117507 20797

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-197205 DATE: February 16, 1982

MATTER OF: Rafael F. Arroyo - Reconsideration - Entitlement to Home Leave Travel - Place of Actual Residence

DIGEST:

By decision Matter of Rafael F. Arroyo, B-197205, May 16, 1980, we considered a claim for home leave and round-trip travel expenses and held that (1) correction of error in overseas transfer agreement may be made when clearly shown that place of actual residence was other than the place named in the agreement, and (2) that place of actual residence at time of transfer must be determined by agency on basis of all available facts. Following our decision, the agency made a factual determination on employee's residence based on independent review of all available evidence. Since agency's determination is not clearly arbitrary, capricious, or contrary to law, we will not substitute our judgment for the agency's as to the employee's actual residence. Accordingly, employee is not entitled to home leave and round-trip travel expenses.

The issue to be decided here is whether Miami, Florida, the employee's post of duty prior to his transfer to Puerto Rico, is to be considered his place of "actual residence" for purposes of travel at Government expense on home leave under the provisions of 5 U.S.C. § 5728(a) (1978).

At the request of the claimant, we are reconsidering our decision Matter of Rafael F. Arroyo, B-197205, May 16, 1980, concerning the entitlement of Rafael F. Arroyo to biennial travel and home leave. Since the factual background of this case is pertinent to our reconsideration, we believe it is necessary to briefly restate the chronological development of this matter.

BACKGROUND

Following service with the Puerto Rico Air National Guard dating to January 1, 1969, Mr. Arroyo was selected on September 2, 1969, for a career-conditional appointment with the Federal Aviation Administration (FAA) as an Air Traffic Control Specialist, with a duty assignment at San Juan, Puerto Rico. Mr. Arroyo was considered to be a "local hire" and hence ineligible for round-trip travel.

On January 4, 1976, Mr. Arroyo was permanently transferred to Miami, Florida. Mr. Arroyo's travel expenses were reimbursed and he executed the usual travel agreement to remain in the Government service for 12 months after his transfer. Less than 2 years later Mr. Arroyo applied for and was accepted for lateral transfer back to Puerto Rico under the merit promotion program. As a result, on December 4, 1977, Mr. Arroyo was laterally transferred to Isla Verde Air Traffic Control Tower, Puerto Rico, where he is presently stationed.

In connection with the transfer back to Puerto Rico, Mr. Arroyo submitted a "Statement as to Place of Actual Residence at Time of Appointment or Transfer Overseas," dated August 29, 1977, in which he claimed Miami, Florida, as his actual residence. The document contained an underlined printed notice to the employee that "[t]he place of actual residence claimed by the employee is subject to review and correction by the agency." In the blank space provided for agency approval of the place of residence, both Miami and San Juan were written in and crossed out, and Miami, Florida, is written in as the approved place, with a note stating that the change was made December 2, 1977, 2 days before Mr. Arroyo's transfer back to Puerto Rico. Similarly, the overseas employment and transportation agreement signed by the employee and FAA in August 1977 contains a typewritten note stating that it was amended on December 2, 1977, to show Miami in lieu of San Juan for home leave and return transportation purposes.

The FAA, however, notified Mr. Arroyo, by memorandum dated August 16, 1979, that the establishment of his actual place of residence as Miami, Florida, in December 1977 had been an administrative error and that as a "local hire" his actual place of residence was San Juan, Puerto Rico. The FAA memorandum concluded by advising Mr. Arroyo that

his entitlement to home leave and biennial travel would be withdrawn and that his agreement would be corrected to reflect San Juan as his place of actual residence.

Mr. Arroyo, through his authorized representative, asked this Office to reverse the FAA decision to withdraw home leave and biennial travel. Contending that "local hires" are being discriminated against by the FAA in the application of its rules and regulations, Mr. Arroyo stated that the effect of FAA's position is that a controller from Puerto Rico cannot change his actual residence whereas a controller from the continental United States can change his residence at any time. Mr. Arroyo also argued that our decision 45 Comp. Gen. 136 (1975), relied on by the FAA, is not applicable since he transferred back to Puerto Rico for the convenience of the Government under a 24-month employment agreement with an extension subject to the approval of the FAA area manager. He argued that he was employed in San Juan incident to a Government assignment, and for that reason San Juan cannot be designated as his place of actual residence.

DECISION OF MAY 16, 1980

In responding to Mr. Arroyo's claim we first discussed the authority derived from section 5728(a) of title 5, United States Code, which provides for granting of round-trip travel expenses for an employee upon completion of a tour overseas, and paragraph 2-1.5g(3) of the Federal Travel Regulations (FTR) (FPMR 101-7) (May 1973) which provides guidance to agencies concerning the determination and designation of an employee's actual place of residence for purpose of entitlement to return round-trip travel expenses. Under these authorities the determination of the place of actual residence of an employee shall be made by the administrative agency on the basis of all available facts. 45 Comp. Gen. 136 (1965); 39 id. 337 (1959); 37 id. 848 (1958); 35 id. 101 (1955). Ordinarily our Office will not question any reasonable determination made by the agency of the employee's actual residence. 35 Comp. Gen. 244, 246 (1955).

