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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eldean K. Minary - Relocation Expenses

File: B-250724

Date: May 2, 1994

DIGEST

1. Transferred employee is not entitled to payment of temporary quarters subsistence expenses (TQSE) since the distance between his new official station and his old residence is not more than 40 miles greater than the distance between his old residence and his old official station, as required by the Federal Travel Regulation. This mileage limitation has the force and effect of law and may not be waived in any individual case.

2. An employee who was transferred between duty stations located 41 miles apart, under orders providing for transportation and temporary storage of household goods utilizing the actual expense (GBL) method. The agency paid the carrier directly for such services, including 90 days of temporary storage and movement into and out of storage. Subsequently, the agency decided that the storage should not have been authorized because of the short distance involved and seeks collection from the employee for the costs. Since there is no regulatory, short-distance limitation in the FTR precluding temporary storage reimbursement, and since such storage was authorized and arranged by the agency, there is no legal basis to retroactively assess the costs against the employee.

3. Transferred employee was authorized movement of household goods by the government under the actual expense (GBL) method, and most of his goods were moved by that method. However, he elected to move 840 pounds of household goods himself. He is entitled to be reimbursed his actual costs for moving the 840 pounds (gas, oil, etc.), but not in excess of what it would have cost the government to move the goods as part of a shipment of his goods in one lot by government bill of lading using a commercial carrier.

4. Transferred employee may be reimbursed for the cost he paid of an owner's title insurance policy incident to his purchase of a residence only if such insurance was purchased by the employee as a prerequisite to obtaining financing or to the transfer of title, not as a matter of prudence for

his own protection. In this case the record does not establish that the insurance was a prerequisite for obtaining financing or transferring title; therefore, it is not reimbursable.

DECISION

The Bureau of Reclamation, United States Department of the Interior, requests a decision as to the propriety of reimbursing certain relocation expenses incurred by Mr. Eldean K. Minary, an employee of the agency, and canceling a Bill of Collection issued to him.[1] Mr. Minary has submitted a reclaim travel voucher in the amount of $9,400.80, a portion, $7,136.91, representing relocation costs that were previously reimbursed by the Bureau. The remaining portion of the amount claimed, $2,102.14 for temporary quarters subsistence expenses (TQSE), and $161.25 for the cost of an owner's title policy, were previously disallowed and not reimbursed by the Bureau of Reclamation.

BACKGROUND

Effective July 15, 1991, Mr. Minary transferred from Scotia, Nebraska, to Palmer, Nebraska, a distance of 41 miles. His travel orders authorized payment of temporary quarters subsistence expenses (TQSE) not to exceed 30 days pending the arrival of his household goods. The travel orders were amended in August 1991 to authorize an additional 30 days of TQSE, for a total of not to exceed 60 days.

The record shows that the distance from Mr. Minary's old residence to his new official station is 53 miles. The distance from the employee's old residence to his old official station is 16 miles, a difference of 37 miles. In regard to TQSE, the Federal Travel Regulation (FTR), 41 C.F.R. § 302-5.2(h) (1991), provides in pertinent part, that:

> "An employee or members of his/her immediate family shall not be eligible for temporary quarters expenses when the distance between the new official station and old residence is not more than 40 miles greater than the distance between the old residence and the old official station, except that the expenses of temporary quarters are allowable for the period during which the employee

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[1]The request was submitted by Ms. Sandra L. Inglefield, Authorized Certifying Officer, Bureau of Reclamation, Denver Office.

> is awaiting the arrival of his/her household goods shipped from the old to the new residence . . ."

Mr. Minary traveled to his new duty station on July 23, 1991. He states that as a result of his change of duty station, he chose to sell his old residence in Ord, Nebraska. He purchased a new residence in Grand Island, Nebraska, near his new duty station, on September 13, 1991.

The Bureau paid the amount claimed by Mr. Minary on his original travel voucher for temporary quarters for the period July 25 through August 23, 1991, but did not pay the claim for the second 30 days of temporary quarters. A portion of the Bill of Collection, $2,673.03, is to collect the alleged erroneous payment of TQSE from July 27 through August 23, 1991, based upon failure to meet the 40-mile regulatory limitation. Mr. Minary's reclaim voucher seeks payment of the total amount claimed for TQSE for the entire period of temporary quarters occupancy from July 7 through September 19, 1991.[2]

Mr. Minary also shipped and stored household goods in connection with his transfer. The Bureau authorized transportation and temporary storage of his household goods under a government bill of lading (the actual expense method). On this basis 17,160 pounds of his household goods were moved by commercial carrier at government expense. He also filed a voucher, including weight receipts, claiming reimbursement for an additional 3,870 pounds of personally transported household goods. The Bureau reimbursed Mr. Minary for 840 pounds of the additional amount, bringing his total up to the maximum allowable statutory weight limit of 18,000 pounds. The reimbursement was computed based on the commercial carrier's line haul rate and the Bureau asks whether this is the correct basis.

The Bill of Collection also includes an amount of $4,463.88 for household goods storage and the extra transportation costs for moving the goods into and out of storage which the Bureau feels should not have been incurred due to the short distance between Mr. Minary's old and new duty stations. Mr. Minary is reclaiming this amount.

In addition, the reclaim voucher includes a claim of $161.75 for Mr. Minary's cost (one-half) of an owner's title policy

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[2]Mr. Minary does meet the minimum requirements for authorization of relocation allowances under which we presume the agency authorized relocation allowances. FTR § 302-1.7.

incurred in connection with the purchase of a residence at his new duty station.[3]

The Bureau asks several questions concerning the relocation entitlements of Mr. Minary which will be answered in our determination of the validity of his claims.

ANALYSIS

With respect to entitlement to reimbursement of TQSE, we have consistently held that regardless of the reason for authorizing payment of the allowance, FTR § 302-5.2(h) (quoted above), clearly imposes the 40-mile limitation on authorization and payment of the allowance. When a transfer involves a difference in commuting mileage of 40 miles or less, the allowance may not be paid.[4] This mileage limitation has the force and effect of law, and may not be waived. Since the difference in Mr. Minary's commuting distance was only 37 miles, he had no entitlement to reimbursement of TQSE, except for a possible limited period awaiting arrival of his household goods "shipped from the old to the new residence."[5] We have held, however, that the regulation contemplates only the limited period of a delay caused by factors related to the transportation of the household goods, as distinguished from a delay caused by the inability of the employee to locate or obtain possession of his new residence.[6] Here, the record shows that Mr. Minary incurred temporary quarters expenses while seeking and obtaining possession of a residence at his new duty station not due to a delay related to transportation of household goods. Accordingly, he has no entitlement to TQSE in these circumstances.

In regard to the extra charges of $4,463.88 for transportation into and out of storage and for storage of household goods, paid to the carrier, the Bureau indicates these charges would not have been incurred had the goods been

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[3]Per agreement with the seller, Mr. Minary and the seller shared equally the cost of this insurance.

[4]See Travis D. Jackson, B-218513, Feb. 28, 1986, Jack R. Valentine, B-207175, Dec. 2, 1982; Kenneth A. Wendland, B-193903, June 19, 1979.

[5]The fact that he may have been erroneously authorized TQSE is not determinative of his entitlement. It is well established that the government is neither bound nor estopped by the erroneous or unauthorized acts of its officers, agents, or employees. See Wendland, cited in note 3.

[6]See B-168458, Dec. 22, 1968.

transported directly from Mr. Minary's old to his new duty station. In view of the following, we do not believe the record supports collection of these charges from Mr. Minary.

Payment by the government of the costs of temporary storage of household goods is authorized when such storage is incident to transportation of the household goods at government expense. FTR § 302-8.5. Temporary storage in connection with an authorized shipment of household goods is allowable for an initial period of not to exceed 90 days, with a possible extension of up to an additional 90 days when justified. FTR § 302-8.2(d). Under the actual expense method as used in this case, the government arranges for the necessary transportation and temporary storage and pays for the cost thereof direct. FTR §§ 302-8.3(b) and 302-8.5(b)(2) (1991). Here, Mr. Minary's travel orders authorized transportation and temporary storage of household goods (within prescribed weight limits), and the Bureau of Reclamation authorized, arranged, and paid the carrier directly for the transportation (in and out of storage) and temporary storage for approximately 90 days. Mr. Minary's orders contained no restriction on temporary storage, and the FTR contains no limitation on temporary storage similar to the 40-mile limitation on TQSE as previously discussed. While in these circumstances the agency may have been justified in placing a limitation on temporary storage in Mr. Minary's orders,[7] in the absence thereof, we see no legal basis to charge Mr. Minary for the amount paid by the agency for such services[8]. Accordingly, such costs should not be collected from him.

