Enclosed

146249

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Gerry R. Conger

File: B-227234.2

Date: March 25, 1992

DIGEST

An Air Force member who retired and is locally hired overseas as a civilian employee may receive a living quarters allowance and a return transportation agreement if the employment takes place before his entitlement to government transportation back to the United States based on his military retirement is used or expires. For this purpose, the Department of Defense policy views a retired military member's use of any portion of his entitlement to transportation for himself and dependents as disqualifying. Under applicable regulations, this is not an impermissible policy. Thus, where an individual returned his daughter to the United States incident to his military retirement but before his civilian employment, he was not eligible for the civilian quarters allowance or transportation agreement.

DECISION

Mr. Gerry R. Conger, a civilian employee of the Air Force, has appealed our Claims Group's settlement[1] which denied his claim for a living quarters allowance and a transportation agreement with the Air Force incident to his employment at Torrejon Air Base, Spain.[2] For the reasons discussed below, we sustain the Claims Group's denial.

Background

Mr. Conger retired from active service in the Air Force in Spain effective December 1, 1985. Incident to his military retirement, he was entitled to travel and transportation at government expense for his return and that of his dependents to the United States within one year from retirement. His dependent daughter returned to the United States at government expense on December 22, 1985. However, Mr. Conger remained in Spain and was hired locally as a civilian employee by the Air Force at Torrejon Air Base on

---

[1]Z-2865348, March 21, 1991.

[2]Mr. Conger is represented by counsel, George E. Day, Esq.

October 14, 1986. At that time, he was advised that he was not entitled to a living quarters allowance and a transportation agreement for travel and transportation at government expense to return to the United States upon separation from his civilian position in Spain, and he signed a form so stating.[3] He was told he could not qualify for these benefits because by using a portion of his military transportation allowances to return his daughter to the United States, prior to employment in the civilian position, Mr. Conger became ineligible for the civilian benefits.

Mr. Conger bases his appeal on the fact that his entitlements to his own and his dependents transportation back to the United States incident to his military retirement were separate entitlements. That is, the use of his entitlement to have his daughter returned to the United States did not affect his entitlement to his own transportation to the United States, provided he exercised it within the prescribed one-year of his retirement.[4] It is his position, therefore, that since he accepted the civilian position before the expiration of one year from the date of his military retirement, his entitlement to his own transportation had not expired, and he was entitled to the civilian living quarters allowance and transportation agreement he claims.

Analysis

Pursuant to 5 U.S.C. §§ 5922 and 5923 (1988), and implementing regulations in section 031.12b, Department of State Standardized Regulations (DSSR), a United States citizen hired locally overseas may be paid a living quarters allowance and a foreign post differential only if he was recruited by the United States government or other related employer and has been in substantially continuous employment by such an employer under conditions which provided for his return transportation to the United States. The DSSR also authorized agency heads to issue further implementing regulations. For the Department of Defense (DOD), the DSSR are supplemented by paragraph 2-2b(1) of DOD Regulation

---

[3]USAFE SU Form 1207, U.S. Citizens Overseas Allowances and Entitlements, signed by Mr. Conger and the Civilian Personnel Representative at Torrejon Air Base, and dated October 14, 1986.

[4]See 37 U.S.C. § 404(c) (service member's entitlement to travel to home of selection within one year of retirement) and 37 U.S.C. § 406 (service member's entitlement to transportation of dependents and household goods within one year of the member's retirement).

1400.25M, November 9, 1981, which provides that under section 031.12b, DSSR, former military members and civilian employees will be considered to have "substantially continuous employment" from the date of separation until the date on which their entitlement to government-paid transportation back to the United States expires.

As noted above, at the time Mr. Conger retired, the regulations in effect defined "substantially continuous employment" in the old job before appointment to the new job overseas to include the period from the separation date to the "date on which their entitlement to government-paid transportation back to the United States expires." DOD Regulation 1400.25M, para. 2-2b(1). For the application of these provisions to former military members Department of Defense policy, as expressed in a memorandum dated October 15, 1984, stated that if a former military member has used <u>any</u> portion of the military travel/transportation entitlement, that individual is no longer considered to have met the requirement for living quarters allowance eligibility purposes. DOD explained this policy as follows:

> "... two general situations have to be addressed. The first involves the separated member who initiates no action to return to the United States. In such cases, the expiration of entitlement to government paid transportation back to the United States is clearly the date established by the former employer at which time forfeiture of the entitlement occurs. The second situation involves a separated member who has used a portion of the return transportation entitlement, but not all of it. To ensure consistency among the various DOD components, agreement was reached several years ago that the use of any portion of the transportation entitlement would be considered as an expression of intent to return to the United States and thereby preclude a subsequent determination of substantially continuous employment. This approach has been followed consistently by all DOD components and is being incorporated in a rewrite of CPM 592."[5]

We have held that the DSSR bestow upon heads of agencies considerable discretion in the granting of a living quarters allowance and require agency heads to withhold payment altogether when in their judgment circumstances warrant such

---

[5]Effective September 1988, paragraph 2-2b(1) of DOD Regulation 1400.25M (CPM ch. 592) was revised to specifically incorporate the stated policy.

action, Joseph P. Carrigan, 60 Comp. Gen. 243, 246 (1981), and Wesley L. Goecker, 58 Comp. Gen. 738, 740 (1979). This Office will not substitute its judgment for that of agency officials responsible for exercising such discretion absent clear evidence that their determinations were arbitrary or capricious.

As Mr. Conger states, his entitlement to his own transportation incident to his military retirement had not expired when he began his civilian employment. However, both that entitlement and the entitlement to his dependent daughter's transportation were Mr. Conger's entitlements steming from his retirement, and thus it is clear that at the time he began civilian employment, he had used a portion of his military entitlement.

In view of the permissive rather than mandatory language in the applicable statutes and regulations, as noted above, and the degree of discretion we have long recognized heads of agencies have in determining whether to authorize these allowances, we cannot say the application of the DOD policy in Mr. Conger's case was arbitrary or capricious. The policy has a rational basis as explained by DOD and it is not inconsistent with implementing regulations. Also, although the policy was not set out in the DOD regulations, at the time of Mr. Conger's employment, Mr. Conger was specifically advised at the time of his employment that he was not entitled to the allowances and he was advised of the policy's application to him.

Similarly, the requirements for granting an initial transportation agreement under the Joint Travel Regulations[6] included a provision that the employee's entitlement to return transportation not have expired, and for such agreements DOD also applies the same policy of considering the entitlement to have expired if any portion of it is used.[7] As noted above, Mr. Conger also was advised at the time of his civilian employment that he did not qualify for a transportation agreement.

---

[6]JTR, vol. 2, para. C4002-3b(1) (Change No. 241, November 1, 1985).

[7]See also 5 U.S.C. § 5722(a)(2), the underlying statutory authority which provides that an agency "may" pay the return travel and transportation expenses of the employee and his dependents.

Accordingly, we do not find that the Air Force abused its discretion in this case. Therefore, the Claims Group's settlement denying Mr. Conger's claims is sustained.

for James F. Hinchman
General Counsel