Mr. Pool

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DECISION

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

[Claim for Retroactive Payment of

FILE: B-200090 DATE: February 10, 1981

MATTER OF: Joseph P. Carrigan - Living Quarters Allowance]

DIGEST: Civilian employee of Department of the Army claims that Government is estopped to adjust his Living Quarters Allowance in accordance with 1974 revision of Department of State Standardized Regulations (Government Civilians, Foreign Areas) because his entitlement to the allowance vested under terms and conditions of 1967 regulations. Claim is denied because doctrine of equitable estoppel does not apply in cases where, as here, the relationship between the Government and the employee is not contractual but appointive, and, pursuant to statute, allowance in question is ultimately discretionary and creates no permanent entitlement for any employee. Also, employee entered into licensing agreement, not a contract, when he constructed portable home on Government property, and such agreements are permissive, unassignable, and can be cancelled at any time.

G. F. Kallina of the United States Army Finance and Accounting Office, Japan, has submitted for our resolution the claim of Mr. Joseph P. Carrigan, a civilian employee of the Department of the Army, for retroactive payment of the rental portion of his Living Quarters Allowance subsequent to August 1978. In view of controlling regulations and in accordance with our analysis here, Mr. Carrigan's claim may not be certified for payment.

The chronological development of Mr. Carrigan's claim as set forth in the administrative record is as follows. In 1967, as a civilian employee within the command of the United States Army Japan (USARJ), Mr. Carrigan constructed an on-post portable house for self-occupancy within the meaning of and in accordance with the prevailing command policy on family housing at that time. The USARJ letter, subject: Family

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Housing Policy, dated December 18, 1967, authorized an annual quarters allowance equivalent to 10 percent of the cost of construction to owners of self-occupied portable-type housing. It did not place a time limitation on the receipt of the allowance. In addition, local USARJ Regulation 420-1, "Portable-Type Family Housing", dated August 9, 1967, authorized a maximum sale price for portables at 50 percent of the initial construction cost after a period of 6 years.

Subsequently, Mr. Carrigan received official notice from the Department of the Army by letter dated March 4, 1975, and referencing Department of State Transmittal Letter TL:SR-252, October 27, 1974, that applicable Living Quarters Allowance regulations had been changed to limit payment of the rental portion for self-owned quarters to 10 years, such period being cumulative from the date that payment for personally owned quarters was initiated. Of additional consequence here, local USARJ Regulation 420-1, "Portable and Mobile-Type Family Housing", dated March 11, 1970, modified the sale price of a portable-type house to no more than 10 percent of the initial construction cost after a period of 10 years. Acting within the purview of these authorities, and finding that Mr. Carrigan had resided at his present quarters longer than 10 years, the Army terminated the rental portion of Mr. Carrigan's Living Quarters Allowance effective August 15, 1978.

Mr. Carrigan contends that the termination of the rental portion of his Living Quarters Allowance was contrary to regulatory agreements existing between the Army and himself.

In essence Mr. Carrigan contends that in 1967 he risked his funds to build an on-post house with the expectation of recovering his costs through the rental portion of his Living Quarters Allowance, and by eventual resale of the house at 50 percent of the construction costs. Mr. Carrigan further states as follows:

> "* * * I have not recovered my costs, which are increasing without remuneration, as provided for in government regulations at the

> time of my decision to build. These regulations taken with the official letter of encouragement for me to build at a time when the quarters situation was extremely tight, meet all the qualifications for a contract as was my understanding at the time. Had I opted to enter into a private rental agreement on the local economy, I would be eligible to draw the quarters portion of the LQA without time limitation and my funds would not have been tied up in expectation of an eventual return at the time of sale."

Mr. Carrigan also contends that while the policy reflected in Department of State Transmittal Letter TL:SR-252, October 27, 1974, can be readily understood in connection with privately owned houses on the economy that have appreciated three to six times in value, its application to on-post houses is questionable. Mr. Carrigan reasons that:

> "* * * Ownership would seem to establish certain property rights of the individual with respect to care and disposal by sale. The right to sell at 50% of the value as initially contracted has been abrogated as has been the right to a return on risk as provided by the agreement to pay a quarters LQA of 10% per year. In place of these rights, the owner must maintain the property at a level not originally specified and the cost of the repair and maintenance is fully the responsibility of the occupant. No other occupants of government quarters nor those drawing rental allowance for leased properties suffer these penalties."

Thus, Mr. Carrigan concludes, in order to recover his capital costs in keeping with the agreements under which he constructed his on-post house, the rental portion of his Living Quarters Allowance should be retroactively restored.

When Mr. Carrigan purchased a portable home in 1968, he entered into a licensing agreement for the use of real estate with Headquarters, USARJ. The license provides:

> "That the exercise of the privileges hereby granted shall be without cost or expense to the United States; under the general supervision and subject to the approval of the officer having immediate jurisdiction over the property, and subject also to such regulations as may be prescribed by him from time to time."

The license is also further subject to the provisions of USARJ Regulation 420-1.