As to the appropriateness of utilizing the carrier's line haul rates as the basis for reimbursing Mr. Minary for the 840 pounds of household goods he personally transported, the rule is that the employee may not be paid or reimbursed more than the cost to ship the total allowable statutory weight allowance of 18,000 pounds in one lot by government bill

[7]Because of the short distance involved, the employee may have been able to make all the necessary arrangements for a permanent residence without the need to store his goods.

[8]The general rule is that except to correct an error apparent on the fact of the orders or where facts and circumstances demonstrate that some provision previously determined and definitely intended has been omitted through error or inadvertence, orders may not be revoked or modified retroactively after the transportation is competed so as to increase or decrease rights that have become fixed under applicable law and regulation. See H.D. Anderson, 57 Comp. Gen. 367 (1978).

lading.[9] When the employee elects to move a portion of the 18,000 pounds himself, he may be reimbursed the actual expenses he incurred (e.g. vehicle rental fee, material handling equipment, packaging materials, fuel, toll charges, etc.) in moving that portion (in this case 840 pounds), not to exceed what it would have cost the government to move that portion as part of the movement of all the goods in one lot from one origin to one destination by commercial carrier. 41 C.F.R. § 101-40.203-2(b) and (d) (1992). Therefore, Mr. Minary's reimbursement for moving the 840 pounds should be based on such actual expenses, but not to exceed what it would have cost to move that amount as part of a single 18,000-pound shipment by commercial carrier.[10]

In regard to the owner's title policy, generally, such a policy is insurance obtained by the employee for his own protection when purchasing a residence, and ordinarily it is not a reimbursable expense. FTR § 302-6.2(d)(2)(i). Reimbursement for such a policy is authorized only if it is a prerequisite to financing or the transfer of the property, or if the cost of the policy is inseparable from the cost of other insurance which is a prerequisite to financing or the transfer of the property. FTR § 302-6.2(d)(ix). In interpreting the regulatory language, we have held that while the purchase of an owner's title insurance policy may have been advisable, the evidence must show that such insurance was purchased by the employee as a prerequisite to obtaining financing, not merely as a matter of prudence for the employee's own protection.[11] Since the record does not

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[9]See B-187904, Nov. 29, 1977; B-187736, May 31, 1977; B-173557, Aug. 30, 1971.

[10]If assistance is required in computing this amount, the agency should contact the General Services Administration which operates the Centralized Household Goods Traffic Management Program for civilian executive agencies. See 41 C.F.R. § 101-40.2.

[11]See Anders E. Flodin, 64 Comp. Gen. 674, 676 (1985); Dr. William E. Howard, III, B-245457, Feb. 14, 1992, and cases cited therein. By comparison, a mortgage title insurance policy protects the lender against possible defects in the purchaser's title to the property, and its cost is reimbursable provided that it is paid for by the employee on a residence purchased by the employee for the protection of, and required by, the lender. FTR § 302-6.2(d)(viii). See also Michael S. Kochmanski, B-227503, Aug. 20, 1987; Daniel T. Mates, B-217822, June 20, 1985; Charles A. Onions, B-210152, June 28, 1983.

show that Mr. Minary met this criterion, he may not be reimbursed his cost of the owner's title insurance policy.

The claims should be settled in accordance with the foregoing.

Seymour Efros

for Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Annis K. Thompson - Claim for Retired Serviceman's Family Protection Plan Annuity

File: B-255512

Date: May 4, 1994

DIGEST

Where payment of a Retired Serviceman's Family Protection Plan annuity on behalf of a mentally incapacitated adult is to be made to a court-appointed guardian, the time period for filing a claim for the annuity was satisfied through filing by the adult's custodian pending the guardian's appointment.

DECISION

We have been asked whether the Barring Act bars the claim of Annis K. Thompson, adult daughter of Lieutenant Colonel Rex M. Thompson, USAF (Retired)(Deceased), for a Retired Serviceman's Family Protection Plan (RSFPP) annuity. The claim is not barred and may be paid if otherwise proper.

When Colonel Thompson retired from the Air Force in 1968, he elected child-only coverage under the RSFPP. His daughter, Annis Thompson, was born with Down's Syndrome and has lived at the Mexia State School in Texas since 1964. From the record it appears that Annis Thompson is incapable of self-support and therefore would be entitled to an RSFPP annuity as an incapacitated adult.

Colonel Thompson's widow, who is Annis Thompson's stepmother, submitted an annuity application for herself soon after his death in August 1986, but was informed that Colonel Thompson had elected child-only coverage. The Defense Finance and Accounting Service (DFAS), Denver Center, requested information about Annis Thompson at that time, but received no response.

Pursuant to a request from Rex M. Thompson, Jr., Annis' brother, a case manager at the Mexia State School wrote to DFAS on March 15, 1991, to ask whether Annis Thompson was eligible for any benefits due to her father's military service. The case manager was advised that a legal guardian would have to be appointed in order for Annis to receive the annuity Colonel Thompson had elected. The school submitted an application apparently signed by Annis herself, but DFAS

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rejected it because it was not signed by a legally appointed guardian.

Subsequently, Mr. Thompson, after being informed of the guardian requirement, contacted DFAS and was advised that if he was appointed guardian the money due on behalf of Annis would be released to him. In December 1991 Mr. Thompson initiated proceedings to be appointed guardian. In September 1992 DFAS received letters of guardianship issued by a Texas court showing that Mr. Thompson had been appointed Annis' legal guardian on July 21, 1992, and that he qualified as guardian as of September 4, 1992. DFAS then denied Annis Thompson's annuity claim on the grounds that it had not been filed within 6 years of Colonel Thompson's death and therefore was barred under the Barring Act.

The RSFPP, 10 U.S.C. §§ 1431-1446, is an income maintenance program for dependents of deceased military members. Eligible beneficiaries include a member's "dependent child." That term is defined to include a child who is incapable of self-support in adulthood due to a mental defect existing before his or her eighteenth birthday. 10 U.S.C. § 1435(2).

Under the Barring Act, 31 U.S.C. § 3702(b), the Comptroller General has the authority to settle a claim against the government when the claim is received within 6 years of accrual. After 6 years the claim is barred from consideration.[1] However, in B-166927, July 25, 1969, we said that when the custodian of a minor presents a claim on behalf of the minor, the filing requirement may be met even if the custodian has not established entitlement to receive the amount due on behalf of the minor.

We think a similar construction of the law is applicable here. The state school where Annis Thompson resides contacted DFAS on her behalf less than 5 years after her claim accrued, and provided DFAS an annuity application.[2]

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[1]Filing with the agency involved in a claim is now the equivalent of filing with the General Accounting Office (GAO). Prior to 1989, regulations required that claims be filed with GAO within 6 years of accrual. In 1989 the regulations were amended to allow filing with the agency involved. As an interim measure we allowed claims filed with an agency before 1989 if they were not already time-barred when the regulations were amended.

[2]At the time that the Mexia State School contacted DFAS, payment of an annuity on behalf of an annuitant such as Annis Thompson was to be made only to a legally appointed guardian. <u>See</u> 62 Comp. Gen. 302 (1983). Upon the enactment (continued...)

Additionally, Mr. Thompson, who eventually was appointed Annis' legal guardian, spoke to DFAS officials concerning the matter. It is our view that the claim-filing requirement was satisfied by the timely actions of Annis' custodian and her brother, who in fact was later appointed her legal guardian and thus was authorized to perfect her claim. See B-166927, supra.

Accordingly, the claim for an RSFPP annuity on behalf of Annis Thompson is not time-barred and may be allowed if otherwise proper.

