Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

May 17, 2002

GSBCA 15754-RELO

In the Matter of DENNIS NIELSEN

Dennis Nielsen, Red Oak, NC, Claimant.

Paul J. Sausville, Lieutenant Colonel, Judge Advocate General's Corps, New York Army National Guard, Latham, NY, appearing for Department of the Army.

NEILL, Board Judge.

Claimant, Mr. Dennis Nielson, has filed this claim as a civilian employee of the Department of Defense. He asks that we review a determination by his agency denying him reimbursement for certain real estate costs he incurred in the sale of a home he occupied as a residence while on active military duty. For the reasons set out below, we conclude that the agency incorrectly determined that it lacked the authority to pay Mr. Nielson's claim.

Background

Effective October 24, 1999, claimant, a member of the National Guard, following completion of an active duty military tour of several years, was restored to civilian status as a GS-13 dual status federal technician with the 185th Fighter Wing of the Iowa Air National Guard. In the National Guard, individuals with this "dual status" are federal civilian employees who, as a condition to that employment, maintain membership in the selected reserve. See 10 U.S.C. § 10216 (Supp. V 1999). As such, even when working as civilian employees of the National Guard, because of their dual status, these employees are deemed to be military technicians employed in the administration and training of the National Guard and in the maintenance and repair of supplies issued to the National Guard or the armed forces. See 10 U.S.C. § 709.

Mr. Nielson states that during his thirty-two years of Government service he has had several active duty tours with the military. From the record, it is clear that, immediately prior to the commencement of the active duty tour of concern to us in this case, Mr. Nielson was employed as an airplane flight instructor and was assigned to the 185th Fighter Wing of the Iowa Air National Guard. His civilian permanent duty station (PDS) prior to beginning this tour of active duty was, therefore, in Iowa and, during this tour, it remained his civilian PDS. Mr. Nielson also states that, while on active military duty, he was on leave without pay (LWOP) from the Iowa National Guard. During this period, claimant's official station was

Andrews Air Force Base (AFB) in Maryland. While stationed there, he purchased a home in Mechanicsville, Maryland, to use as a residence for himself and his family.

In 1999, as his active duty tour neared completion, claimant was advised to apply for job restoration rights in accordance with the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. ch. 43. His application was approved. Effective October 24, 1999, he was returned to duty at his former civilian PDS with the 185th Fighter Wing of the Iowa Air National Guard in the position of a GS-2181-13 flight instructor.

Prior to Mr. Nielson's being restored to his civilian position, the matter of his reassignment had been discussed by National Guard officials. The Iowa Air National Guard apparently had no vacancy at the time claimant asked to be returned to his civilian position. It was eventually agreed, however, that immediately upon restoration to his position with the Iowa National Guard, Mr. Nielson would be transferred to the New York Air National Guard in Latham, New York, where there was an opening for a flight training instructor. As part of this agreement, the Iowa Air National Guard agreed to fund claimant's position with the New York Air National Guard until his fifty-fifth birthday or his retirement, whichever occurred sooner. As agreed, one day after Mr. Nielson was restored officially to his former civilian PDS in the Iowa Air National Guard, he was transferred to the headquarters of the New York Air National Guard in Latham, New York.

Notwithstanding the apparent agreement among National Guard officials regarding his restoration and immediate transfer, Mr. Nielson was not issued permanent change of station (PCS) orders in connection with his transfer from Iowa to New York until early January 2000. On January 6, Mr. Nielson signed a transportation agreement, and on the following day, January 7, he was issued PCS orders. In block seven, which reads: "Releasing Official Station and Location, or Actual Residence," the orders list the headquarters of the Iowa Air National Guard in Johnston, Iowa. In block twenty, "Remarks or Other Authorizations," the orders read:

> The employee is entitled to reimbursement for all the various categories of relocation allowances including travel (including mileage for two POVs [personally owned vehicles]), temporary storage, temporary quarters subsistence expense allowance (TQSE), shipment of HHG [household goods], miscellaneous expenses incurred in the selling of old technician PDS (Iowa) or buying of residence at new PDS.

On January 28, 2000, Mr. Nielson sold his home in Mechanicsville, Maryland. On May 10, he filed a voucher with the New York Air National Guard seeking payment of $24,514 for expenses incurred in conjunction with the sale of this home.