In Mr. Arroyo's case we noted that almost 2 years elapsed between the time Mr. Arroyo initially prepared his

overseas travel agreement and the date the FAA decided to change his residence designation. Paragraph 2-1.5g(3)(a) of the FTR states that the place of actual residence shall be determined at the time of selection and designated in the written agreement. Thus, since Mr. Arroyo's agreement was amended 2 days before the effective date of his transfer to show Miami as his place of actual residence, we were faced with the question of whether or not the changed determination made by the FAA, some 2 years later, was in fact reasonable.

Although the controlling law and regulations do not preclude correction of errors in overseas assignment or transfer records when it is later shown clearly that the place of actual residence was other than the place named in the agreement and related papers, in Mr. Arroyo's case we found that the facts did not clearly show how or why the FAA determined that Mr. Arroyo's actual place of residence was San Juan, Puerto Rico.

In so finding we stated that our decision 45 Comp. Gen. 136 (1965) does not preclude the FAA from finding that Miami is the place of residence in Mr. Arroyo's case. The fact that Mr. Arroyo was originally a "local hire" should not be made the sole criterion or residency determination because that would have the effect of preventing a local hire from ever establishing a different actual place of residence. Such action on the part of the agency would be arbitrary and capricious.

We concluded our decision by stating that the FAA should make a factual determination as to Mr. Arroyo's actual residence after giving him a full opportunity to submit further evidence to support his claim. We stated:

> "If the agency determines that the actual residence is in fact Miami, Florida, Mr. Arroyo is entitled to round-trip travel expenses and home leave, provided the other provisions of the statutory authority are met."

SUBSEQUENT DEVELOPMENT

By letter dated March 11, 1981, Mr. Arroyo requested that this Office make a final determination concerning his

entitlement to home leave. Mr. Arroyo advised this Office that by memorandum dated October 14, 1980, the FAA provided an "Interim Response" declaring that the agency had again determined that his place of actual residence was San Juan, Puerto Rico. No rationale was given to support this determination. By letter of April 15, 1981, this Office asked the FAA to provide a full report as to the basis for the agency's determination that San Juan, Puerto Rico, was Mr. Arroyo's place of actual residence.

The FAA responded to our request by letter dated May 18, 1981, stating that a careful review of the information which Mr. Arroyo submitted for consideration pursuant to our May 16, 1980, decision revealed that it was no different from that on which the initial decision was based. Consequently, the FAA reaffirmed its determination that Mr. Arroyo's actual place of residence was San Juan, Puerto Rico. The agency's report provides in pertinent part as follows:

> "As shown in our records, Mr. Arroyo was born, reared and educated in Puerto Rico. * * * His first appointment in federal service was with the Department of Defense in Puerto Rico in January 1969. He subsequently transferred to the FAA in San Juan in August 1969. He voluntarily applied and was selected for reassignment to Miami in January 1976, which remained as his official duty station until his transfer back to San Juan in December 1977. This transfer was in connection with his selection for a position in Puerto Rico which he applied for under competitive procedures.
>
> * * * * *
>
> "In view of the above, it is our determination that Mr. Arroyo's actual place of residence is San Juan, and that the evidence which he presented to show Miami, Florida, as his actual place of residence is only compatible with his residence at the place (Miami) incident to the performance of his duties as a government employee. Since Mr. Arroyo is considered not to have had an actual residence in

the continental United States, and he has transferred back to the area in which he was recruited, he does not meet the requirements stipulated in Title 5, U.S.C. Section 6304(b) which entitles an employee to 45 days leave accumulation and, therefore, is not eligible for home leave under Title 5, U.S.C. Section 6305(a)."

DISCUSSION AND CONCLUSION

As indicated above, we believe that the provisions of 5 U.S.C. § 5728(a) and the regulations set out at paragraph 2-1.5g(3) of the FTR place the responsibility for determining the place of actual residence of an employee on the administrative agency and as requiring the determination to be made on the basis of all available facts. 45 Comp. Gen. 136 (1965); 39 id. 337 (1959); 37 id. 848 (1958); 35 id. 101 (155). Such a determination must, of necessity, be based on the facts of each case, and ordinarily our Office will not question any reasonable determination made by the agency of the employee's actual residence. 35 Comp. Gen. 244, 246 (1955).

The record before us is not without competing considerations concerning the designation of Mr. Arroyo's actual residence. Mr. Arroyo's contention is based on numerous specific contacts with Miami, Florida, that he physically resided in Miami at the time of his selection to San Juan and designated it as his actual place of residence on August 29, 1977, that he owned a house and personal property at Miami, and that he exercised privileges and duties of citizenship in Miami, such as voting and payment of taxes on income and personal property.

Nevertheless, although the issue is not free from doubt, we are unable to conclude on the basis of the record here that the agency's determination was clearly arbitrary, capricious, or contrary to law. Mr. Arroyo is a native of Puerto Rico and he resided in Miami only from January 1976 to December 1977 when he returned to Puerto Rico upon being selected for a position for which he had applied. Therefore, the FAA's determination that Mr. Arroyo's actual residence is San Juan and that his residence in Miami was only incident to his duties there must be accorded great deference. This Office will not

substitute its independent judgment for that of the agency under these circumstarces.

Accordingly, since the FAA has determined that Mr. Arroyo's actual residence is San Juan, Puerto Rico, he is not entitled to travel to Miami, Florida, at Government expense for home leave purposes under 5 U.S.C. § 5728(a).

for Milton J. Socolar
Comptroller General
of the United States