Seymour Efros

for Robert P. Murphy
Acting General Counsel

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[2](...continued)
of Pub. L. No. 102-190, § 654, 105 Stat. 1389-1390 (1991), relevant regulations were amended to allow payment to a representative payee determined by the Secretary concerned to be responsible for the care of the annuitant. See Department of Defense Military Retired Pay Manual paragraphs 80503 and 90503c. However, while these regulations were made retroactive to the date the law was enacted, they were not issued until after the events here took place.

Comptroller General
of the United States

Washington, D.C. 20548

111755

Decision

Matter of: Erich W. Koch - Indirect Travel - Return from Overseas Assignment

File: B-252529.2

Date: May 5, 1994

DIGEST

An employee of the Army transferred from Chicago to Germany with reemployment rights in Chicago upon completion of the assignment in Germany. Because of the impending closure of the base in Chicago, he elected transfer of his employment rights to Fort McPherson, Georgia. Upon his transfer from Germany directly to Fort McPherson, he traveled under an amended order authorizing travel by a circuitous route via Chicago to pick up an automobile. He may not be paid travel expenses in excess of those necessary to permit travel on a usually traveled route directly from Germany to Fort McPherson. The travel orders contained a specific provision stating that the employee would be responsible for additional costs via Chicago, and in any event, the Federal Travel Regulations require that the extra expense of travel via a circuitous route be borne by the employee.

DECISION

Mr. Erich W. Koch, an employee of the Army, has appealed our Claims Group's settlement[1] which upheld the Army's denial of travel expenses by a circuitous route in excess of those necessary to permit his travel by a usually traveled route directly from his old duty station in Heidelberg, Germany, to his new duty station in Fort McPherson, Georgia. For the reasons discussed below we sustain the denial.

BACKGROUND

The Army transferred Mr. Koch from Fort Sheridan, Illinois, to Heidelberg, Germany, in October 1989, at which time he owned two automobiles. Mr. Koch shipped one of his automobiles at government expense to Heidelberg and stored the

[1] Z-2868334, May 5, 1993.

other one near Fort Sheridan in the Chicago area.[2] While Mr. Koch was in Germany, he was made aware of the anticipated closing of Fort Sheridan, and he elected to have his reemployment rights transferred from Fort Sheridan to Fort McPherson, Georgia. He subsequently accepted a transfer from Heidelberg to Fort McPherson in October 1992. His original travel order listed his destination as Fort McPherson and his alternate destination as Chicago, Illinois [where Fort Sheridan is located] and also stated that "Any additional expenses incurred by travel . . . to alternate destination will be borne by the employee." However, just before Mr. Koch left Germany, his order was amended to say: "Employee auth to fly from Frankfurt, Ge[rmany] to Chicago, Ill. He will drive by car to Ft. McPherson, Ga." That amendment, however, did not affect the provision in the original order, quoted above, to the effect that any additional expenses incurred for travel to Chicago would be borne by Mr. Koch.

Mr. Koch apparently disposed overseas of the automobile he had shipped at government expense to Germany, since he did not have it returned at government expense incident to his assignment to Fort McPherson. He states that this saved the government money and thus would justify his travel at government expense under the amended travel order via the circuitous route by air from Germany to Chicago and then via his automobile from Chicago to Fort McPherson. The Army, however, reimbursed him only the constructive costs of direct travel on the usually traveled route from Germany to Fort McPherson. Our Claims Group affirmed the Army's action and disallowed Mr. Koch's claim for additional costs of travel via the circuitous route.[3]

OPINION

Although Mr. Koch had return rights to a position in Chicago pursuant to 10 U.S.C. § 1586,[4] and Chicago may have been Mr. Koch's actual residence and home of record to which he

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[2]Federal Travel Regulation, 41 C.F.R. § 302-10.3 authorizes shipment at government expense of one privately owned vehicle to the new duty station incident to an employee's transfer outside the continental United States.

[3]Mr. Koch's claimed excess costs were taxi charges at the Chicago airport and mileage, tolls and per diem for driving his automobile from Chicago to Fort McPherson.

[4]10 U.S.C. § 1586 provides for granting the right of return to a position in the United States to Defense Establishment employees transferred to positions outside the United States.

would have been entitled to travel expenses under 5 U.S.C. § 5722 upon completion of his tour of duty in Germany, those return rights were extinguished when he accepted a transfer from Germany to Fort McPherson. That is, he then had no travel and transportation entitlement to Chicago and then to Fort McPherson but only an entitlement from his old duty station in Germany to his new duty station at Fort McPherson. Roger E. Dexter, B-214904, Sept. 5, 1984. In connection with the performance of travel during a transfer, the Federal Travel Regulation (FTR), 41 C.F.R. §§ 302-2.1 and 301-2.5(b) (1993), requires that employees who use circuitous routes for official travel are responsible for the excess costs involved. Sydney Smith, B-193923, Jan. 3, 1980. Thus, since Mr. Koch did not travel from Heidelberg to Fort McPherson by a usually traveled route but by a circuitous route via Chicago, he is responsible for the excess costs.

While Mr. Koch argues that the amendment to his travel order authorized the circuitous travel at government expense, as noted above, the amendment did not remove the explicit statement in the original order that any additional travel costs via Chicago would be at the employee's expense. In any event, however, where a travel order is clearly in conflict with the governing regulation, such as the FTR provision referred to above prohibiting circuitous travel at government expense, the provision in the travel order that conflicts with the governing regulation is of no effect. See Steven B. Wirth, B-249337, May 6, 1993. Also, while Mr. Koch's decision not to return his automobile from Germany at government expense may have saved the government that expense, that does not provide a basis to allow him to travel via a circuitous route at government expense contrary to the provisions of the FTR. Thus, the Army correctly limited Mr. Koch's reimbursement to the costs of travel via the usually travelled direct route.[5] Accordingly, our

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[5]We note that there is now statutory authority to allow reimbursement for the sale of a residence at the old duty station where an employee is transferred from an overseas duty station to a different duty station in the United States than the one from which he transferred (where his residence was located) to the overseas station. See 5 U.S.C. § 5724a(a)(4)(A), as amended by Section 628(a)(1) of Title VI, § 101(m), Pub. L. 100-202 (1987). However, we are aware of no similar statutory authority to allow payment of excess costs of travel via the old station claimed in this case.

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Claims Group's disallowance of Mr. Koch's claim for additional amounts for travel via the circuitous route is sustained.

Seymour Efros

for Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Captain Gerald E. Green, USN (Retired) - Waiver Request

File: B-255699

Date: May 9, 1994

DIGEST

A retired Navy officer was hired by the Department of Energy as a consultant with a limited appointment, and approximately 6 months later became a temporary full-time employee. Although his military retired pay was subject to reduction under the Dual Compensation law after 30 days of employment, reductions were not initiated until a few days before his status changed. Since he did not inform the Navy of his government employment promptly, he is not without fault in accepting the resulting overpayments, and his waiver request under 10 U.S.C. § 2774 is therefore denied.

DECISION

This is in response to an appeal of a Claims Group settlement denying the request of Captain Gerald E. Green, USN (Retired), for waiver of a debt that arose when he received erroneous payments because the Dual Compensation statute was not applied to his employment. We affirm the settlement.

Captain Green retired from the Navy in 1984, and on January 6, 1992, accepted a limited appointment with the Department of Energy as a temporary consultant. His status became that of a temporary full-time employee in July 1992. Although Captain Green's pay was subject to reduction under the Dual Compensation statute 30 days after his employment began, deductions were not begun until July 1, 1992. For the period between February 5, 1992, and June 30, 1992, Captain Green was therefore overpaid, and is indebted to the government in the amount of $15,420.18. The Claims Group denied his waiver request, and Captain Green has appealed that action.

The retired pay of a member who holds a "position" in the government is subject to reduction by a formula set forth in 5 U.S.C. § 5532(b). "Position" is defined in section 5531(2) as including a temporary, part-time, or intermittent position in any of the three branches of government. The definition includes employment as a consultant. See Colonel Robert Johnston, USAF (Retired), B-178042, May 19, 1977. A member receiving retired pay is also subject to a "pay cap" limiting combined retired pay and federal civilian pay to the rate for level V of the Executive Schedule. 5 U.S.C. § 5532(c).

