DECISION

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

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FILE: B-209721 DATE: September 2, 1983

MATTER OF: Scope of discretion under 31 U.S.C. § 3721

DIGEST: The concept of administrative discretion does not permit an agency to refuse to consider all claims submitted to it under the Military Personnel and Civilian Employees' Claims Act, which authorizes agencies to settle claims of Government employees for loss or damage to personal property. While GAO will not tell another agency precisely how to exercise its discretion, the agency has a duty to actually exercise it, either by the issuance of regulations or by case-by-case adjudication.

The Federal Mediation and Conciliation Service has asked our opinion regarding whether it has discretion to refuse to consider all claims filed by its employees under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended (the Act).[1/] Based on the reasoning herein, we conclude that the concept of administrative discretion does not permit an agency to adopt a policy of refusing all claims submitted to it under the Act.

Background

The Military Personnel and Civilian Employees' Claims Act of 1964 authorizes agencies to settle claims of Government employees for loss or damage to personal property. It states in part as follows:

> "The head of an agency may settle and pay not more than $25,000 for a claim against the Government made by a member of the uniformed services under the jurisdiction of the agency or by an officer or employee of the agency for damage to, or loss of, personal property incident to service. A claim allowed under this subsection may be paid in money or the personal property replaced in kind." 31 U.S.C. § 3721(b).

A claim, to be cognizable under the Act, must be by a member of the uniformed services or a civilian officer or employee and must be

1/ 31 U.S.C. § 3721 (formerly 31 U.S.C. § 240-243, recodified by Pub. L. No. 97-258, September 13, 1982, and Pub. L. No. 97-452, January 12, 1983).

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for damage or loss to personal, not real, property. The loss or damage must be "incident to service," and the agency should be satisfied with the degree of evidence submitted by the claimant before allowing the claim. The agency also must determine that possession of the property was reasonable or useful under the circumstances. If the loss or damage occurred in quarters occupied by the claimant within the 50 states or the District of Columbia, a claim is cognizable only if the quarters were assigned or otherwise provided in kind by the United States. Negligence on the part of the claimant, his agent, or his employee will preclude an award under the Act. The maximum settlement authority is $25,000. Finally, the statute of limitations is two years after accrual, although this may be tolled during time of war or armed conflict.

Most claims under the Act involve loss or damage suffered in the shipment of personal property in connection with a change of duty station. See B-155619, January 18, 1965. Loss or damage to property incident to authorized nontemporary storage is also cognizable (see 44 Comp. Gen. 290, 292 (1964); B-178243, May 1, 1973), as is loss or damage to a privately-owned motor vehicle while used for official business (see B-185513, March 24, 1976; B-174669, February 8, 1972).

The definition of "settlement" under the Act includes full or partial allowance or disallowance. 31 U.S.C. § 3721(a)(3). The agency's decision regarding settlement of the claim is final and conclusive. 31 U.S.C. § 3721(k). The Act does not contemplate judicial review.[2/] GAO does not have jurisdiction to settle a claim against another agency or to question another agency's settlement as long as it was made in accordance with the statutory criteria and applicable regulations. See 47 Comp. Gen. 316 (1967).

The Act authorizes the President to prescribe uniform policies to implement the statute with respect to the civilian agencies. 31 U.S.C. § 3721(j). This authority has not been exercised, however. Each department and agency must therefore determine its own policies subject to the statutory criteria. In a 1961 decision, we said that payment under the Act "is not a matter of right but of grace resting in administrative discretion." B-144926, February 23,

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2/ Macomber v. United States, 335 F. Supp. 197 (D.R.I. 1971). Several other courts have reached the same result under other "final and conclusive" statutes. See also Work v. Rives, 267 U.S. 175 (1925), discussed in text, supra; United States v. Babcock, 250 U.S. 328 (1919).

1961. Noting this statement in our Principles of Federal Appropriations Law (1st ed., June 1982), the Federal Mediation and Conciliation Service questions the limits of its discretion. The specific issue is whether an agency can adopt a policy of refusing to consider all claims under the Act.

Analysis

The purpose of agency regulations is to support the intent of the enabling legislation. See Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936); Dixon v. United States, 381 U.S. 68, 74 (1965).

As a general rule, a statute should be construed according to its subject matter and the purpose for which it was enacted. Sutherland, Statutory Construction, section 58.06, at 474 (4th ed. 1973). The legislative history of the Military Personnel and Civilian Employees' Claims Act shows a clear purpose of allowing all Government employees the opportunity to present a claim for loss or damage to personal property.

The origin of 31 U.S.C. § 3721 was the Military Personnel Claims Act of 1945, 59 Stat. 225, applicable to military personnel and civilian employees of the military departments. The authority was extended to civilian agencies as well with passage of the Military Personnel and Civilian Employees' Claims Act in 1964 (78 Stat. 767). The Committee on the Judiciary of the House of Representatives stated that enactment "would extend equivalent authority to all Government agencies so that all employees of the Government and military personnel would be entitled to assert such claims." H.R. Rep. No. 460, 88th Cong., 1st Sess. 2 (1963).

In an amendment to the Act, Pub. L. No. 89-185, the Committee further discussed its purposes, as follows:

> "This committee has repeatedly recognized that the United States owes a moral duty to compensate individuals who have suffered such heavy personal losses, because of their service to the Government. * * * [T]he introduction of private relief bills has served to focus attention on the fact that there is a serious lack in the existing law to cope with these losses.
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> "[I]t has seemed that there is a lack of understanding of the responsibility of the United States regarding the

> losses which give rise to claims cognizable under the statutes referred to in this bill. * * * It is only just that the Government assume this responsibility of paying for losses while the property is being sent under Government contract to a new place of duty." H.R. Rep. No. 382, 89th Cong., 1st Sess. 5 (1965).