On the morning of May 18, 2000, Mr. Nielson submitted a written request to his supervisor asking that the PCS orders issued to him in January be amended. Specifically, he asked that in block seven, the reference to the headquarters of the Iowa Air National Guard in Johnston, Iowa, be changed to his place of actual residence in Mechanicsville, Maryland, and that the reference to the selling of a residence in Iowa be changed as well. In requesting this change, claimant pointed out that the agency had already recognized the realities of his

situation in agreeing to move his family and household goods from Maryland to New York. He argued, therefore, that authorization of reimbursement of expenses in selling a residence in Iowa rather than Maryland, where he actually resided, was hardly in keeping with the intent of the travel regulations.

By letter bearing the same date of May 18, 2000, the comptroller for the New York Air National Guard returned Mr. Nielson's claim for real estate costs incurred in the sale of his residence in Maryland. The basis for the rejection read: "[N]o authorization exists to reimburse you for the sale of a residence in Maryland."

Mr. Nielson contends that, following this rejection of his claim, several National Guard officials indicated their disagreement with the comptroller's ruling. He was encouraged to resubmit his claim and did so. On June 29, 2000, however, it was again rejected. Subsequent efforts on claimant's part to resolve this matter within the agency have been unsuccessful. He has, therefore, asked this Board to review the matter.

In its report to the Board, the agency contends that we lack jurisdiction to settle Mr. Nielson's claim. The agency recognizes that this Board has jurisdiction over claims for reimbursement of expenses incurred in connection with relocation to a new duty station but argues that Mr. Nielson's claim seeks reimbursement for expenses incurred in connection with relocation from his military duty station upon expiration of his active duty service. This is said to involve permanent change of station benefits governed by the Joint Federal Travel Regulation for the uniformed services and to be, therefore, outside the Board's jurisdiction.

Alternatively, the agency argues that, even if the Board does have jurisdiction over this claim, the claim fails on its merits. Counsel writes for the agency:

> COL Nielsen's PDS at the time he was transferred to New York was Iowa. The fact that COL Nielson may have chosen to reside in Maryland does not justify the payment of real estate expenses from Maryland.

Discussion

We turn first to the question of whether the Board has the authority to settle this claim. We conclude that we do. Our authority stems from 31 U.S.C. § 3702(a)(3) (Supp. V 1999), which provides that the Administrator of General Services shall settle claims against the United States Government involving expenses incurred by federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty station. This authority has been delegated by the Administrator to this Board. Delegation ADM P 5450.39C CHGE 78 (Mar. 21, 2002) (referencing 31 U.S.C. § 3702). The claim before us in this case is obviously one submitted by a civilian employee who has been in the continuous employ of the Federal Government for several years. Mr. Nielson contends, and the agency has not challenged this assertion, that he was in LWOP status with the Iowa Air National Guard during his military tour of duty. He did not go to his PDS in New York as a new hire but as a civilian employee restored to his civilian PDS in Iowa and promptly thereafter transferred to a new civilian PDS in New York. Further, this claim does not involve a military PCS benefit. Rather, the benefit Mr. Nielson seeks here is one which

he contends is occasioned by his transfer, as a civilian employee, from Iowa to New York.

The issue, as we view it, is a relatively simple one. Mr. Nielson asks whether, as a civilian employee of the Federal Government, he is entitled to an allowance for expenses incurred in connection with residence transactions on the occasion of his transfer from Iowa to New York when the residence in question is not located at his old PDS in Iowa but elsewhere.

To respond to this inquiry we look to the Federal Travel Regulation (FTR) and the statutes which it implements. Further, because Mr. Nielson is an employee of the Department of Defense (DoD), we also look to the Joint Travel Regulations (JTR), which implement the FTR for DoD's civilian employees.

The FTR provides that, subject to various constraints, when an agency transfers an employee to a new permanent duty station in the interest of the Government, the Government shall reimburse the employee for expenses required to be paid by him or her in connection with the sale of the employee's residence at the old official station. 41 CFR 302-6.1 (1999); see also 5 U.S.C. § 5724a(d)(1) (Supp. V 1999). A similar provision can be found in JTR C14000.

In the past we have had occasion to comment on this FTR provision and, in particular, on its use of the term "old official station." "Old official station" does not necessarily mean "old PDS." The FTR defines "official station" as:

> The building or other place where the officer or employee regularly reports for duty. . . . With respect to entitlement under this chapter relating to the residence and the household goods and personal effects of an employee, official station or post of duty also means the residence or other quarters from which the employee regularly commutes to and from work.