Under 10 U.S.C. § 2774, the Comptroller General may waive all or part of an erroneous payment if collection would be against equity and good conscience and not in the best interest of the United States. Waiver is precluded if there exists any indication of fault on the part of the member.

Captain Green points out that the position he held with the Department of Energy did not entitle him to the usual benefits of life insurance, health benefits, and retirement. Captain Green states that he believed that the position was exempt from the operation of the Dual Compensation law, and that he in fact was so told by employees of the Department of Energy.

In our view, Captain Green is not without fault in this matter. Given the wide availability to retiring Navy officers of briefings and publications regarding the Dual Compensation law, and given his rank and military experience, we think Captain Green should have been aware of the importance of ascertaining for himself his exact status regarding the Dual Compensation law and requested verification in writing. See Captain Ronald L. Bouchard, B-251128, May 4, 1993. Moreover, Captain Green filled out a DD-1357, Statement of Employment, when he retired. The form states "I will file a new Statement of Employment within 30 days after the information in this statement has ceased to be accurate." At the least, he should have fulfilled his obligation to complete the required form when his employment began. Since Captain Green did not inform the Navy of his employment, he is not without fault, and waiver may not be granted. Id.

Accordingly, Captain Green's waiver request is denied, and the Claims Group's settlement is affirmed.

for Seymour Efros

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Admiral Jonathan T. Howe, USN (Retired)

File: B-255792

Date: May 9, 1994

DIGEST

Where Board for the Correction of Naval Records changed officer's military records to show that he retired on June 1, 1992, in the rank of Admiral (O-10) rather than on July 1, 1992, at which time he had reverted to permanent rank of Rear Admiral (O-8) because of delay in confirmation of retirement at rank of Admiral, officer may have excess leave liquidated in accordance with his corrected record.

DECISION

The Defense Finance and Accounting Service (DFAS) has asked that we determine whether Admiral Jonathan T. Howe, USN (Retired), should have had his excess leave, upon retirement and subsequent to action by the Board for the Correction of Naval Records, liquidated at the grade of Rear Admiral (O-8) or Admiral (O-10). We find that liquidation at the higher grade is proper.

Admiral Howe was serving in a position under 10 U.S.C. § 601 for which he was entitled to the grade of O-10, Admiral. However, Admiral Howe was to revert to his permanent grade of O-8, Rear Admiral, prior to his projected retirement sometime before June 4, 1992. As a result, legislation was enacted to continue him in the grade of Admiral through June 4, 1992. See Pub. L. No. 102-297, June 2, 1992, 106 Stat. 216. Admiral Howe, however, was not transferred to the retired list until July 1, 1992, by which time the extension of his O-10 grade had expired, so that the 60 days of excess leave he had accumulated were liquidated at the O-8 rate to which he had reverted a week earlier.

Section 1370 of title 10, United States Code, provides that an officer may be retired in the grade in which he was serving under 10 U.S.C. § 601, in the discretion of the President with the advice and consent of the Senate. Although the President had nominated Admiral Howe in late 1991 for retirement at grade O-10, due to a delay in forwarding the request for confirmation, and delay in the Senate, his retirement at that grade was not confirmed by the Senate until July 2, 1992.

On June 9, 1993, the Board for the Correction of Naval Records corrected Admiral Howe's military records to show that he was transferred to the retired list on June 1, 1992, and was retained on active duty until June 30, 1992. The Board found that there never was an intent to delay the confirmation of his retirement in grade 0-10 pursuant to the President's nomination.

DFAS has requested our advice in view of 37 U.S.C. § 501 (b)(1), which provides that a member who has accrued leave to his credit at the time of his discharge is entitled to be paid for such leave on the basis of the basic pay to which he was entitled on the date of discharge. DFAS points out that when Admiral Howe actually retired on July 1, 1992, he was an 0-8, not an 0-10.

Section 1552 of title 10, United States Code, authorizes the correction of a military record, such as was done in Admiral Howe's case, when considered necessary by the Secretary concerned to correct an error or remove an injustice. Such record corrections are "final and conclusive on all officers of the United States," except when procured through fraud. 10 U.S.C. § 1552(a)(4).

In our view, the Correction Board's action requires that Admiral Howe's leave be liquidated at the 0-10 rate. The statutory requirements that he be retired in the grade of Admiral in the discretion of the President with the advice and consent of the Senate were met. Admiral Howe's records simply were changed to reflect an earlier date of retirement and continuation on active duty, to rectify the problem caused by the delay in completing the process of nomination, advice, and consent. In this respect, we note that the statute provides that the Secretary of the department concerned correct the records; we assume that the Correction Board action has been approved by the Secretary of the Navy or his designee. In such case, Admiral Howe should be paid his entitlement on the basis of his corrected records.

Robert P. Murphy
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of the United States

Washington, D.C. 20548

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Decision

Matter of: Timothy S. Haymend

File: B-255822

Date: May 17, 1994

DIGEST

An employee transferred to an overseas location in Korea, and sold his residence at his old duty station in Hawaii. He is entitled to reimbursement for real estate expenses on the basis of a statutory exception in 5 U.S.C. § 5724a(a)(4)(A) (1988), which provides reimbursement of real estate expenses when an employee returns from an overseas assignment to a different location in the United States. The employee (1) was notified that he would not be returning to his old duty station; (2) he sold his residence pursuant to such notice; (3) an agency regulation precluded his return; and (4) he returned from overseas to another duty station in the United States. Robert M. Hooks, B-249184, Mar. 5, 1993, 72 Comp. Gen. 130.

DECISION

Mr. Timothy S. Haymend, requests reconsideration of a Claims Group settlement[1] that denied his request for reimbursement for real estate expenses. For the reasons that follow, we overrule our Claims Group settlement and allow reimbursement.

Mr. Haymend was assigned to the U.S. Army Material Command (AMC), Logistic Assistance Program (LAP) at Fort Shafter, Hawaii, during the period 1988 through 1991. In April 1991, Mr. Haymend was notified that he would receive a permanent change of station to Fort McPherson, Georgia. In anticipation of the pending transfer, he signed a listing agreement on April 15, 1991, effective until November 1, 1991, to sell his residence in Hawaii. However, in June 1991, Mr. Haymend accepted a position in Seoul, Korea, and reported for duty there in September 1991. His residence in Hawaii was sold on November 15, 1991, and he has requested reimbursement for real estate expenses totaling $12,916.29.

[1]Z-2868443, August 31, 1993.

Mr. Haymend's request for reimbursement of real estate expenses was denied by both the AMC and our Claims Group on the basis of statutory and regulatory provisions that provide that both the old and new duty station must be located within the United States or other named locations in order for such expenses to be reimbursable. Mr. Haymend states that he is entitled to reimbursement because his position is mandatory mobility[2], and governing regulations prohibit him from staying overseas for more than 5 years. Since he would have completed 5 years overseas after his assignment in Korea, he states that it would have been impossible for him to return to Hawaii. By travel orders issued March 12, 1993, Mr. Haymend was transferred from Seoul, Korea, to his current duty station in Huntsville, Alabama.

Under the provisions of 5 U.S.C. § 5724a(a)(4)(A) (1988), the implementing regulations, the Federal Travel Regulation, 41 C.F.R. § 302-6.1(a) (1993), and the Joint Travel Regulations, Vol. 2, para. C14000-1-1, both the old and new duty stations must be located within the United States (the 50 states) or other named locations to entitle an employee to reimbursement of the expenses of selling or purchasing a residence.[3] However, section 5724a(a)(4) was amended in 1987 to allow reimbursement of real estate expenses to an employee transferred to a foreign duty station who is transferred back to a duty station in the United States other than the one from which he transferred overseas. Such reimbursement shall not be allowed for any real estate transaction that occurs "prior to official notification" that the employee's return to the United States would be to an official station other than the one from which he was transferred to the foreign post of duty.

