

DATE: November 14, 2006

In Re:

[Redacted]

Claimant

)

Claims Case No. 06103007

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

In the absence of clear error, amendments to regulations cannot be applied retroactively.

An administrative delay in revising an allowance rate does not qualify as such an error.

DECISION

This is in response to a request for reconsideration of Defense Office of Hearings and Appeals (DOHA) Appeal Decision, DOHA Claim No. 06071716, dated October 19, 2006, which denied the member's claim for the increased cost of living allowance (COLA) for Ashgabat, Turkmenistan, for the period November 18, 2001, through August 31, 2002.

Background

During the period November 18, 2001, through August 31, 2002, the member was serving in the Air Force assigned to Ashgabat, Turkmenistan. After completing the retail price schedule (RPS) survey for Ashgabat, the Department of State increased the COLA allowance for U.S. government civilian employees in Ashgabat effective November 18, 2001. The Per Diem, Travel and Transportation Allowances Committee (Committee) of the Department of Defense did not receive the RPS survey for Ashgabat until February 2002. The Committee did not complete its analysis of the survey until July 2002. In August 2002 the matter was submitted to the Committee's Military Advisory Panel (MAP). The MAP approved the increased COLA for Department of Defense personnel in Ashgabat effective September 1, 2002. The adjustment was prospective only, and no member assigned to Ashgabat was entitled to receive the higher COLA rate until September 1, 2002.

The member originally filed a claim with his finance office for the increased COLA effective November 18, 2001. His claim was submitted to the Committee, which denied it, relying on a Comptroller General decision which prohibited retroactive payments of increased COLA rates. *See* 33 Comp. Gen. 505 (1954). The member subsequently filed his claim with the Defense Finance and Accounting Service (DFAS). DFAS denied his claim on the grounds that the increased COLA did not become effective until September 1, 2002. The member appealed DFAS's denial of his claim to our Office. The adjudicator found that the delay in issuing the revised COLA was due to administrative delay and thus denied the member's claim on the authority of 33 Comp. Gen. 505, *supra*.

The member seeks reconsideration of the appeal decision. He argues that the 14-month delay in adjusting the COLA for U.S. military members must be considered a substantial, unacceptable and unfair administrative delay. He states that there must be some remedy for the Committee's delay, especially since the Department of State was able to update the COLA in a timely manner for the same location. He estimates that he is owed approximately \$6,000. He cites 33 Comp. Gen. 505, *supra*, in support of his claim.

Discussion

When regulations are properly issued, rights thereunder become fixed and although regulations may be amended prospectively to increase or decrease rights, they may not be amended retroactively except to correct an obvious error. *See* Comptroller General decisions

B-260480, May 5, 1995; B-205237, Mar. 15, 1982; 56 Comp. Gen. 1015 (1977); and 32 Comp. Gen. 315 (1953). However, where a regulation was based on clearly erroneous information and did not result from a judgment arrived at upon consideration of the actual circumstances involved, an exception to that rule has been allowed in limited circumstances not applicable here. *See* 56 Comp. Gen. 1015, *supra*. For example, in a case where housing allowances were erroneously reduced based on a currency devaluation that had no effect on rents, the allowances may be corrected retroactively. *Id.*

The member's request for reconsideration is based on the delay in the administrative implementation of allowances that were correctly calculated. He is not alleging that his loss of the higher COLA rate was a result of a mistake of fact underlying the cost of living allowance itself. There is no evidence that the computation of the COLA rates affecting Ashgabat was based on erroneous information. The adjustment to the COLA was properly calculated based on the survey by the State Department. By Memorandum of Understanding, the Committee receives State Department reports for all locations where members are assigned. Unfortunately in this case, although the State Department completed the RPS in August 2001, the Committee did not receive a copy until February 2002. Subsequently, the Committee followed standard procedures and sent the matter to the MAP to act on the change. Although the Committee did not forward its analysis until August 2002, which caused a six month delay, there was no error in setting the increased COLA rate, and therefore no basis for retroactive application of the revised rate.

The Comptroller General's decision in 33 Comp. Gen. 505, *supra*, does not support the member's claim. In that case, the rates for Manila were properly raised in the Joint Travel Regulations (JTR). Confusion arose over whether the increased rate should apply for the region around Manila. Because of the confusion, an attempt was made to retroactively amend the relevant portion of the JTR, and disbursing officers made payments to members in the outlying region retroactive to the date the Manila rate was increased. In his decision, the Comptroller General stressed the principle that the JTR could not be amended to change travel allowances retroactively, and he did not allow the retroactive rate change in the instant case. However, because the disbursing officers had already made payments due to confusion over the date of the change, the Comptroller General stated that they would not be held liable for the payments when their accounts were audited. The Comptroller General did not approve the retroactive payments to members; he merely said that under the circumstances of that case the increased payments already made would not be collected from them.

Conclusion

For the reasons stated, the request for reconsideration is denied, and the appeal decision is sustained. In accordance with 32 C.F.R. Part 282, Appendix E, paragraph o(2), this is the final Department of Defense action in this matter.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board