

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

July 15, 2003

GSBCA 16095-RELO

In the Matter of WILLIAM T. ORDERS

William T. Orders, Rockville, MD, Claimant.

Charlotte L. Turner, Director, Division of Financial Services, Office of the Chief Financial Officer, Nuclear Regulatory Commission, Washington, DC, appearing for Nuclear Regulatory Commission.

NEILL, Board Judge.

Claimant, Mr. William T. Orders, asks that we review a decision of his agency denying his claim for reimbursement of expenses associated with the sale of a residence owned by him. The residence in question is not the one from which Mr. Orders commuted on a regular daily basis to his last permanent duty station. Rather, it is located in the city where Mr. Orders previously resided before taking the position from which he has now been transferred. We sustain the agency's determination that the claimant is not entitled to reimbursement of costs associated with the sale of that residence.

Background

In November 2001, Mr. Orders left his residence in Charlotte, North Carolina, to accept a position with the Department of Energy (DOE) in Los Alamos, New Mexico. At the time, Mr. Orders did not relinquish his home in Charlotte. Rather, he put the house up for sale and, in the meantime, rented a private room in the Los Alamos area, from which he commuted daily to his new permanent duty station. While working at Los Alamos, Mr. Orders often visited his home in Charlotte to be with his family, which had remained there. Although on sale from the time Mr. Orders took up his new duties at Los Alamos, the house in Charlotte did not sell while he remained at his new post.

In late May 2002, Mr. Orders was offered a position with the Nuclear Regulatory Commission (NRC) in Rockville, Maryland. After accepting the position, he was contacted by the NRC regarding his change of station benefits. It would appear that when the agency alluded to benefits associated with the sale of a transferring federal employee's residence, Mr. Orders believed that this would apply to his residence in Charlotte. He contends that this was also the apparent understanding of an NRC employee involved with facilitating his transfer. This employee allegedly advised Mr. Orders to remove his Charlotte residence

from the market until he was officially notified of his transfer from Los Alamos to Rockville.

Whatever the understanding may have been regarding the applicability of relocation benefits to Mr. Orders' residence in Charlotte, in late July 2002, shortly before Mr. Orders left his position with DOE in Los Alamos, an NRC official advised him that the sale of his residence in Charlotte would not meet the requirements set forth in the Federal Travel Regulation (FTR) entitling him to reimbursement of certain expenses associated with the sale of one's residence at the old duty station. Specifically, the agency had determined that this was because Mr. Orders, while stationed at his old duty station in Los Alamos, had not commuted to and from work on a daily basis from his residence in Charlotte, as specifically required under section 302-11.100 of the FTR.

Shortly after reporting for work at his new duty station in Rockville, Mr. Orders requested the agency to reconsider its decision not to allow reimbursement of expenses associated with the sale of his residence in Charlotte. One argument which the claimant raised in support of his request was that under the FTR, when one's duty station is located in a remote area where adequate family housing is not available within reasonable daily commuting distance, "residence" is said to include the dwelling where the family of the employee resides. It was Mr. Orders' contention that because Los Alamos was one such remote area, his residence in Charlotte should be considered the residence to which the relocation benefit applied.

The agency denied Mr. Orders' request for reconsideration. As to Mr. Orders' claim that Los Alamos was in a remote area, the agency undertook its own survey of housing possibilities in the Los Alamos and surrounding areas. The results of that survey were provided to Mr. Orders and are contained in the record. Based upon that survey, the agency concluded that there was adequate family housing within a reasonable daily commuting distance of Los Alamos and that a duty station located there was not, therefore, in a "remote area," as that term is used in the FTR.

Discussion

The relocation benefit which Mr. Orders is claiming is based upon the provision of law that when an employee transfers in the interest of the Government from one official station to another for permanent duty, the agency is to reimburse the employee for expenses of the sale of the employee's residence at the old official station. 5 U.S.C. § 5724a(d) (2000). The FTR implements this statute. Under the version of the FTR which is applicable to this case, the following provision appears:

For which residence may I receive reimbursement for [sic] under this subpart?

You may receive reimbursement for the one residence from which you regularly commute to and from work on a daily basis and which was your

residence at the time you were officially notified by competent authority to transfer to a new official station.

41 CFR 302-11.100 (2002) (FTR 302-11.100).¹

Under the applicable statute and its implementing regulation, Mr. Orders simply does not qualify for the benefit he seeks in connection with his permanent change in station from Los Alamos to Rockville. His residence in Charlotte was plainly not the residence from which he regularly commuted to and from work on a daily basis at the old official station (i.e., Los Alamos). See Wayne A. Wetzel, GSBCA 16017-RELO, 03-1 BCA ¶ 32,224.