This Office recently allowed reimbursement under circumstances similar to Mr. Haymend's in Robert M. Hooks, B-249184, Mar. 5, 1993, 72 Comp. Gen. 130. In Hooks, the employee was notified prior to his transfer from Alaska to Singapore that he would not be allowed to return to Alaska, and that his return rights would be to his prior position in Savannah, Georgia. These instructions were given by agency officials pursuant to an agency regulation which did not permit a return to Alaska. Subsequently, the employee transferred back from Singapore to Charleston, South Carolina, since his former position had been moved to that

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[2]Employees are designated as emergency essential and participate along with military personnel in major field exercises or mobilizations.

[3]Donald E. Clay, B-242558, June 19, 1991, aff'd on reconsideration, B-242558.2, Dec. 18, 1991; Frederick J. Donnelly, B-237607, May 21, 1990.

new location. Therefore, he came within the purview of the statutory exception since he returned from an overseas assignment to a duty station other than the one that he was initially assigned to prior to going overseas.

Thus, the criteria enunciated in Hooks are: (1) official notice prior to an overseas assignment that the employee would not be returning to that duty station; (2) sale of the residence after such official notice; (3) an agency regulation that provides that an employee will not return to his/her old duty station; and (4) the employee's return to another official duty station.

We believe that Mr. Haymend's circumstances fall within the criteria for reimbursement outlined in Hooks so as to permit reimbursement. The record contains a memorandum from the then Director, LAP activity, who states that he told Mr. Haymend in June that his assignment in Korea would be followed by an assignment to Headquarters, which at that time was Alexandria, Virginia, or in the alternative, Huntsville, Alabama, if the function was transferred there. We believe that this constitutes official notice to Mr. Haymend that he would not be returning to his old duty station in Hawaii. And Mr. Haymend sold his residence in Hawaii after receiving the official notice.

In addition, Mr. Haymend signed a Mobility Agreement in August 1991, incident to his overseas assignment to Korea. One of the provisions of the Agreement refers to AMC Regulation 700-19, and provides that, unless otherwise approved by LAP management, assignments outside the continental United States will be limited to 5 consecutive years. Upon completion of 5 consecutive years, the employee will be reassigned to the continental United States. Mr. Haymend's 3-year assignment to Hawaii, together with his 2-year assignment to Korea satisfies this criteria. Lastly, Mr. Haymend has returned to a different duty station, Huntsville, Alabama, other than that from which he was first assigned to the overseas assignment.

Therefore, the criteria in Hooks have been met, and Mr. Haymend is entitled to reimbursement of the allowable expenses of selling his residence in Hawaii.

for Seymour Efros

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

350185

Decision

Matter of: Major Alberto S. Leonardo, USMC (Retired)

File: B-255091

Date: May 18, 1994

DIGEST

Where erroneous payment of Basic Allowance for Quarters was waived because the officer was not at fault, it was improper to offset the amount of the officer's final settlement check for wages and unused leave to reduce the amount subject to waiver.

DECISION

This is in response to an appeal of a Claims Group settlement waiving the government's claim arising from erroneous payments of Basic Allowance for Quarters (BAQ) to Major Alberto S. Leonardo, USMC (Retired). The waiver was applied to the debt remaining after sums due Major Leonardo were offset against the overall debt.

We modify the settlement.

Major Leonardo was erroneously paid full BAQ instead of partial BAQ during the period October 2, 1989, through September 30, 1992, resulting in an overpayment of $18,348.65. Upon his separation from the service, his debt was reduced to $10,642.21 by withholding $7,706.44 for items of pay due Major Leonardo at that time. Our Claims Group found that there was no evidence that Major Leonardo was aware that he was not entitled to receive full BAQ and that he had acted in good faith in accepting the overpayment. Therefore, the Claims Group waived the balance of the debt, $10,642.21, under the authority of 10 U.S.C. § 2774.

Major Leonardo objects to the offset. Major Leonardo contends that if he had received his final settlement check (which included his last 2 weeks active duty pay, 60 days leave, and foreign language proficiency pay), the entire $18,348.65 would have been waived.

Section 2774 authorizes our Office to waive, in whole or in part, a government claim arising out of an erroneous payment of pay or allowances if collection would be against equity and good conscience and not in the best interest of the

PUBLISHED DECISION
73 Comp. Gen.____

United States. The statute permits considering the total erroneous payment for waiver, as opposed to a net amount after offset for cash repayments by the member or setoff for an underpayment that may have resulted from some other administrative error. 55 Comp. Gen. 113 (1975). In this respect, subsection 2774(c) specifically authorizes refund to a member who has repaid all or part of a waived erroneous payment.

On the other hand, in limited situations it would be proper for the government to subtract underpayments in the member's account from overpayments in determining the amount which might be waived. Id. at 117. We have found this to be the case where the individual owed the government an amount with respect to the particular transaction which also resulted in an overpayment subject to waiver. For example, in Simon F. Kula, B-247346, June 24, 1992, we held that relocation expenses due an employee for a change of station move should be offset against an erroneous overpayment of other relocation expenses in connection with the same move. In Maureen S. Fearn, 65 Comp. Gen. 696 (1986), the widow of a deceased military member erroneously received retired pay that should have ceased upon the member's death. We held that survivor annuity payments for the same period, to which she later was found entitled, should be offset by the erroneous payment (which we previously had waived).

In Major Leonardo's case, he in good faith accepted the $18,348.65 overpayment, and the Claims Group agreed that he was without fault in the matter. The payments withheld at separation were not underpayments caused by administrative error, nor were they in any way related to the event that gave rise to the erroneous payments. Application of the waiver statute is to follow equitable principles. We think it unfair to conclude first that Major Leonardo had no reason to suspect that he had been overpaid, so that the overpayment is waivable, but then to collect more than 40 percent back at separation by withholding pay the member had every reason to believe would be forthcoming.[1] In our view, Major Leonardo was entitled to full payment of the money due him at his separation irrespective of the erroneous overpayment.

The Claims Group should have waived the full amount of the overpayment to Major Leonardo, $18,348.65. Major Leonardo

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[1]We note that if the overpayment had not been discovered until 1 day after Major Leonardo's separation and attendant receipt of the pay due him at that time, the overpayment would have been waived in full.

therefore should be paid $7,706.44, representing his final settlement check.

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

1144245

Decision

Matter of: Joseph M. Ford - FLSA Overtime - Limitations Period

File: B-250051

Date: May 23, 1994

DIGEST

1. Fire inspection employee worked 8-1/2-hour day, including one-half hour meal period. The employee is not entitled to Fair Labor Standards Act overtime for scheduled meal period for those days he was on annual or sick leave since he was not charged leave for the meal period. Armitage v. United States, 23 Cl. Ct. 483 (1991), aff'd, 991 F.2d 746 (Fed. Cir. 1993).

2. Provisions of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. § 255(a), imposing a limitation period of 2 years (3 years for willful violations) on a "cause of action" under the Fair Labor Standards Act (FLSA) will be applied in the settlement of pending and future FLSA claims filed with GAO by federal employees. Section 255(a) constitutes an exception to 31 U.S.C. § 3702(b)(1), which establishes a 6-year limit on filing claims with GAO "except . . . as provided by . . . another law." Prior GAO decisions that allowed a 6-year period for filing FLSA claims, 57 Comp. Gen. 441 (1978), 67 Comp. Gen. 247 (1988), and 68 Comp. Gen. 681 (1989), will no longer be followed.

DECISION

Mr. Joseph M. Ford, a Fire Inspector formerly employed by the Department of the Air Force at Scott Air Force Base, Illinois, claims overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., for meal periods during his regularly scheduled daily tour of duty of 8-1/2 hours. The claim may be partially allowed to the extent stated below.

Mr. Ford was a Fire Inspector engaged in fire protection activities. His schedule called for him to work 5 days per week. His tour of duty consisted of 4 days of 8-1/2 hours and 1 day of 24 hours, for a total of 58 hours. Mr. Ford's agency paid him based on only 56 hours a week, since it considered the 1/2 hour on the four "short days" to be a duty-free meal break. He received 3 hours of FLSA overtime because employees engaged in fire protection activities are entitled to FLSA overtime compensation for work more than 53 hours per week. FPM Letter 551-20 (Sept. 22, 1983).

