

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

May 26, 2006

GSBCA 16841-RELO

In the Matter of PAUL B. D'AGOSTINO

Paul B. D'Agostino, Alexandria, VA, Claimant.

Michael N. Spargo, Agency Counsel, Department of Homeland Security, South Burlington, VT, appearing for Department of Homeland Security.

DeGRAFF, Board Judge.

When an employee transfers from one official duty station to another in the interest of the Government, the Government is required to reimburse some of the employee's relocation expenses.

Background

In January 2004, Paul B. D'Agostino was a civilian employee of the Department of Justice in New York and was a reserve member of the United States Army on active duty in the Washington, D.C. area. In response to a vacancy announcement from the Department of Homeland Security (DHS), he applied for a position in Washington, D.C. In the work history section of his application, Mr. D'Agostino listed both his active duty military service with the Army in Washington, D.C., and his employment with the Department of Justice in New York, as his present positions. His résumé, which was part of his application, listed his address as a suburb of Washington, D.C. His biographical summary, which was also part of his application, contained an address in New York. He supplied DHS with his most recent Standard Form 52, which showed his duty station was in New York. The vacancy announcement to which Mr. D'Agostino responded provided, "Relocation expenses are authorized." The announcement also said the vacancy was open to all federal employees.

In mid-November 2005, DHS notified Mr. D'Agostino it had tentatively selected him to fill the vacancy it had announced nearly two years earlier, and asked him to accept or decline the position within five days. Mr. D'Agostino immediately accepted. At the end of November 2005, after Mr. D'Agostino received the necessary security clearance, DHS sent him and his supervisors at the Department of Justice a selection notice which showed he would receive a promotion in connection with his selection. It listed his employer as the Army and listed his address as Washington, D.C. It also said "Notified of [permanent change of station (PCS)]: [Not applicable (N/A)]" and "Date PCS Approved: N/A."

The same day Mr. D'Agostino received the selection notice, he explained to DHS that his current civilian position was with the Department of Justice, although he was on active military duty with the Army in the Washington, D.C. area. He said he hoped he would be able to begin working on a PCS move as soon as possible. The next day, in a telephone call with a DHS employee, Mr. D'Agostino learned DHS was not going to pay his relocation expenses because it considered him as having been hired locally from the Washington, D.C. area. Mr. D'Agostino explained that his permanent civilian job was in New York, that he owned a house in New York, and that he rented a house in a suburb of Washington, D.C., because he was on active military duty in the Washington, D.C. area. He explained he had provided DHS with his address in suburban Washington, D.C., when he applied for the position so DHS would be able to contact him while he was on active duty with the Army. Mr. D'Agostino also pointed out that the vacancy announcement to which he had responded nearly two years before said relocation expenses were authorized.

In early December 2005, a DHS employee told Mr. D'Agostino if he wanted to be reimbursed for his relocation expenses, he could ask a DHS waiver board to approve a waiver. Two weeks later, DHS told Mr. D'Agostino the waiver board had decided not to approve reimbursement of his PCS expenses. DHS said, "Although the vacancy announcement authorized PCS funding, it still needed to be approved by management." Mr. D'Agostino asked why the waiver board had decided not to approve his PCS funding and a DHS employee told him the determining factor was the suburban Washington, D.C. address listed on his application. Subsequently, the same employee said although the board had not given a reason for not funding his relocation, she believed it had "something to do with the financial constraints the agency is under." Later in December, Mr. D'Agostino noticed a DHS vacancy announcement which said relocation expenses would be paid to the person who was selected to fill the vacancy. Mr. D'Agostino took this as an indication that the agency's financial constraints had eased, so he asked DHS if his own expenses could be reimbursed. DHS responded, "Unfortunately, the budget situation has not improved."

In January 2006, Mr. D'Agostino began working for DHS in Washington, D.C. Soon after, he again asked DHS to review his request for reimbursement of his relocation

expenses. Mr. D'Agostino's supervisor told him that due to budget constraints, DHS paid relocation expenses only for employees hired from within DHS.

Mr. D'Agostino asked us to review DHS's decision to refuse to reimburse his relocation expenses. In its initial submission to us in response to Mr. D'Agostino's request, DHS says it never intended to fund Mr. D'Agostino's relocation. As evidence of this, DHS says it never issued documents to Mr. D'Agostino related to a permanent change of station and never asked him to sign a service agreement. DHS also says Mr. D'Agostino accepted the transfer knowing he would not be reimbursed because before he entered on duty, DHS "specifically advised the Claimant he would not be reimbursed for relocation expenses due to the current financial constraints of the Agency." DHS told us when it decided in mid-December not to fund Mr. D'Agostino's relocation, "The Agency's decision was due to the financial constraint it was subjected to at that time."

