls the effective date of [redacted] entitlement to LQA despite any other equitable or moral considerations that might be raised.

Since [redacted] entitlement to a transportation agreement is governed by Army Regulation 230-2 and not by the JTR as argued, whether or not a specific JTR change was relied upon or some other change was received by the personnel office after a certain

date is not relevant. Yet, conceding for the moment that the JTR do apply to [redacted] situation and that he does have a bona fide residence in the United States, he would nonetheless fail to qualify for a transportation agreement under the provisions of JTR, Volume 2, para. C4002-3b(2)2 (Change 85, November 1, 1972) having been employed by a Japanese firm prior to his appointment to the Stars and Stripes, and no waiver of this provision being available. As a nonappropriated fund employee, [redacted] had to meet the criteria of Army Regulation 230-2, para. 3-8 (change 1, February 17, 1971) which only authorized a transportation agreement for nonappropriated fund employees recruited in the United States or recruited overseas for assignment to other overseas areas. Therefore, since [redacted] did not fall within these categories he was not entitled to a transportation agreement in June 1974.

Yet, it is clear from the record that the civilian personnel office did in fact authorize--although erroneously--a transportation agreement for [redacted] in June 1974. However, the general rule is that in the absence of specific authority therefor, the United States is not liable for the erroneous actions of its officers, agents, or employees, even though committed in the performance of their official duties. 46 Comp. Gen. 348 (1966); 44 Comp. Gen. 337 (1964). Thus, [redacted] is not entitled to a transportation agreement merely because one was erroneously authorized by a Government officer or employee at the time of his appointment.

Nor is [redacted] now entitled to a transportation agreement as an appropriated fund employee because JTR, Volume 2, para. C4002 (Change 121, November 1, 1975) only authorized a transportation agreement for the nonappropriated fund employees hired overseas for appropriated fund positions who were initially "recruited in the United States under conditions of employment which provided for return transportation." Thus, since [redacted] was never entitled to a transportation agreement as a nonappropriated fund employee, he is not entitled to one as an appropriated fund employee. Moreover, there is no authority to waive these provisions of the JTR.

Accordingly, the Army's determinations appear to be correct.

B-191419

We regret that our reply could not be more favorable to your constituent.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States