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DECISION

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

FILE: B-196809 DATE: May 9, 1980

MATTER OF: Charles E. Brookshire - Foreign transfer allowance
[Claim For]

DIGEST: Civilian employee of the Department of the Army transferred overseas in August 1977, is denied temporary quarters subsistence expense allowance authorized by 5 U.S.C. 5724a(a)(3) and the predeparture subsistence expense portion of the foreign transfer allowance (FTA) authorized by Public Law 94-141, November 29, 1975. Statute prohibits payment of temporary quarters subsistence expense allowance to employees transferred overseas. Granting of the FTA is discretionary with the agency concerned and since Army implementing regulation did not authorize payment of the FTA to its employees until May 1978, Army employees transferred overseas prior to May 1978 may not be paid the FTA.

The issues presented in this case upon an appeal from a settlement of our Claims Division are whether a civilian employee of the Department of the Army transferred overseas is entitled to a temporary quarters subsistence expense allowance under 5 U.S.C. 5724a (1976) or a foreign transfer allowance (FTA) where the regulations implementing the FTA for Department of Defense (DOD) civilian employees were adopted by the Department of the Army in May 1978 and the transfer occurred in August 1977. Temporary quarters subsistence expense allowance is limited by statute to employees transferred within the United States, its territories or possessions, the Commonwealth of Puerto Rico or the Canal Zone. Since the allowance of FTA is discretionary with the agency concerned, employees of the agency are not eligible to receive such allowance until authorized by the agency.

Mr. Charles E. Brookshire, a civilian employee of the Department of the Army, was transferred to an overseas duty station by travel orders issued June 10, 1977, with

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a reporting date of August 1, 1977. Just prior to departure from his old duty station in Virginia, Mr. Brookshire relocated his family to a motel and incurred expenses in the amount of \$303.44 for meals and lodging for the period July 6, 1977, through July 13, 1977. His claim for \$303.44 was denied by the Army on the basis that paragraph C13004, Volume 2, Joint Travel Regulations (2 JTR), does not authorize the payment of temporary quarters subsistence expenses for employees transferred to a duty station outside the United States and that the FTA, which was expanded by Public Law 94-141, November 25, 1975, to include costs incurred in the United States prior to departure overseas, was not authorized for DOD employees until May 1, 1978.

Mr. Brookshire contends that he is entitled to the FTA since his expenses in connection with the overseas transfer were incurred after October 1, 1976, the date as of which the Department of State amended Chapter 240 of the Standardized Regulations (Government Civilians, Foreign Areas) to implement the provisions of Public Law 94-141. He claims that failure to include authorization for payment of such expenses for DOD civilians in either the Joint Travel Regulations or the Standardized Regulations was an "administrative error."

The FTA is one of several allowances authorized by the Overseas Differentials and Allowances Act of September 6, 1960, Public Law 86-707; 74 Stat. 792, as amended and codified in Chapter 59, Subchapter III, of title 5, United States Code. The FTA is one of the cost-of-living allowances authorized by 5 U.S.C. 5924 (1976). The pertinent part of section 5924 provides that:

"The following cost-of-living allowances may be granted, when applicable, to an employee in a foreign area:

* * * * *

"(2) A transfer allowance for extraordinary, necessary, and reasonable expenses, not otherwise compensated for, incurred by an employee

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incident to establishing himself at a post of assignment in--

"(A) a foreign area (including costs incurred in the United States prior to departure for a post of assignment in a foreign area); or * * *"

Authority to prescribe regulations under the Overseas Differentials and Allowances Act was delegated to the Secretary of State by Executive Order No. 10903, January 11, 1961, as amended, 5 U.S.C. 5921 note (1976). Implementing regulations are presently found in Standardized Regulations (Government Civilians, Foreign Areas). That part concerning the FTA is found in Sections 240-242. The part of the regulations which implemented Public Law 94-141 first became effective on October 1, 1976. The narrative of that change, effected by TL 277/278, September 26, 1976, and October 26, 1976, includes the following statement:

"This benefit is applicable to employees eligible under their agency regulations for transfer benefits provided under 5 U.S.C. 5924(2) and under subchapter 240 of these regulations."

The Department of Defense did not authorize payment of any part of the FTA for its civilian employees until May 1, 1978. See Department of Defense Instruction (DODI), paragraph D, section 1418.1, and Department of the Army, Civilian Personnel Regulations, Chapter 592, Appendix B, paragraph D (CPR 592 (C 1)), dated January 29, 1975.

