

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

FILE: B-180881

DATE: JUL 1 2 1976

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MATTER OF: Ronald H. Davis - Living Quarters Allowance

DIGEST: Where initial determination of eligibility for a living quarters allowance under subparagraph 031.12c of the Standardized Regulations (Government Civilians, Foreign Areas) was clearly erroneous and where employee was not temporarily in foreign area for travel at time of appointment under subparagraph 031.12d, Army acted properly in withdrawing allowance. 54 Comp. Gen. 149 (1974) sustained. Indebtedness arising out of erroneous payment of living quarters allowance is hereby waived.

This action involves a reconsideration of our decision 54 Comp. Gen. 149 (1974) denying Mr. Ronald H. Davis' claim for a living quarters allowance incident to his employment in August of 1964 with the Department of Defense School System. Mr. Davis has designated Mr. James E. Brown to present his appeal.

The facts giving rise to Mr. Davis' claim are set forth in our Claims Division Settlement Certificate No. Z-2388176, May 6, 1970, and 54 Comp. Gen. 149, supra. Insofar as necessary to discussion of the issues raised upon appeal, the relevant facts are as follows: Mr. Davis traveled to Germany at his own expense in December of 1963 and two months later obtained a personal services contract with the United States Armed Forces Institute (USAFI). That contract, which did not provide for return transportation to the United States, was terminated some six months later on August 31, 1964. Eleven days later he applied for a position with the Department of the Army. On October 16, 1964, Mr. Davis was employed with the Department of Defense School System and, at that time, was authorized a living quarters allowance under subparagraph 031.12 of the Standardized Regulations (Government Civilians, Foreign Areas). On June 28, 1968, Mr. Davis was notified that he did not meet the eligibility criteria of that subsection and was, in fact, ineligible to receive a living quarters allowance.

Section 031.12 of the Standardized Regulations as in effect from October 13, 1963, TL:SR-134, and at the time of Mr. Davis' appointment provided in pertinent part as follows:

"031.12 Employees Recruited Outside the United States

- "Quarters allowance prescribed in Chapter 100 may be granted to employees recruited outside the United States, provided that
 - "a. the employee's actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his employment by the United States Government; and
 - "b. the employee is not a member of the household of another employee or of a member of the U.S. Armed Forces; and
 - "c. prior to appointment, the employee was recruited in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States, by
 - "(1) the United States Government, including its Armed Forces;
 - "(2) a United States firm, organization, or interest;
 - "(3) an international organization in which the United States Government participates; or
 - "(4) a foreign government;and had been in substantially continuous employment by such employer under conditions which provided for his return transportation to the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States; or
 - "d. the employee was temporarily in the foreign area for travel or formal study and immediately prior to such travel or study had resided in the United States, the Commonwealth

of Puerto Rico, the Canal Zone, or a possession of the United States; or

- "e. as a condition of employment by a government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency."

Our decision at 54 Comp. Gen. 149, supra, affirmed the denial of Mr. Davis' claim for a living quarters allowance based on the regulation quoted above. In sustaining the disallowance we rejected the contention that the original determination of eligibility precluded a subsequent finding to the contrary where the initial determination was clearly erroneous.

In appealing the above decision, Mr. Brown suggests that the original determination of entitlement was not erroneous. He argues that at the time of Mr. Davis' recruitment by the Army for his position with the Defense Department School System he was in Germany under conditions meeting the eligibility criteria of subparagraph 031.12d of the above-quoted regulation, i.e., that he was temporarily in the foreign area for travel and immediately prior thereto had resided in the United States. Mr. Brown's representation of the facts in support of this argument is as follows:

" * * * Mr. Davis arrived in Europe from his place of actual residence in the United States in December 1963 for travel of an indefinite duration. Mr. Davis' resources were limited; therefore, he intended to sustain himself by working occasionally while continuing his travels. After a period of two months, Mr. Davis obtained temporary employment with the United States Armed Forces Institute * * * which lasted until August 1964. Mr. Davis continued his travels until October 16, 1964, when he was appointed to a position with the Department of Defense's Overseas School System."

He further contends that the Army's determination of ineligibility was improperly based upon a "6 month rule of thumb" to the effect that an individual absent from the United States for more than six months is not regarded as being in the foreign area temporarily. In this connection, he relies on the Court of Claims' holding in Trifunovich v. United States, 196 Ct. Cl. 301 (1971).

We are unable to agree with Mr. Brown's contention that the Army improperly withdrew the initial eligibility determination on the basis of a "6 month rule of thumb." The record contains no indication that the Army applied any such criteria. The fact that such a standard was used by the Department of the Navy, as indicated in the Trifimovich case cited above, is irrelevant. The record indicates, rather, that the determination of ineligibility turned upon the fact that Mr. Davis did not meet the eligibility criteria of subparagraph 031.12c, quoted above, since prior to appointment he was not recruited in the United States by the United States Government under conditions providing for return transportation. The June 27, 1968, letter from the Department of the Army advising Mr. Davis of the determination as to his ineligibility states:

"A review of personnel actions taken by this office in the past months disclosed that an incorrect eligibility determination was made in your case at the time of your appointment. A redetermination based on an audit of your records, is that you are ineligible for the free government quarters or a quarters allowance in lieu thereof. The copy of SF-1190 showing the original determination is outdated. Your contract Employment with USAFI was under conditions that did not provide for return transportation to the US or quarters at government expense. Consequently, you cannot meet the criteria of the Department of State Standardized Regulations, as to qualifying presence in the area, for eligibility for quarters allowance."