Mr. Ford claims an additional 2 hours overtime per week since meal periods for those engaged in fire protection activities are compensable under the FLSA whether they are duty-free or not. Specifically, he requests such overtime pay from September 10, 1985, 6 years before the date the agency received his claim on September 10, 1991, to the date of his retirement, July 28, 1992, including periods of paid leave, and for his unused annual leave at the date of retirement.

The Department of the Air Force agrees that Mr. Ford performed "fire protection activities" under FLSA and should receive overtime pay for the meal periods that were part of his 8-1/2-hour work days. See Henry G. Tomkowiak, et al., 67 Comp. Gen. 247 (1988). However, the agency contends that payment is not due for periods when the claimant was in a paid leave status, including his leave pay at retirement. The agency also contends that payment of backpay is appropriate only for the period beginning 2 years before the claim was filed, rather than 6 years.

OPINION

Periods of Paid Leave

Mr. Ford claims that he should receive FLSA overtime pay for meal periods on days of paid leave under the rationale of Lanehart v. Horner, 818 F.2d 1574 (Fed. Cir. 1987). In Lanehart, the firefighters had an uncommon tour of duty of six 24-hour shifts for 144 hours per biweekly pay period. They were entitled to FLSA overtime pay for hours worked over 106 per pay period. They also earned and used leave at an accelerated rate of 144 hours per pay period. Thus, when they took a day of leave they were charged 24 hours of leave. The court of appeals held that the various leave with pay statutes (sick, annual, jury, and military leave) in title 5, United States Code, prevented any reduction in their regular pay, including overtime pay under the FLSA, when they are on leave under the title 5 leave provisions.

The agency disagrees with the application of the Lanehart holding to this case and argues that the periods when Mr. Ford was in a paid leave status must be deducted because of the holding of the United States Claims Court in

Armitage v. United States, 23 Cl. Ct. 483 (1991), aff'd, 991 F.2d 746 (Fed. Cir. 1993). The plaintiffs in Armitage were police or law enforcement officers regularly scheduled to work 8 hours a day plus another period of regularly scheduled overtime each day. If they took annual or sick leave, like Mr. Ford, they were only charged 8 hours leave for those days. This distinguished them from the firefighters in Lanehart who earned and used leave at an accelerated rate of 24 hours per day because of their uncommon tour of duty. As stated above, when the firefighters took a day of leave, they were charged 24 hours of leave that included their FLSA overtime hours. In contrast, when the plaintiffs in Armitage took a day of leave, no annual or sick leave was charged for regularly scheduled overtime hours that were not worked. Because of this distinction, the Claims Court in Armitage held that, since the plaintiffs were not charged leave for hours of overtime not worked, they were not entitled to overtime pay for periods of leave under the Lanehart rationale or the leave with pay statutes.

We agree with the agency that Armitage is controlling here because Mr. Ford, like the plaintiffs in Armitage, was not charged leave for the one-half hour overtime period when he took leave on any of his four 8-1/2-hour days.[1] Accordingly, he is not entitled to overtime pay during periods of paid leave on those days. Armitage, supra, 23 Cl. Ct. at 492.

Statute of Limitations

The authority of GAO to settle claims against the United States is contained in 31 U.S.C. § 3702(b)(1) (1988), which provides that a claim filed in this Office must be received within 6 years after the date the claim accrues, "except . . . as provided in this chapter or another law."[2] The issue is whether the Portal-to-Portal Pay Act of 1947, as amended, is such another law since it provides in 29 U.S.C.

[1]Although Mr. Ford was engaged in fire protection activities, he was not a firefighter and did not work the same hours as the firefighters in Lanehart. The one 24-hour day he worked per week is not at issue here, and we express no opinion as to overtime pay requirements for that day when leave is taken.

[2]The quoted phrase was added to the statutory limitation provisions on GAO's claims settlement authority for clarity when title 31 of the United States Code was codified by Pub. L. No. 97-258, 96 Stat. 877, 970 (1982). See reviser's note following 31 U.S.C. § 3702; H.R. Rep. No. 651, 97th Cong., 2d Sess. at 131 (1982).

§ 255(a) that a "cause of action" under the FLSA shall be forever barred unless commenced within 2 years (3 years for willful violations) after it accrues.[3]

We considered this issue in Transportation Systems Center, 57 Comp. Gen. 441 (1978), and concluded that section 255(a) did not constitute an exception to 31 U.S.C. § 3702. Thus, we held that the time limit for filing an FLSA claim with GAO was 6 years. We have followed Transportation Systems Center in subsequent decisions dealing with FLSA claims. See Federal Firefighters, 68 Comp. Gen. 681 (1989); Henry G. Tomkowiak, et al., supra.

In the current case, the Air Force asks us to reconsider our position and apply the limitations of 29 U.S.C. § 255(a) to FLSA claims filed with our Office. The Department of the Navy likewise advocates a change in our position, as does the Office of Personnel Management (OPM), which has statutory responsibility to administer the FLSA for federal employees. See 29 U.S.C. § 204(f).

OPM points out that the courts apply the FLSA time limitations to federal employee overtime pay claims arising under that law. See, e.g., Hickman v. United States, 10 Cl. Ct. 550, 552 (1986), observing that when the FLSA was extended to federal employees, "no congressional intent was manifested in the amending language or its underlying legislative history that federal employees would be accorded a more liberal limitations period than employees in the private sector."[4] OPM also points out that in the Federal Employees Pay Comparability Act (FEPCA) of 1990,[5] Congress recognized the distinct and separate overtime entitlements of those federal employees covered by FLSA and those FLSA-exempt federal employees covered by various title 5 pay provisions whose claims remain subject to a 6-year statute of limitations.

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[3]Section 255(a) applies to actions arising under several statutes, including "[a]ny action commenced on or after May 14, 1947, to enforce any cause of action for . . . unpaid overtime compensation . . . under the Fair Labor Standards Act of 1938, as amended."

[4]The court in Hickman rejected the plaintiffs' argument that filing FLSA claims with GAO tolled the running of the limitations applicable to judicial actions on FLSA claims under 29 U.S.C. § 255(a), and thereby enlarged the period of recovery.

[5]Pub. L. No. 101-509, § 529, 104 Stat. 1427 (1990). See § 210 of FEPCA, 104 Stat. 1460, amending 5 U.S.C. § 5542.

On the other hand, representatives of federal employees have urged us to adhere to our current position, or, in the alternative, to apply any change only to claims which are filed after the date of a new decision.

For the reasons stated below, we agree with OPM and the other executive agencies that 29 U.S.C. § 255(a) constitutes an exception to the 6-year limitation period in 31 U.S.C. § 3702(b).

Our original decision in Transportation Systems Center, supra, holding that the FLSA limitation period did not supersede the general 6-year limitation period, adopted the position advanced at that time by OPM's predecessor agency, the Civil Service Commission. Both the Commission and our Office reasoned that since the FLSA time limitations in 29 U.S.C. § 255 referred to a "cause of action," they applied only to actions filed in court and not to administrative claims.

In reaching this conclusion, both the Commission and our Office relied on an earlier decision of our Office, 51 Comp. Gen. 20 (1971), which distinguished between limitations applicable to judicial actions and administrative claims. The 1971 decision held that a 1-year limitation period on the commencement of "actions at law" for the recovery of certain communications charges did not supersede the general limitation for filing claims with GAO, which then was 10 years. See 31 U.S.C. §§ 71a and 237 (1970).

The premise underlying our earlier decisions--that a limitation on claims expressed in terms of judicial actions should be distinguished from administrative proceedings to adjudicate the same claims--runs counter to general principles of law. When a statute creates a right that did not exist at common law and restricts the time to enforce it, expiration of the time limit not only bars the remedy but extinguishes the underlying rights and liabilities of the parties. See, e.g., William Danzer Co. v. Gulf R.R., 268 U.S. 633, 635-37 (1925); Kalmich v. Bruno, 553 F.2d 549, 553 (7th Cir. 1977).

Accordingly, a time limitation imposed on a statutorily created judicial cause of action will apply to administrative proceedings to adjudicate the same claims absent a specific provision to the contrary. Moreover, the policies and objectives underlying limitations on judicial actions ordinarily apply with equal force to administrative proceedings dealing with the same entitlements. See, Utah Consolidated Mining Co. v. Industrial Comm'n of Utah, 57 Utah 279, 194 P. 657, 16 ALR 458 (1920). Thus, legislative determinations to limit the extent of a party's exposure to liability or to discourage claims involving stale facts or documentation problems are no less relevant to administrative than to judicial proceedings.