It is regrettable that the claimant and allegedly an employee of the NRC assisting him with his travel arrangements initially thought that the sale of Mr. Orders' residence in Charlotte would meet the requirements set forth in statute and regulation entitling him to reimbursement of certain expenses associated with that sale. This misapprehension, however, was corrected by the agency prior to Mr. Orders' move -- albeit at the very last moment. Nevertheless, even if the agency had not provided this last-minute clarification, it still would have lacked the authority to pay the expenses Mr. Orders wishes to have it pay. It is well established that the Government may not authorize the payment of money if not in accordance with statute and regulation. Kevin S. Foster, GSBCA 13639-RELO, 97-1 BCA ¶ 28,688 (1996) (citing Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)). Payment, in the absence of proper authorization, cannot be justified solely by the fact that a claimant may have relied in good faith and to his or her detriment on the incorrect advice of an agency official. While it may seem grossly unfair that a claimant cannot be paid under these or similar circumstances, it must be recognized that the overriding concern in such cases is the protection of the taxpayers' interest in not having unlawful disbursements made from public funds. See Barry McGuire, GSBCA 15346-RELO, 01-1 BCA ¶ 31,343; Patricia A. Tobin, GSBCA 14483-RELO, 98-1 BCA ¶ 29,663.

Claimant's argument that "residence" should be more broadly interpreted in his case because his duty station was in a remote area fails for two reasons. First, the FTR provision on which he relies, namely, 302-1.4(k) (2001), was deleted from the subsequent version of the FTR which is applicable to this case. Second, even if this provision were applicable, the agency determination that Los Alamos is not in a remote area is a reasonable one. Given the absence of a specific definition of "remote area" in the FTR, the determination of whether a particular location fits this description is a matter left to the discretion of the employee's agency. In this case, the agency examined the matter of housing availability in the Los Alamos area and concluded that there was adequate family housing within a reasonable daily commuting distance.

¹ The version of the FTR cited here was issued in November 2001 and went into effect on February 19, 2002. 66 Fed. Reg. 56,194 (Nov. 20, 2001). It undoubtedly applies in this case since, according to Mr Orders, he left Los Alamos to assume his new position with NRC on July 25, 2002. See FTR 302-2.3-2.4.

Mr. Orders has attempted to refute the agency's conclusion regarding the availability of housing in the Los Alamos area by submitting for our review a recommendation prepared by a DOE official and dated June 14, 2000, that a group retention allowance be authorized for certain employees assigned to DOE's Los Alamos area office. The recommendation notes, among other things, that Los Alamos is an isolated DOE community with a shortage of privately owned land. This document does not convince us that NRC has clearly erred in concluding that adequate family housing is available within a reasonable daily commuting distance of Los Alamos.

We have reviewed the documentation assembled by the NRC in support of its conclusion regarding the availability of housing within a reasonable daily commuting distance from Los Alamos. We find that the information contained in this material provides a reasonable basis for the agency's conclusion. We, therefore, see no reason to question that conclusion even if another agency at a different time and under different circumstances did not arrive at the same conclusion. As we have so often stated in the past, we will not disturb an agency's discretionary judgments unless we are convinced that they are arbitrary, capricious, or clearly erroneous. *E.g.*, Armando G. Solis, GSBCA 15713-RELO, 02-2 BCA ¶ 31,870; Fred J. Martin Jr., GSBCA 15639-RELO, 01-2 BCA ¶ 31,635; Larry E. Olinger, GSBCA 14566-RELO, 98-2 BCA ¶ 29,877; Paul C. Martin, GSBCA 13722-RELO, 98-1 BCA ¶ 29,412 (1996); Earl G. Gongloff, GSBCA 13860-RELO, 97-1 BCA ¶ 28,792.

Under the version of the FTR applicable here, a slightly different provision exists regarding employees stationed in remote or isolated areas. It reads:

May we waive statutory or regulatory limitations relating to relocation allowances for employees relocating to/from remote or isolated locations?

Yes, the agency head or his/her designee may waive any statutory or regulatory limitations for employees relocating (to/from a remote or isolated location) when determining that failure to waive the limitation would cause an undue hardship on the employee.

FTR 302-2.106 (2002). The agency has, of course, made no such determination in this case in view of the conclusion it reached regarding the availability of housing in the surrounding area. Under this provision, therefore, claimant's argument fares no better than it might have under the expired regulation.

Claimant's use of an outdated version of the FTR also appears to have misled him regarding the relevance of FTR 302-11.100 quoted above and previously cited to claimant by agency officials in discussing the merits of his claim. Mr. Orders apparently believes that the daily commute requirement stated in this provision has been taken out of context since, in his opinion, it is in a part of the FTR which deals with the relocation income tax allowance. It is of course true that part 302-11 of the 2001 version of the FTR did deal with relocation income tax allowance. However, the provision in question did not appear in that version of the FTR. Rather, it appeared in part 302-11 of the subsequent revision. That part is now entitled "Allowances For Expenses Incurred In Connection With Residence Transactions," and, as we have already stated, is unquestionably applicable to this case. In

relying on that provision, therefore, the agency properly concluded that it lacks the authority to pay Mr. Orders' claim.

EDWIN B. NEILL
Board Judge