It thus appears that the initial determination of eligibility was made upon an erroneous interpretation of subparagraph 031.12c. In this regard, Mr. Brown suggests that Mr. Davis should have been granted return transportation incident to his work with USAFI and hence that he should be regarded as eligible for a living quarters allowance under subparagraph 031.12c. The record does not support this contention. Mr. Davis' relationship to USAFI was not as a Federal employee, but was that of an independent contractor working under a nonpersonal services contract which did not provide for his return transportation to the United States. An individual whose services are procured in this manner is not an employee of the United States Government and is not entitled to the allowances provided by law for Government employees, except insofar as may be specifically provided for in his contract. Nonetheless, the record as confirmed by Mr. Davis' own

correspondence clearly indicates that he was not recruited in the United States and therefore does not meet the conditions set forth in subparagraph 031.12c. For this reason we are obliged to concur with the Army's conclusion that the initial determination as to Mr. Davis' eligibility for a living quarters allowance was clearly erroneous.

Although the Army's determination of ineligibility appears to have been predicated on other grounds, the question of whether Mr. Davis was temporarily in the foreign area for travel at the time of appointment and hence within the eligibility criteria of subparagraph 031.12d, was subsequently addressed. In response to his filing of a grievance, Mr. Davis was advised by memorandum dated February 2, 1969, that his presence in the area immediately prior to appointment could not be considered as "for travel or formal study as required by section 031.12d." Notwithstanding Mr. Brown's characterization of Mr. Davis' presence in Germany prior to October of 1964, we do not believe a determination that he was temporarily there for the purpose of travel can be reasonably sustained. Regardless of whether Mr. Davis may initially have departed the United States with an intent to travel, the facts simply do not support a conclusion that such an intent persisted through October of 1964 when he was employed by the Army. Prior to that time he had been employed under a Government contract for approximately six months. After that contract was terminated, he delayed only eleven days in formally seeking permanent employment with the Army. Under the circumstances, we believe the Army reached the only conclusion it reasonably could -- that Mr. Davis' presence in the area was other than temporary and for purposes other than travel.

Based on our review of the record, we remain of the opinion expressed in 54 Comp. Gen. 149, supra, that the initial determination of eligibility was clearly erroneous and that the finding by the Department of the Army to that effect was proper. While Mr. Brown concedes that a clearly erroneous determination is not conclusive upon the Government, he has presented lengthy argument in support of the position that one official of the Government is without authority to review a determination by another Government official acting within the scope of his authority. Mr. Brown's argument has been addressed in B-182226, April 21, 1976, a case involving his own entitlement to a living quarters allowance. In view of the above conclusion that the initial determination regarding Mr. Davis' entitlement was clearly erroneous, we see no reason to address Mr. Brown's further

arguments in support of the contention that this determination is not subject to reversal.

In reviewing the record submitted in Mr. Davis' case, we find that his indebtedness to the United States for the erroneous overpayment of living quarters allowance has been neither satisfied nor waived. Together with his letter of November 30, 1973, initially seeking review of our Claims Division's denial of his claim, Mr. Davis forwarded a copy of the Civilian Personnel Officer's letter of July 17, 1973, specifically recommending that he apply for waiver of the indebtedness under Public Law 92-453, 86 Stat. 758, approved October 2, 1972. We regard that submission as a request for waiver.

Public Law 92-453, supra, amended 5 U.S.C. 5584 to authorize waiver of erroneous overpayments of allowances (other than travel, transportation and relocation allowances) made subsequent to July 1, 1960. Insofar as pertinent here, section 5584 now provides:

"5584. Claims for overpayment of pay and allowances, other than travel and transportation expenses and allowances and relocation expenses.

"(a) A claim of the United States against a person arising out of an erroneous payment of pay or allowances, other than travel and transportation expenses and allowances and relocation expenses payable under section 5724a of this title, on or after July 1, 1960, to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part by--

"(1) The Comptroller General of the United States; or

"(2) the head of the agency when--

* * * * *

"(b) The Comptroller General or the head of the agency, as the case may be, may not exercise his authority under this section to waive any claim--

"(1) If, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim * * *."

Section 91.5 of title 4 of the Code of Federal Regulations sets forth the standards under which waiver may be granted. Insofar as pertinent here, that section provides:

"§ 91.5 Conditions for waiver of claims.

"Claims of the United States arising out of an erroneous payment of pay or allowances may be waived in whole or in part in accordance with the provisions of § 91.4 whenever:

* * * * *

"(c) Collection action under the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any other person having an interest in obtaining a waiver of the claim. Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case. The facts upon which a waiver is based should be recorded in detail and made a part of the written record in accordance with the provisions of § 92.6 of this subchapter."

Having considered the circumstances under which Mr. Davis was authorized and paid a living quarters allowance, we find that

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the erroneous payment occurred through administrative error and that the record is wholly devoid of any indication of fraud, misrepresentation, fault or lack of good faith on his part. Therefore his indebtedness to the United States arising out of the erroneous payment to him of a living quarters allowance during the period from October of 1964 through June of 1968 is hereby waived.

PAUL G. DEBBING

For the Comptroller General
of the United States