We believe that these general principles are just as valid in the context of GAO's claims settlements. Indeed, the General Accounting Office Act of 1974[6] reduced the limitation period in 31 U.S.C. § 3702 from 10 years to 6 years, thereby conforming it to the 6-year limitation period applicable to judicial actions on claims against the United States under 28 U.S.C. §§ 2401 and 2501. The legislative history noted that "[t]his will make the time limitation consistent with the Statute of Limitations now applicable to claims filed in administrative agencies and the courts." S. Rep. No. 1314, 93d Cong., 2d Sess. 5-6 (1974); see also, H.R. Rep. No. 1300, 93d Cong., 2d Sess. 18 (1974).

These principles also apply in the context of FLSA claims which involve rights created by statute. The language of the Portal-to-Portal Act expresses its limitations in comprehensive terms, applying to "any action . . . to enforce any cause of action for . . . unpaid overtime compensation" under the FLSA.[7] As noted in Hickman v. United States, supra, it appears that Congress intended to subject federal employees to the same limitation period applicable to other FLSA claimants. Preserving a 6-year period for FLSA claims filed with GAO would be inconsistent with this purpose, and would create disparate treatment not only between federal employees and private sector employees, but also between federal employees who file claims only in court and those who file administrative claims.

Upon reconsideration, therefore, we will follow the interpretation of OPM and the rationale of the courts and apply the statute of limitations in 29 U.S.C. § 255(a) to FLSA claims filed with our Office. Transportation Systems Center, Federal Firefighters, and Henry G. Tomkowiak, supra, are overruled.

Consistent with our usual practice, we will apply the 2-year statute of limitations (3 years for willful violations) in 29 U.S.C. § 255(a) (1988) to all FLSA claims that have not been settled prior to the date of today's decision. See, e.g., Turner-Caldwell, 61 Comp. Gen. 408, 410 (1982).[8] Settlements made before the date of this decision by our

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[6]Pub. L. No. 93-604, § 801, 88 Stat. 1965 (1975).

[7]See note 3, supra.

[8]Today's decision does not apply to claims that arise solely out of the title 5 overtime provisions; the 6-year limitation period still applies to title 5 claims.

Office or other federal agencies pursuant to our prior decisions will not be disturbed.

Accordingly, Mr. Ford may be reimbursed for the meal periods that were part of his 8-1/2-hour work days beginning 2 years before the date he filed his claim with his agency, but he may not receive overtime pay for periods when he was in a paid leave status.

James F. Hinchman

Comptroller General
of the United States

532255

Decision

Matter of: Office of the Civilian Health and Medical Program of the Uniformed Services; Aetna Government Health Plans, Inc.--Request for Modification of Decision

File: B-254397.11; B-254397.12

Date: May 23, 1994

Thomas P. Humphrey, Esq., Frederick W. Claybrook, Jr., Esq., Robert M. Halperin, Esq., Paul Shnitzer, Esq., and Stephanie B. Renzi, Esq., Crowell & Moring, for Foundation Health Federal Services, Inc.; and James A. Dobkin, Esq., Richard S. Ewing, Esq., and J. Robert Humphries, Esq., Arnold & Porter, for QualMed, Inc., the protesters.
Roger S. Goldman, Esq., David R. Hazelton, Esq., Penelope A. Kilburn, Esq., and Katherine A. Lauer, Esq., Latham & Watkins, for Aetna Government Health Plans, Inc., an interested party.
Kenneth S. Lieb, Esq., Ellen C. Callaway, Esq., and Karl E. Hansen, Esq., Office of the Civilian Health and Medical Program of the Uniformed Services, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that General Accounting Office (GAO) withdraw a finding of entitlement to costs is denied, where the basis for the request, a district court's granting of a motion for voluntary dismissal of a complaint, was not inconsistent with prior GAO decision.

DECISION

The Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) and Aetna Government Health Plans, Inc. request that our Office modify its decision in Foundation Health Fed. Servs., Inc.; QualMed, Inc., B-254397.4 et al., Dec. 20, 1993, 94-1 CPD ¶ 3, in which we sustained the protesters' challenge to the award of a contract to Aetna under request for proposals (RFP) No. MDA906-91-R-0002. In particular, OCHAMPUS and Aetna request that we withdraw our finding that the protesters are entitled to recover the reasonable costs of filing and pursuing their protests.

We sustained the protests because we found that, in evaluating proposals and selecting Aetna for award, OCHAMPUS had failed to follow the RFP evaluation scheme. We recommended that OCHAMPUS revise the RFP to inform offerors of the actual bases for evaluating technical and cost proposals.[1] We did not recommend that the agency terminate Aetna's contract unless, as a result of the evaluation of revised proposals, the agency concluded that it did not represent the best value to the government.

Shortly after our decision was issued, OCHAMPUS exercised the first 1-year option under Aetna's contract. Foundation and QualMed then filed suit in United States District Court for injunctive and declaratory relief to prevent OCHAMPUS from having Aetna perform under the contract. After their motions for a temporary restraining order (TRO) and a preliminary injunction were denied, Foundation and QualMed moved for voluntary dismissal, which the court granted, dismissing the complaint with prejudice on February 25, 1994.

OCHAMPUS and Aetna now contend that the court's dismissal with prejudice constitutes an adjudication on the merits which was inconsistent with our decision. Relying primarily on our decision in SWD Assocs.--Claim for Costs, 68 Comp. Gen. 655 (1989), 89-2 CPD ¶ 206, they argue that we should withdraw the finding that Foundation and QualMed are entitled to the cost of filing and pursuing their protests.[2]

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[1]In the alternative, we recommended that, if the agency elected to proceed with the evaluation as described in the RFP, it should reopen discussions with all competitive range offerors, request revised proposals, and proceed with the source selection process based on appropriate evaluations. The agency decided to revise the RFP rather than opt for this alternative recommendation.

[2]Aetna also requests that we dismiss Foundation's and QualMed's protests and withdraw our decision in its entirety, a request we deny for the same reason we deny the request regarding the award of costs.

Both OCHAMPUS and Aetna also make reference to the regulation under which our Office will dismiss a protest where the matter involved is the subject of court litigation unless the court requests a decision by our Office. 4 C.F.R. § 21.9(a) (1994). That regulation, also refers to dismissal (rather than the withdrawal of a decision), applies only to protests (or requests for reconsideration) that are pending, and generally bars further consideration
(continued...)

Our Office treats a decision by a court of competent jurisdiction as taking precedence over an inconsistent decision of our Office. See Lear Siegler, Inc.--Recon., B-218188.2, June 27, 1985, 85-1 CPD ¶ 733. In SWD Assocs.--Claim for Costs, supra, we determined that our prior decision to award costs to the protester should be withdrawn, because it was based on our conclusion that a violation of procurement regulations had occurred, and the district court in which the protester subsequently filed suit had explicitly rejected that conclusion.

Here, in contrast, the district court merely granted the motion by Foundation and QualMed for voluntary dismissal; the court never made findings of fact or reached conclusions of law regarding the propriety of the agency's evaluation of proposals. The court's only findings were the determinations that there was "little likelihood of success on appeal" and that the absence of a TRO would not cause the plaintiffs irreparable harm. Neither those determinations nor any other statement by the district court suggested that the court disagreed with any aspect of our decision--the substantive determination that OCHAMPUS had failed to follow the solicitation evaluation scheme, the recommendation, or the declaration of entitlement to costs. Because there is no inconsistency between the district court's action in the civil case (including its dismissal of the complaint) and our decision sustaining the protests, we have no basis to modify that decision or withdraw our award of costs.[3]

The request that we modify our decision is denied.

Robert P. Murphy

Robert P. Murphy
Acting General Counsel

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[2](...continued)
of those cases by our Office; it is inapplicable to protests, such as Foundation's and QualMed's, where our Office has already issued a decision and no request for reconsideration is pending. See Techniarts Eng'g--Recon., B-238520.7, June 10, 1992, 92-1 CPD ¶ 504.