The purpose of the Overseas Differentials and Allowances Act as expressed in Senate Report No. 1647, 86th Congress, June 22, 1960, was to improve and strengthen Government overseas activities by establishing a uniform system for compensating all Government employees in overseas posts irrespective of the agency by which they were employed. While Congress recognized that conditions of employment might not justify extending all of the benefits to all employees, it did not wish to deny these benefits solely because of the lack of statutory authority where

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the conditions of employment of the employees of different agencies might be substantially the same. The predeparture lodging allowance was added to the FTA as a Senate amendment to Public Law 94-141, The Foreign Relations Act of 1975.

We have consistently held that the granting of allowances authorized by the Overseas Differentials and Allowances Act is a discretionary matter. 58 Comp. Gen. 738 (1979) (living quarters allowance); and B-188979, July 24, 1978 (separate maintenance allowance). Both the statutory authorization and the implementing regulations provide that overseas differentials and allowances "may be granted." The use of the word "may" rather than "shall" leaves with the heads of agencies broad discretion in the implementation of these allowances. In the present case, the Department of Defense and the Army made a policy determination that FTA would not be paid to civilian employees. Because of the discretionary nature of the Overseas Differentials and Allowances Act, there is no basis to question this particular determination in the absence of evidence showing it clearly to be in error.

Neither can the change to CPR 592, which authorized the FTA for DOD employees after May 1978, be applied retroactively. This Office has held that while statutory regulations may be amended or modified from time to time, they may not be made retroactively effective to decrease or increase rights already fixed or vested, 17 Comp. Gen. 566 (1938); 32 id. 315 (1953); 33 id. 174 (1953); 40 id. 242 (1960) and 45 id. 451 (1966). An exception to the rule against retroactivity is made in the case where modification is for the purpose of correcting an obvious or administrative error. On the basis of the record before us we are unable to find that the failure of the JTR to authorize payment of the FTA to civilian employees was other than the consequence of its proper exercise of administrative discretion.

Additionally we find that there was no "administrative error" in the failure of the JTR to provide for payment of a temporary quarters subsistence expenses allowance for DOD civilian employees transferred to new duty stations

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outside the United States or other designated areas. Under 5 U.S.C. 5724a(a)(3) (1976), authority to grant a temporary quarters subsistence expenses allowance is specifically limited to employees transferred to locations within the United States or other designated areas. That subsection provides:

"(a) Under * * * regulations * * * funds available * * * for administrative expenses are available for the reimbursement * * * of the following expenses of an employee * * *.

* * * * *

"(3) Subsistence expenses of the employee and his immediate family for a period of 30 days while occupying temporary quarters when the new official station is located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. * * *" (Emphasis added.)

Regulations issued pursuant to the foregoing are contained in paragraph 2-5.2a of the Federal Travel Regulations (FPMR 101-7, May 1973) and provide in part:

"Subsistence expenses of the employee for whom a permanent change of station is authorized or approved * * * shall be allowed * * * while the employee and family necessarily occupy temporary quarters and the new official station is located in the 50 States, the District of Columbia, United States territories and possessions, the Commonwealth of Puerto Rico and the Canal Zone * * *."

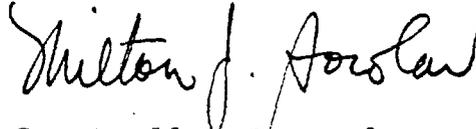
Since Mr. Brookshire was transferred to Germany, there was no authority to pay him a temporary quarters subsistence expenses allowance.

For the reasons set forth above, the settlement of our Claims Division denying Mr. Brookshire a temporary

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quarters subsistence expenses allowance as well as a foreign transfer allowance is sustained.

An individual may take other action to obtain a favorable ruling on his claim even after having presented a claim to this Office. The United States District Courts and the United States Court of Claims have jurisdiction to consider certain claims against the Government if appropriate action is filed within 6 years following the date the claim first arose. See 28 U.S.C. 1346, 1491, 2401, 2501 (1976). However, the filing of a claim with the General Accounting Office does not prevent the statute of limitations from running against a person in the United States District Court or the United States Court of Claims.

A handwritten signature in cursive script that reads "Milton J. Fowler". The signature is written in dark ink and is positioned above the typed name.

For the Comptroller General
of the United States