Additional discussion of the intent of the Act is found in the legislative history of Pub. L. No. 97-226, which increased the ceiling payable on claims from $15,000 to $25,000. The report of the Senate Judiciary Committee stresses the inequities of requiring "military personnel and civilian employees of the Government to risk losses of their property incident to their service without adequate protection." It further states "the Committee believes that it is important that Government personnel have a guarantee of reasonable recompense for losses suffered as a result of Government directed moves." S. Rep. No. 97-482, 97th Cong. 2d Sess. 3 (1982).

There is also evidence in the legislative history of the 1964 Act and subsequent amendments that one purpose of the Act was to reduce the need for Congress to consider private relief bills. See, e.g., S. Rep. No. 1423, 88th Cong., 2d Sess. 6 (1964). Routine denial of all claims would thwart that purpose.

It seems clear from the foregoing that Congress did not contemplate that an agency simply refuse to consider all claims.

Clearly the intent of the Act and its various amendments was to broaden, not narrow, the coverage of Government employees. On its face, the Act is broadly written; an agency "may settle and pay a claim." (Emphasis added.) This language is discretionary, not mandatory. It does not create a legal entitlement. Certainly, as noted earlier, an agency has considerable discretion in implementing the Act. However, a blanket refusal to consider all claims is, in our opinion, not the exercise of discretion.

Our point is illustrated by the Supreme Court's decision in Work v. Rives, 267 U.S. 175 (1925). That case concerned a statute structurally very similar to the Military Personnel and Civilian Employees' Claims Act of 1964. The statute involved was section 5 of the Dent Act, 40 Stat. 1274, under which Congress authorized the Secretary of the Interior to compensate a class of people who incurred losses in furnishing supplies or services to the Government during war. The Secretary's determinations on particular claims were to be final and conclusive. As is the Military Personnel and Civilian Employees' Claims Act of 1964, section 5 of the Dent Act

"was a gratuity based on equitable and moral considerations" (267 U.S. at 181), vesting the Secretary with the ultimate power to determine which losses should be compensated.

The plaintiff in Rives had sought mandamus to compel the Secretary to consider and allow a claim for a specific loss, incurred as a result of the plaintiff's obtaining a release from a contract to buy land. The Secretary had previously denied this claim because he had interpreted the statute as not embracing money spent on real estate. The Supreme Court held that it could not compel the Secretary to take any further action; the Secretary had made a decision and had articulated reasons for it.

The case is relevant here in that the Court went on to cite, and distinguish, a line of cases in which "a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator [plaintiff] in such cases does not ask for a decision any particular way but only that it be made one way or the other." 267 U.S. at 184. Thus, the Court could not compel the Secretary to exercise his discretion to achieve a particular result, but the Secretary had in fact exercised that discretion.

The concept is further illustrated in Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971). There, Congress had delegated to Interior Department officials the discretion to determine the specific content of regulations pertaining to 25 U.S.C. §§ 261 and 262. In a class action by Indians to compel the adoption of regulations, the Ninth Circuit noted that the term "discretion" does not include the "unbridled discretion to refuse to regulate," but rather implies that the designated officials "shall exercise discretion in deciding what regulations to promulgate and in determining specific quantities, prices and kinds." 449 F.2d at 571.

Applying this concept to the Military Personnel and Civilian Employees' Claims Act of 1964, we do not think the administrative discretion conferred by Congress is satisfied by its non-exercise, that is, by the simple refusal to consider all claims.

It is generally recognized that administrative discretion may be exercised in either of two ways--the issuance of regulations or case-by-case adjudication. (The two are of course not mutually exclusive.) See generally 2 Davis, Administrative Law Treatise ch. 7 (2d ed. 1979); SEC v. Chenery Corp., 332 U.S. 194, 202-203 (1947). Under the first approach, which seems to be the more common method of implementing the statute in question, an agency issues regulations defining the types of claims it will or will not consider,

together with whatever other administrative requirements it wishes to impose. Under the second approach, the agency renders a decision on each claim, stating its reasons for allowance or disallowance, and gradually builds a body of "regulations" through this process.

We do not purport to tell any agency which approach it must follow.[3/] It seems to us, however, that either approach should include, at a minimum, the consideration of claims incident to changes of duty station. This was one of the major situations that prompted the original legislation, and it has been repeatedly emphasized in the legislative history of subsequent amendments. To exclude change-of-station claims would be clearly inconsistent with congressional intent. Beyond this, however, we recognize that there is considerable variation among agencies[4/] and we would view it as inappropriate to comment on which types of otherwise cognizable claims another agency should or should not consider. We hold merely that an agency has the duty to actually exercise its discretion and that this duty is not satisfied by a policy of refusing to consider all claims.

Harry R. Van Cleve
for Comptroller General
of the United States

3/ We recognize that 31 U.S.C. § 3721(j) now provides that "the head of each agency shall prescribe regulations to carry out this section." However, the mandatory "shall" was not used in the source provision--see 31 U.S.C. § 241 (1976)--and we construe the recodification in accordance with its stated intent of restating the law without substantive change.

4/ For example, agencies vary considerably on the extent to which they will consider claims for damage to privately-owned motor vehicles used on official business.