A license in real property is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein. 25 Am. Jur. 2d Easements and Licenses § 123. Thus, Mr. Carrigan did not enter into a contract with USARJ. He entered into a licensing agreement, and such agreements are permissive in nature, unassignable, and can be cancelled at any time. See Hartzler v. Westair, Inc., 390 N.Y. S.2d 630 (N. Y. Sup. Ct. 1977). The licenses here were apparently in effect for only a 2-year period, at which time they were renewed. Also, as stated above, the privileges granted under the license were subject to approval of the officer having jurisdiction over the property and subject to prescribed regulations, which could be changed from time to time.

Further, section 5922(c) and 5923(2) of title 5, United States Code, provide that a Living Quarters Allowance may be granted in accordance with regulations prescribed by the President. The President's authority was delegated to the Secretary of State by section 1(b) of Executive Order 10903, January 11, 1961, 26 F.R. 217. We have noted that the Secretary's Regulations, Standardized Regulations (Government Civilians, Foreign Areas) 1961, bestowed considerable discretion in the granting of a Living Quarters Allowance upon heads of agencies and required them to withhold payment altogether when in their judgment circumstances warranted. Section 134.2 (TL:SR-144, January 2, 1966). The Standardized Regulations also authorized heads of agencies to issue further implementing regulations. Section 013 (TL:SR-127, January 6, 1963). See generally,

Wesley L. Goecker, 58 Comp. Gen. 738 (1979). Furthermore, in the Goecker decision we indicated that the controlling regulations referred to above made the granting of a Living Quarters Allowance discretionary with the employing agency and that the General Accounting Office had no authority to overrule the agency's determination regarding the claimant's entitlement in the absence of evidence that it was arbitrary or capricious.

Section 136 of the Department of State's Standardized Regulations (TL:SR-252, October 27, 1974) provides as follows:

> "When quarters occupied by an employee are owned by the employee or the spouse, or both, an amount up to 10 percent of original purchase price of such quarters shall be considered the annual rate of his/her estimated expenses for rent. Only the estimated expenses for heat, light, fuel (including gas and electricity), water and in rare cases land rent, may be added to determine the amount of the employee's quarters allowance in accordance with section 134. The payment of the rental portion of the allowance (up to 10 percent of purchase price) is limited to a period not to exceed ten years at which time the employee will be entitled only to the utility expenses, including land rent, as specified in this section."

This section, as well as implementing guidance promulgated by the Army and referenced earlier in our decision here, clearly present the initial requirements and additional qualifications in regard to entitlement to a Living Quarters Allowance in connection with personally owned quarters. In the present case, Mr. Carrigan does not challenge the substance of these combined provisions, but he does challenge the application of these provisions to the evaluation of his claim concerning the rental portion of his Living Quarters Allowance because, as he contends, the terms and conditions of his entitlement vested in 1967 and may not be subsequently modified.

In essence Mr. Carrigan is arguing that the doctrine of equitable estoppel applies in his case. That is,

the Government is estopped from unilaterally adjusting his Living Quarters Allowance where he acted in reliance upon currently existing regulations in constructing personally owned on-post quarters in 1967, and where his qualification for and receipt of the Living Quarters Allowance at that time evidenced the formation of a contract with the Government for both parties based on continued compliance with those existing 1967 regulations. Thus, Mr. Carrigan contends that where the Government unilaterally readjusts his Living Quarters Allowance in these circumstances it is breaching the contract and may be estopped from effecting such action.

We do not agree. As we have noted, the grant of a Living Quarters Allowance under section 5922(c) and 5923(2) of title 5, United States Code, is ultimately discretionary and creates no permanent entitlement for any employee. As we have also noted, the allowance is granted in accordance with the Standardized Regulations (Government Civilians, Foreign Areas) which are prescribed by the Secretary of State pursuant to a delegation of authority from the President. As a result, the Standardized Regulations have the force and effect of law and may not be waived or modified by the employing agency or the General Accounting Office regardless of the existence of any contrary understanding or extenuating circumstances. Thus, since section 021 of the Standardized Regulations provides that amendments and revisions are effective as of the dates specified in each, the substantive change of section 136 of the regulations contained in Department of State Transmittal Letter TL: SR-252, October 27, 1974, is applicable to and controlling of the evaluation of Mr. Carrigan's entitlement at that time. Similarly, the Department of the Army regulations implementing the changed section 136 of the Standarized Regulations are equally applicable to Mr. Carrigan's claim.

Furthermore, the relationship between the Federal Government and its employees is not a simple contractual relationship. Since Federal employees are

appointed and serve only in accordance with the applicable statutes and regulations, the ordinary principles of contract law do not apply. See Frederick J. Killian, B-196476, May 9, 1980, and decisions cited therein. In terminating the rental portion of Mr. Carrigan's Living Quarters Allowance effective August 15, 1978, the Department of the Army is enforcing a clear requirement that is founded in law, the Standardized Regulations, and implementing Army directives.

Accordingly, we find no basis for disturbing the Department of the Army's determination in regard to Mr. Carrigan's entitlement to a Living Quarters Allowance.

Milton J. Socolar

For The Comptroller General
of the United States