

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

May 4, 2006

GSBCA 16875-RELO

In the Matter of DANIEL J. KUHLMEIER

Daniel J. Kuhlmeier, Bellevue, NE, Claimant.

Rick Miller, Civilian Travel and Overseas Allowances Policy Manager, Force Sustainment Division, Office of the Chief of Staff, Department of the Air Force, Washington, DC, appearing for Department of the Air Force.

BORWICK, Board Judge.

The agency, Department of the Air Force, seeks a 31 U.S.C. § 3529 opinion on an issue arising from tragic circumstances connected to the war in Iraq. A civilian agency employee, Mr. Daniel J. Kuhlmeier, was killed while on authorized temporary duty (TDY) in Iraq. The agency desires an opinion as to whether 5 U.S.C. § 5742(b)(2) provides authority for the agency to reimburse the relocation expenses of Mr. Kuhlmeier's dependents from their residence near Mr. Kuhlmeier's permanent duty station at Offutt Air Force Base (AFB), Nebraska, to their family home in the Washington, D.C. area. We conclude that the statute does not provide that authority. We also conclude that the applicable provisions of the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR), which prohibit such a domestic relocation payment when an employee dies outside the Continental United States (CONUS), are in accord with the intent of the statute.

Background

On or about September 30, 2003, the agency hired Mr. Kuhlmeier as a Criminal Investigator with the Department of the Air Force's Office of Special Investigation (AFOSI). In connection with that hire, Mr. Kuhlmeier signed a mandatory mobility agreement.

An employee who signs the mandatory mobility agreement acknowledges that mobility is an important factor in planning and making assignments in the AFOSI, and that assignment of employees to AFOSI positions throughout the world promotes the employee's advancement to positions of greater responsibility within the office. For its part, the agency agrees in making mobility assignments to take into account the employee's preference for assignments to particular geographical areas, and the hardship a move to a particular area might cause to the health and welfare of the employee's family.

According to the agency officials, Offutt AFB was Mr. Kuhlmeier's first duty station and Mr. Kuhlmeier moved himself from the Washington, D.C. area. In accordance with the terms of the mandatory mobility agreement, Mr. Kuhlmeier went on trips abroad. On February 5, 2006, Mr. Kuhlmeier departed for Iraq and was killed there on February 20. Mr. Kuhlmeier's dependents desire to return to the Washington, D.C. area.

Discussion

Statute provides:

When an employee dies, the head of the agency concerned, under regulations prescribed by the President and, except as otherwise provided by law, may pay from appropriations available for the activity in which the employee was engaged--

(1) the expense of preparing and transporting the remains to the home or official station of the employee, or such other place appropriate for interment as is determined by the head of the agency concerned, if death occurred while the employee was in a travel status away from his official station in the United States or while performing official duties outside the continental United States or in transit thereto or therefrom;

(2) the expense of transporting his dependents, including expenses of packing, crating, draying, and transporting household effects and other personal property to his former home or such other place as is determined by the head of the agency concerned, if death occurred while the employee was performing official duties outside the continental United States or in transit thereto or therefrom; and

(3) the travel expenses of not more than 2 persons to escort the remains of a deceased employee, if death occurred while the employee was in travel status away from his official station in the United States or while performing official duties outside the United States or in transit thereto or therefrom, from the

place of death to the home or official station of such person, or such other place appropriate for interment as is determined by the head of the agency concerned.

5 U.S.C. § 5742(b) (2000).

The intent of the statute, enacted in 1940, is stated in legislative history:

The purpose of this bill is to authorize the United States to pay certain expenses in cases of death of civilian officers and employees of the Government while they are in travel status away from their official stations in the United States.

....

The absence of the authority that would be provided by this section frequently results in great hardship to members of the families of low-salaried officers and employees who die while performing official duties in foreign countries . . . There have been many pathetic instances *where families have been left stranded in foreign countries* and where they have otherwise been put to heavy expense. It seems that the Government is morally obligated to bear the expense of returning to their homes the remains, families, and effects of such officers and employees.