In a supplement to its initial submission to us, DHS says it has determined Mr. D'Agostino's relocation was not in the best interest of the agency. In support of this position, DHS says it did not direct Mr. D'Agostino to transfer, that his selection was a competitive merit selection, and that DHS was capable of filling the position by hiring someone locally.

Discussion

By statute, when an employee is transferred in the interest of the Government from one official duty station to another, the Government is required to reimburse the employee for some relocation expenses (travel, transportation of household goods, real estate transactions, miscellaneous expense allowance), and it has the discretion to reimburse the employee for other relocation expenses (house hunting trip, temporary quarters subsistence expenses, moving a vehicle). When a transfer is primarily for the convenience of an employee, the Government cannot pay any of the employee's relocation expenses. 5 U.S.C. §§ 5724, 5724a, 5727 (2000). The authority to decide whether an employee's transfer is in the Government's interest rests primarily with the employing agency, and we will not disturb such a decision unless it is arbitrary, capricious, or clearly erroneous. *Bart J. Dubinsky*, GSBCA 14546-RELO, 98-2 BCA ¶ 29,840; *Steven D. Hanson*, GSBCA 14270-RELO, 97-2 BCA ¶ 29,314.

None of the reasons set out in DHS's initial submission to us is sufficient to support its decision to deny reimbursement of Mr. D'Agostino's relocation expenses. DHS says its intent not to reimburse his expenses is shown by the fact that it never provided him with any of the documents related to a transfer. DHS's intent is immaterial to the extent the agency meant to deny benefits conferred by the statute, and its failure to issue documents which would have authorized the reimbursement of relocation expenses sheds no light upon

whether the statute requires DHS to reimburse such expenses. *Ross K. Richardson*, GSBCA 15286-RELO, 00-2 BCA ¶ 31,131; *Dubinsky*. DHS says Mr. D'Agostino accepted the transfer after being told he would not be reimbursed. Even if DHS's statement were accurate, which it is not, such an action by an employee does not justify an agency's decision to deny reimbursement of properly payable relocation expenses. *Jenny Yoon*, GSBCA 16116-RELO, 03-2 BCA ¶ 32,354; *Richardson*. Finally, DHS says in its initial submission that it refused to reimburse Mr. D'Agostino's relocation expenses due to budgetary reasons. Although we have no doubt this is true, budgetary reasons are never a sufficient justification for withholding payment of an amount the statute requires an agency to pay. *LaVerle E. Olivier*, GSBCA 16598-RELO, 05-1 BCA ¶ 32,959.

DHS's supplemental submission to us is no more persuasive than its initial submission. In the supplemental submission, DHS says Mr. D'Agostino's transfer was not in the Government's interest because it did not direct him to relocate and because he was competitively selected after he responded to a vacancy announcement. The fact that DHS did not direct Mr. D'Agostino to relocate is immaterial to determining whether his transfer was in the Government's interest because he did not work for DHS when he applied for the position and DHS could not have directed him to transfer. In addition, although Mr. D'Agostino was competitively selected after he responded to a vacancy announcement, this does not prove his transfer was primarily for his benefit. *Gregory A. Chaklos*, GSBCA 15685-RELO, 02-1 BCA ¶ 31,773. DHS contends it could have filled the position by hiring someone locally. However, when DHS announced the vacancy for which Mr. D'Agostino applied, it did not restrict the area of recruitment to the Washington, D.C. area and it said it would pay relocation expenses, both of which are inconsistent with the agency's present contention that it could have filled the position by hiring locally. Also, even if local candidates were available to fill the vacancy, DHS did not select such a candidate. Instead, after announcing it would pay relocation expenses, it selected Mr. D'Agostino, whose permanent duty station was in New York.

The agency's position that Mr. D'Agostino's transfer was not in the interest of the Government was raised only after he submitted his claim to us for review, and is not supported by any facts contemporaneous with his selection. Mr. D'Agostino responded to a vacancy announcement which said relocation expenses would be reimbursed. The agency was sufficiently interested in hiring him that it retained his application and selected him nearly two years after he applied for the vacancy. He received a promotion when he transferred to DHS, and the selection and transfer of an employee who receives a promotion is nearly always an action taken in the interest of the Government. *Chaklos; Richardson*. All the contemporaneous documentation of DHS's decision not to reimburse Mr. D'Agostino shows the decision was based upon budgetary reasons and had nothing to do with whether his transfer was in the Government's interest. Because DHS's characterization of

Mr. D'Agostino's transfer as being not in the interest of the Government is unsupported by the facts, it is clearly erroneous.

The claim is granted. DHS is obligated to reimburse Mr. D'Agostino's relocation expenses as provided by statute and the regulations in effect on the date he reported for duty in Washington, D.C.

MARTHA H. DeGRAFF
Board Judge