[3]Cf. Wright & Miller, Federal Practice and Procedure: Civil § 2373 ("Even though [a] dismissal is with prejudice, if no facts have been adjudicated, as when the dismissal is for want of prosecution, the judgment, though a bar to a second suit on the same claim, does not establish any facts to which the doctrine of collateral estoppel can be applied in later litigation on a different claim.").

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Douglas E. and Nancy O. Williams - Married Couple/Employees - Separate Relocation Allowances

File: B-255824

Date: May 23, 1994

DIGEST

Under Federal Travel Regulations, as amended in September 1991, employees who are members of the same family and who are transferred to the same duty station may elect to receive separate relocation benefits, regardless of when the employees actually relocate, but they may not be paid duplicate benefits. 41 C.F.R. § 302-1.8 (1993). Michael L. Wineman and Kimberly L. Butterworth, B-249457, Mar. 31, 1993, and 57 Comp. Gen. 389 (1978), distinguished. Therefore, each employee may be reimbursed temporary quarters subsistence expenses based on each's separate entitlement for actual expenses incurred, including each employee's claim for one-half their total lodging cost. Each also may be paid a separate full mileage allowance for driving separately to the new station. However, only one miscellaneous expense allowance is payable since only one residence was disestablished and reestablished.

DECISION

An authorized certifying officer of the Department of Agriculture requests an advance decision on certain relocation expense claims of Douglas and Nancy Williams, a married couple who are both employed by the Forest Service and who each transferred from Atlanta, Georgia, to Washington, D.C., at approximately the same time in the spring of 1993.

BACKGROUND

The agency first issued Douglas E. Williams travel orders dated April 26, 1993, transferring him to Washington. These orders listed as immediate family members, Nancy Williams, his spouse, and two children, Bryce and Trevor. On May 14, 1993, the agency issued separate travel orders for Nancy O. Williams to transfer to Washington. Subsequently, Donald Williams's orders were amended to remove Nancy and Trevor as listed family members, and Nancy Williams's orders were amended to add Trevor as her family member. Thereafter, each of the Williams's traveled under separate orders, with each of them claiming one of their children as a family member. Both employees' orders authorized temporary quarters at government expense.

The Williams's traveled separately to the their new duty station, with Mrs. Williams arriving May 19. Mr. Williams remained in Atlanta an additional day awaiting loading of their household goods, and he arrived at the new station on May 21. Each of the Williams's was authorized the use of a privately owned vehicle at .17 per mile, the rate applicable for an employee and one family member. See Federal Travel Regulation (FTR), 41 C.F.R. § 302-2.3(b) (1993).

For the period in question, after arrival in the Washington area, the entire family occupied temporary quarters together, with each employee claiming half the cost of the quarters on his or her voucher for temporary quarters subsistence allowance (TQSE) purposes. Each of them also claimed the full $700 miscellaneous expense allowance that may be claimed without itemized receipts. See 41 FTR § 302-3.3(2).

Regarding the Williams's entitlement to relocation benefits, the agency asks five questions:

> (1) Since Mr. and Mrs. Williams's departure from their old official duty station was one day apart, does this establish them as transferring at "distinctly" different times?
>
> (2) Once temporary quarters are established by the transferring employees, does one employee become primary at the $66 per day rate and the other employee become spouse at the reduced cost of $44 per day?
>
> (3) If the answer to #2 is no, then is it legal for the employees to utilize the same receipts and split the total of receipts in half?
>
> (4) Can both employees claim the miscellaneous expense as established in Chapter 302-3.3(2)?
>
> (5) Should one employee be authorized use of the POV at a higher mileage rate and second POV be utilized at reduced mileage rate?

OPINION

The agency's first question is based on our decision, Michael L. Wineman and Kimberly L. Butterworth, B-249457, Mar. 31, 1993, which followed the rule applied in Roberta J. Schoaf, 57 Comp. Gen. 389 (1978). In these cases, we interpreted provisions of FTR § 302-1.8, then in effect (and its predecessors) applicable to employee couples, which limited reimbursement to only one employee with the other employee eligible only as a family member. We held in those cases, however, that the FTR provision did not prevent the payment of separate allowances to each employee because the employees were transferred at distinctly separate times, provided there was no duplication of payments.

Subsequent to the dates of the transfers in those two prior decisions, the General Services Administration, which has the statutory authority to promulgate the Federal Travel Regulations, amended FTR § 302-1.8, effective September 17, 1991, to allow a couple such as the Williams's to elect either to claim relocation benefits separately, or for one employee to claim such benefits with the other employee claimed as a family member. If the employees elect to claim separately, which the Williams's apparently elected, neither spouse may claim the other as an immediate family member, duplicate allowances for non-employee family members are prohibited, and duplicate payments for the same expenses may not be made.

This new provision is applicable in the present case. Therefore, it is under the new provision that questions posed by the agency are being answered.

Concerning question (1), under the amended provisions of the regulations, it is not necessary that the employees be transferred at distinctly different times to claim separate benefits. Therefore, the fact that the Williams's were transferred at about the same time does not affect their entitlement to elect to claim separately.

Concerning questions (2) and (3), for TQSE purposes, the Williams's were in a similar position to any two employees traveling on separate travel orders who share accommodations. They may each claim TQSE separately, for actual expenses each incurred, not to exceed the rates established by the regulations. FTR § 302-5.4. In this case, the four family members occupied the same temporary quarters together for about 50 days costing $83.60 per night including tax. Each employee submitted a separate claim for TQSE of lodging, meals and other expenses for himself or herself and one child. Mr. Williams claimed the child who was over 12 years of age, and Ms. Williams claimed the other child, who was under 12. As lodging expenses, each employee claimed one-half of the $83.60 ($41.80) per night.

Although allowing each employee to elect separate allowances results in possibly higher total reimbursements for TQSE, since reimbursement is limited to actual expenses incurred and would not result any duplicate payments, each employee's claim may be allowed to the extent it is otherwise correct and does not exceed the maximums prescribed by the regulations.[1]

Concerning question (4), the rule against duplicate payments of expenses does bar payment of a full miscellaneous expense allowance to each employee in this case, i.e. the maximum $700 that may be claimed without further justification and receipts for an employee with an immediate family. FTR § 302-3.3. As stated in the regulations, the miscellaneous expense allowance is meant to defray various contingent costs of discontinuing residence at one location and establishing residence at a new location. FTR § 302-3.1(a). Since the Williams's discontinued one residence at the old duty station and established one residence at the new duty station, the expenses for which the allowance is authorized necessarily would have been incurred in the same transactions, and thus payment of two allowances would be duplicate payments prohibited by FTR § 302-1.8.[2]

Finally, regarding question (5), as noted previously, these employees apparently elected separate relocation allowances as authorized by FTR, § 302-1.8, and each was authorized to travel by and actually drove an automobile, with a dependent child, to the new duty station. In these circumstances, FTR § 302-2.3(a) would apply to each employee separately so that each employee's use of an automobile for travel to the new station would be considered advantageous to the government. Therefore, the 17 cents-per-mile rate provided in FTR § 302-2.3(b), applicable to an employee and one family member, would apply to each employee. Although this provides a greater reimbursement than would be available had the employees not elected separate relocation allowances, it

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[1]For the first 30 days each employee's maximum reimbursement is based on the full CONUS per diem rate prescribed under FTR § 301-7.6(a)(3) and Appendix A of Chapter 301 ($66). For the child over 12, the maximum rate is based on two-thirds of this per diem rate, and for the child under 12, it is based on one-half this per diem rate. For the remaining days, over 30, the maximums are based on three-fourths of the 30-day rates. See FTR § 302-5.4(c).

[2]See also 54 Comp. Gen. 892 (1975), where we reached the same conclusion concerning the same or similar allowances in the case of an employee married to an Air Force officer, if a joint residence is involved.

does not constitute duplicate payment for the same expense since the Williams's traveled separately and incurred separate expenses.

The employees' vouchers are being returned for settlement in accordance with the above.

Seymour Efros

for

Robert P. Murphy
Acting General Counsel

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