**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Deborah L. Childress--Reconsideration

File: B-253202.3

Date: May 15, 1996

DIGEST

Prior decision holding that a relocation service contractor's fee for purchasing a transferring employee's residence may not be paid is affirmed on reconsideration. Relocation service contracts entered into pursuant to 5 U.S.C. § 5724c (1994) are subject to the limitations and restrictions found in 5 U.S.C. § 5724a and in Chapter 302 of the Federal Travel Regulation. Under these provisions, residence sales expenses may be reimbursed only if the transferring employee's residence is the one from which the employee regularly commuted to the old official station. Since the residence purchased by the contractor here does not qualify as the employee's commuting residence at her old station, the agency lacks authority to pay the contractor, even though its agent had authorized the contractor to provide the service. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

DECISION

By letter of November 9, 1995, PHH Homequity Corporation (PHH), a relocation services contractor for the Federal Aviation Administration (FAA), asks us to reconsider our decision of March 9, 1995 (B-253202.2), denying its claim of $82,834.50.

The claim covers PHH's contract fee for its purchase and resale of Mrs. Deborah L. (Phelps) Childress's residence in Corona, California, in connection with her transfer from the United States Customs Service at Tucson, Arizona, to the FAA, in San Pedro, California. Since Mrs. Childress's residence in Corona, California, was not located at her old official station in Tucson, Arizona, we denied PHH's claim, even though the agency's representative had authorized PHH to provide the service. We affirm our prior decision.

BACKGROUND

PHH was awarded contract No. DTFA01-89-D-00027, by FAA for relocation services effective March 1, 1989, for a term of 12 months with three 12-month option periods. The contract was a requirements-type contract calling for PHH to provide,

among other relocation services, guaranteed home sale services. In return, PHH received a fee based on the home appraisal value and on the period of time for which the home was in inventory prior to resale. The home sale services involved here occurred in late 1992.

Deborah L. Phelps was employed by the Customs Service during 1992, stationed at Davis-Monthan Air Force Base, Tucson, Arizona. On July 16, 1992, Ms. Phelps, who was then engaged to marry Mr. Richard Childress, leased her residence in Tucson, starting in August. On July 28, 1992, she vacated that residence and shipped her household goods to the residence of Mr. Childress in Corona, California, approximately 425 miles away. On August 7, she married Richard Childress.

On August 23, Mrs. Childress began a temporary duty assignment for the Customs Service at March Air Force Base, which is near Corona, and where she remained until September 26. During this period, she received a job offer from FAA for employment in San Pedro, California, which she accepted, and she reported for duty on October 5.

The FAA issued travel orders to her authorizing permanent change-of-station travel for herself, her husband, and stepson, from Corona to San Pedro, including real estate transaction expenses. Mrs. Childress requested the use of relocation services, listing her home in Corona, California, as her address in the requesting documents. On October 9, 1992, the FAA relocation services coordinator (RSC), the official responsible for determining eligibility of FAA employees for relocation services, authorized PHH to negotiate its purchase of the house owned by Mr. Childress in Corona.

On November 18, 1992, PHH contracted to purchase the Corona residence for $161,000, and closed the transaction on November 24, 1992. PHH sold the house on August 9, 1993, for $149,500 and submitted fee invoices totaling $82,832.50, consisting of a 10 percent fee of $16,100, plus $66,734.50, as an additional fee provided by the contract of 41.45 percent of the sales price, for 264 days during which period the house did not sell.

Thereafter, the FAA discovered that the Corona residence was not the residence from which Mrs. Childress had commuted to her old duty station in Tucson, Arizona. Based on that finding, the FAA's Regional Accounting Manager concluded that there was no authority to pay real estate expenses and, therefore, no authority to pay PHH's fee. However, the FAA Director of Accounting argued that PHH had acted in good faith and should be paid. The matter was submitted to us for resolution.

In our decision of March 9, 1995, we concluded as follows:

> "Although PHH Homequity seeks payment under the terms of a contract, we believe the reasoning of Richmond [Office of Personnel Management v. Richmond, 496 U.S. 414 (1990)] applies equally to its claim. The contract between the agency and PHH homequity was entered into pursuant to the authority granted by 5 U.S.C. § 5724c and subject to the restrictions in section 5724a and in chapter 302, Part 12, of the FTR. Under these provisions, the FAA is only authorized to use its funds to pay real estate expenses for the sale of an employee's residence at the employee's old station. The agency lacks authority to use its funds to pay real estate expenses for the sale of an ineligible residence or to arrange with a relocation service contractor for the purchase and sale of an ineligible residence."