FTR 302-1.4(k). In Ron Myers, GSBCA 14219-RELO, 98-1 BCA ¶ 29,409, we concluded that, where the transferred employee's old PDS is or has become an administrative designation rather than the place where the officer or employee regularly reports for duty, then, for purposes of relocation benefits regarding the employee's residence, one can consider the official station to be the residence or quarters from which the employee regularly commutes to and from work. As we stated in that decision, this conclusion on our part is in keeping with similar rulings issued by the General Accounting Office, which formerly settled claims by federal employees against the United States pertaining to expenses incurred in relocating from one duty station to another.

We see no reason why the rationale we enunciated in the Myers decision cannot be applied to the present case as well. It is of course true that, when the claimant was on active military duty and on leave from his civilian PDS, he was not simply away from his civilian PDS on special detail or temporary duty – as was the case in Myers and similar cases. Nevertheless, the situation is sufficiently analogous as to convince us that the principle of Myers is still applicable. Claimant's dual status with the National Guard as a civilian employee and a member of the reserve makes him somewhat unique. As already noted, even

when working as a civilian employee of the National Guard, an employee falling into this category is looked upon as a military technician employed in the administration and training of the National Guard and in the maintenance and repair of supplies issued to the Guard or the armed forces. There is, consequently, an inevitable degree of continuity between the responsibilities as a National Guard employee working at a civilian PDS and the responsibilities the same employee may assume when on active military duty. For this reason, we consider Mr. Nielson's situation similar to that of a civilian employee without dual status who leaves his PDS for an extended period of time to perform his duties elsewhere.

While on active duty at Andrews AFB, Mr. Nielson's civilian PDS in Iowa was nothing more than an administrative designation. In this case, after he was restored to his former position, that PDS remained only an administrative designation given the National Guard's plan to transfer him immediately to New York. Mr. Nielson's residence in Mechanicsville, from which he regularly commuted to and from work while on leave from his PDS in Iowa, can, therefore, be considered his official station, for purposes of determining his entitlement under the FTR and the JTR relating to the sale his residence upon transfer.

In arguing that Mr. Nielson is not entitled to payment, the agency relies heavily on JTR C4110. This is the provision which supports Mr. Nielson's transfer from Iowa to New York. It states that when a civilian employee on return from military duty is restored to his prior position but an appropriate vacancy does not exist at the place from which the employee was reassigned to enter the armed forces, the employee may be regarded as restored at that place for purposes of paying travel expenses in connection with a transfer from the place of restoration to a place where a suitable vacancy is available. This provision also provides that, in the event of transfer, real estate expenses in connection with the sale of the residence at the "former civilian PDS" are allowable.

The agency reads this language in C4110 as meaning that a restored employee, upon being transferred to a new PDS, is entitled to reimbursement of real estate expenses incurred solely with regard to a residence which he or she owns at the former civilian PDS and nowhere else. We disagree. It is, of course, true that C4110 speaks only of the employee's residence at the "former civilian PDS" and makes no reference to a residence at the employee's "official station." This, however, is also true of the language in JTR C14000 which sets out the basic requirements for reimbursement of real estate costs for a transferred employee. Nevertheless, such a narrow reading of the term "PDS" is not supported by the definition of "PDS" given in Appendix A of the JTR. That definition expressly notes that PDS also means "official station." Indeed, the definition, using wording similar to that found in FTR 302-1.4(k), notes that "with respect to entitlement under these regulations relating to the residence . . . , PDS also means the residence or other quarters from which the employee regularly commutes to and from work . . . ."

We see no conflict, therefore, between the applicable provisions of the FTR and the JTR with regard to the entitlement in question. Our decision in Myers is equally applicable whether under the FTR or the JTR.

The agency has twice rejected Mr. Nielson's claim on the ground that no authority exists to reimburse him for the sale of a residence in Maryland. This determination is incorrect. There is ample authority under statute and regulation as interpreted by this Board. Given the unique facts of this case, the claimant has a right to reimbursement of real estate costs incurred in conjunction with the sale of his residence in Maryland upon transfer from Iowa to New York. Mr. Nielson's claim should, therefore, be processed without further delay and, if found to be otherwise acceptable, promptly paid.

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EDWIN B. NEILL
Board Judge