

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

November 15, 2001

GSBCA 15684-RELO

In the Matter of LOUISE C. MÂSSE

Louise C. Mâsse, Chevy Chase, MD, Claimant.

Kenneth W. Stith, Director, Office of Financial Management, National Institutes of Health, Department of Health and Human Services, Bethesda, MD, appearing for Department of Health and Human Services.

DANIELS, Board Judge (Chairman).

The National Institutes of Health (NIH) asks, pursuant to 31 U.S.C. § 3529 (Supp. V 1999), whether it may pay temporary quarters subsistence expenses (TQSE) incurred by Dr. Louise C. Mâsse, a special consultant to the Public Health Service. We conclude that these expenses may not be paid.

Background

In October 2000, the agency interviewed Dr. Mâsse for a position as a consultant. In the course of ensuing negotiations between the agency and the doctor, the agency agreed to make available all allowances and benefits which it then afforded to newly appointed consultants. TQSE were among these items. On December 7, 2000, Dr. Mâsse was offered and accepted a position with the National Cancer Institute. At that time, NIH, by written policy, paid TQSE to expert and consultant appointees. Travel and Shipping Entitlements Pamphlet for Civilian Employees (NIH Feb. 1991).

On December 18, 2000, following a lengthy examination of travel rules and regulations, the NIH revised its written policy to provide that newly-hired special consultants, like other new appointees to Government service, are not eligible for TQSE allowances. NIH Manual, ch. 1500 (Travel Policies and Procedures) (Dec. 18, 2000), available at <http://www1.od.nih.gov/oma/manualchapters/management/1500/09.html> (visited Nov. 13, 2001)).

Dr. Mâsse moved from Texas to Maryland and began her consultancy in May 2001.

Discussion

By statute, a new appointee to federal service is entitled to certain benefits when she moves to her duty station from her place of residence at the time of appointment. 5 U.S.C. §§ 5722, 5723 (2000). These benefits are similar to those provided to an employee whom an agency transfers in the interest of the Government from one duty station to another, *id.* §§ 5724, 5724a, but they are not identical. Of importance to this case, the law authorizes agencies to reimburse transferred employees, but not new appointees, for TQSE. Roy Katayama, GSBCA 15605-RELO, 01-2 BCA ¶ 31,542; Barbara A. Caviness, GSBCA 15390-RELO, 01-2 BCA ¶ 31,498.

Dr. Mâsse was appointed to her position under authority conferred by 42 U.S.C. § 209(f) (1994). That law states: "In accordance with regulations, special consultants may be employed to assist and advise in the operations of the [Public Health] Service. Such consultants may be appointed without regard to the civil-service laws." As an individual entering federal service, Dr. Mâsse must be considered a new appointee and therefore ineligible for TQSE unless "the civil-service laws" without regard to which she was appointed may be deemed to include the statutes governing travel and transportation expenses of federal appointees and employees.

Reading the term "the civil-service laws" in 42 U.S.C. § 209(f) to include the statutes governing travel and transportation expenses of federal appointees and employees would be unreasonable. In 1944, the Congress enacted this provision as part of "a comprehensive bill which would substitute for the existing mass of uncorrelated legislation a compact and logically arranged law governing the Public Health Service." U.S. Code Congressional Service 1211, 1212 (1944). The action was taken "merely [to confirm] the present situation" with regard to "exemption from civil service and [pay] classification laws." *Id.* at 1218. There is no indication in the legislation itself, Public Health Service Act, Pub. L. No. 78-410, § 208(c), 58 Stat. 682, 686 (1944), or the legislative history, that the exemption was designed to cover more than hiring and compensation. The official annotation to the current version of the United States Code regarding this provision says that the term "the civil-service laws" refers, most particularly, to chapter 33 of title 5 of the Code. 42 U.S.C. § 209 note (1994). Chapter 33 is entitled "Examination, Selection, and Placement." Pay and classification of federal employees are addressed in chapters 51 and 53 of title 5. Travel and transportation, on the other hand, are addressed in chapter 57. Payments for items covered in chapter 57 (including relocation benefits) are not encompassed within the term "pay." Synita Revels, GSBCA 14935-RELO, 00-1 BCA ¶ 30,716 (1999), reconsideration denied, 00-1 BCA ¶ 30,896. Further indicative of Congress' desire that pay be treated distinctly from travel and transportation is the statutory provision that claims of or against the Government involving civilian employees' compensation are to be resolved by the Office of Personnel Management, whereas claims by those persons involving travel and transportation, and relocation, are to be resolved by the General Services Administration. 31 U.S.C. § 3702(a) (Supp. V 1999).

We consequently conclude that although NIH had the authority to hire and pay Dr. Mâsse without regard to civil service laws, the agency was precluded by another statute from reimbursing her, as a new appointee, for TQSE she may have incurred when relocating to assume her position. The current agency rules, adopted on December 18, 2000, state the law

correctly insofar as they address TQSE for new appointees. The previous rules were contrary to law as to this matter and therefore have no effect on it.

Dr. Mâsse says that she and her husband made their decision to relocate as and when they did in reliance, in part, on NIH's promise to reimburse her for TQSE they incurred. She asserts that a failure to make reimbursement would be unethical and would impose a financial hardship on the couple.

That the employee may have relied on a promise the agency made, but is legally barred from fulfilling, is clearly unfortunate – an "unpalatable result," as we have recently described the predicament. David B. Nelson, GSBCA 15609-RELO (Aug. 30, 2001). Nevertheless, the law is clear on the matter at issue.

Any theory such as detrimental reliance which is based on contract law cannot help the claimant.

The courts have consistently held that there is a "well-established principle that, absent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government." Chu v. United States, 773 F.2d 1226, 1229 (Fed. Cir. 1985). In other words, "public employment does not . . . give rise to a contractual relationship in the conventional sense." Shaw v. United States, 640 F.2d 1254, 1260 (Ct. Cl. 1981) (quoting Urbina v. United States, 428 F.2d 1280, 1284 (Ct. Cl. 1970)); see also [many other court decisions].

Revels, 00-1 BCA at 151,712 n.2.¹

The issue thus becomes solely one of relating statutory and regulatory provisions to a specific situation. As we have previously explained:

In considering claims like this one, . . . the arbiter must balance the harm the employee would suffer if the claim were denied against the damage which would result to our system of government if federal officials were free to spend money in ways which are contrary to the strictures of statute and regulation. In making this balance, the Supreme Court has clearly come down on the side of protecting our system of government. We follow the Court in holding that although [the employee] has undeniably relied to his detriment on [the agency's] promises, he may not be reimbursed because the law prevents the agency from honoring commitments made in its name by officials who do not have the power to make them.

¹Both the cited Chu decision and a related decision, Chu v. Schweiker, 690 F.2d 330, 333 (2d Cir. 1982), express this principle in the context of litigation by Public Health Service employees against the agency which employed them.

Gary MacLeay, GSBCA 15394-RELO, 01-1 BCA ¶ 31,210 (2000); Pamela A. Mackenzie, GSBCA 15328-RELO, 01-1 BCA ¶ 31,174 (2000); George S. Page, GSBCA 15114-RELO, 00-1 BCA ¶ 30,707 (1999) (all citing Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)).

STEPHEN M. DANIELS
Board Judge