....

The drain upon the slender resources of their families *in bringing back to the United States* the remains of their dead husband or father and *the family and its household effects* is at best a very heavy one. At worst, it may mean that the only recourse is the charity of their relatives or friends. The situation is bad enough in times of peace. It is much worse in the present chaotic state of affairs abroad.

S. Rep. No. 76-1604 at 2-3 (1940)(emphasis supplied). See 66 Comp. Gen. 677 (1987).

The implementing FTR provides in its question and answer format:

When the employee dies at or while in transit to or from his/her official station outside CONUS must we return the immediate family, baggage and household goods to the residence or alternate destination?

Yes, however, your agency head or other designated representative must approve the family's election to return to an alternate destination, and the allowable expenses cannot exceed the cost of transportation to the decedent's residence. . . .

41 CFR 303-70.302 (2004).

On this subject, the JTR provide:

A. While Performing Duties OCONUS [Outside the Continental United States]

1. General. The cost of return transportation of a deceased employee's dependents, baggage and HHG [household goods] (and that of the decedents) must be paid when an employee dies at or while in transit to or from the OCONUS PDS (or CONUS PDS [permanent duty station] in the case of an employee reassigned from the HOR [home of record] under a mandatory agreement). Allowable transportation costs shall not exceed the costs of returning the dependents, baggage, and HHG from the place where official duties were performed or were to be performed, by the most direct route to the decedent's actual residence or any other place the commander concerned or designee designates.

. . . .

B. While Stationed in CONUS. When an employee stationed in CONUS dies while on TDY, transportation expenses may not be authorized for dependents or HHG.

JTR C6058 (Feb. 1, 2006).

The agency questions whether JTR C6058-B is unnecessarily restrictive. The agency notes that 5 U.S.C. § 5742(b)(2) does not explicitly state that the authorization for dependent's relocation expenses is limited to circumstances where the family has accompanied the deceased employee on an OCONUS permanent change of station. The agency asks whether the statutory phrase "expenses of . . . transporting household effects and other personal property to his former home or such other place [determined by the head of the agency]" might be read to encompass a situation where, after the employee's death, the employee's family resides in CONUS and desires to relocate to another place. In this regard the agency notes that the statute requires only that the employee's death occur when the employee was outside CONUS on official business, as Mr. Kuhlmeier certainly was.

Admittedly, the statute itself is ambiguous on this point, but the legislative history as reflected in the Senate Report is clear as to its intent. The purpose of the statute was to defray the relocation expenses of families stranded outside CONUS when the employee died outside CONUS.

The statute is implemented by both the FTR and the JTR. As the FTR is a legislative rule, we grant it substantial deference in interpreting any ambiguities in the statute. *Gonzales v. Oregon*, 126 S.Ct. 904, 906 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 227-28; *Acker v. United States*, 6 Cl. Ct. 503, 507 (1984); *Renea A. Webb*, GSBCA 15220-TRAV, 00-1 BCA ¶ 30,889. Although the JTR is not a legislative rule in this instance, because it was not issued pursuant to a statutory delegation, we will respect that interpretation to the extent it has the “power to persuade.” *Gonzales*, 126 S.Ct. at 914-15 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); *Mead*, 533 U.S. at 227-28.

In its question and answer format, the FTR strongly suggests that the agency’s reimbursement obligation when an employee dies outside of CONUS is triggered only when the family incurs expenses in returning from OCONUS to the residence. 41 CFR 303-70.302 (2004). The JTR provide that families who are in CONUS when the employee dies outside CONUS are not entitled to relocation payments because they are already at the residence. These provisions are in accordance with the statutory intent and consequently will be upheld.

In answer to the agency’s question, 5 U.S.C. § 5742(b)(2) does not provide the statutory authority for the agency’s reimbursement of Mr. Kuhlmeier’s family relocation from the residence near Offutt AFB, Nebraska to the Washington, D.C. area.

ANTHONY S. BORWICK
Board Judge