RECONSIDERATION REQUEST

PHH, through its counsel, offers several alternative legal arguments. It argues that: (1) the RSC had lawful discretion to make a determination that Mrs. Childress's Corona residence was eligible for relocation services, which determination bound the FAA whether or not the RSC erred in determining Mrs. Childress's eligibility; (2) even assuming that the ordering of home sale services for Mrs. Childress was unauthorized, the order should not be deemed a nullity because it was neither plainly nor palpably illegal; (3) the RSC's failure to determine Mrs. Childress's eligibility prior to placing an order is a breach of the contract or, alternatively, a constructive contract change; and (4) at a minimum, PHH is entitled to relief under the doctrine of quantum meruit. A discussion of each of these arguments follows below.

With respect to its first argument, PHH maintains that once the RSC determined eligibility, rightly or not, issued a service order, and the contractor performed, it became entitled to payment. PHH cites Twin Pipeline Company v. Harding Glass Co., 283 U.S. 353, 356-357 (1931), for the principle that contract agreements should be invalidated on grounds of public policy only in cases plainly within the reasons on which that doctrine rests. PHH argues that there is no public policy against enforcement of its contract in view of the language of 5 U.S.C. § 5724c, which broadly authorizes the discretionary use of agency funds to pay for services rendered under relocation services contracts.

PHH further argues that our reliance on Richmond in reaching our conclusion is misplaced. That case involved a claim by a retired government employee who received erroneous advice from a government employee concerning disability benefits. The Supreme Court held that the government is not estopped from denying benefits based on erroneous advice given by its agents because otherwise the Appropriation Clause of the U.S. Constitution could be rendered a nullity. In

PHH's view, its claim bears no resemblance to Richmond, since it is based on a contract rather than on a statutory entitlement.

The 1931 Supreme Court case cited by PHH (Twin Pipeline Company) is not relevant to this situation. The Court there dealt with the attempt of a manufacturing company to avoid the consequences of a contract with a public utility on the ground that the contract violated State public policy against monopolies. The Court rejected the argument, stating that it will not invalidate a contract on grounds of public policy unless the impropriety is convincingly shown, which it found not to be the case. The question at issue here is not one of public policy versus contract rights, but whether the government is bound to pay for a service erroneously authorized by its agent under a contract.

The short response to PHH's argument concerning the RSC's discretion to authorize home sale services for Mrs. Childress's Corona residence is that he had no discretion to do so. Section 5724a of title 5, United States Code, provides that under such regulations as the President may prescribe, appropriations or other funds available to the agency for administrative expenses are available for the reimbursement of all or part of the expenses of an employee for whom the government pays expenses of travel and transportation under section 5724(a) of this title, including "expenses of the sale of the residence . . . of the employee at the old station. . . ."

Section 5724c provides:

> "Under such regulations as the President may prescribe, each agency is authorized to enter into contracts to provide relocation services to agencies and employees for the purpose of carrying out the provisions of this subchapter. Such services include arranging for the purchase of a transferred employee's residence."

The regulations implementing these statutory provisions are found in Chapter 302, Part 12, of the Federal Travel Regulation (FTR).[1] As stated in our prior decision, FTR §§ 302-1.4(k) and 302-6.1(b) require that, in order for an employee to be reimbursed residence sales expenses, the residence must be the one from which the employee regularly commuted to and from the old official station. See Roger W. Montague, B-251211, Feb. 4, 1993. The performance of temporary duty away from the official station does not effect a change of station during the pendency of the temporary duty assignment. John E. Wright, 64 Comp. Gen. 268, 271-272 (1985). Therefore, since Mrs. Childress never regularly commuted from her residence in

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[1]41 C.F.R. §§ 302-12.1 to 302-12.7 (1995).

Corona to her official permanent duty station in Tucson, the Corona residence did not qualify as her residence at her old official station.

As PHH asserts, the Federal Circuit Court of Appeals has distinguished Richmond from a claim based on a contract. That court held that the government generally is legally responsible for the mistaken contract actions of its contracting officials when they are acting within the scope of their authority and not contrary to an express limitation of law. Burnside-Ott Aviation Training Center v. United States, 985 F.2d 1574 (Fed. Cir. 1993).[2] However, the court recognized in Burnside-Ott that an agency is not authorized to pay a contract claim contrary to statutory appropriations, even if its contracting officer agreed to the payment. Id. at 1581.

That is the situation involved here. An agency's authority to use its appropriation to provide home relocation services to a transferring employee is limited to services for the employee's residence at the old station. See 5 U.S.C. § 5724a(a)(4)(A) and FTR § 302-12.6(b)(2). Mrs. Childress's Corona residence did not qualify for relocation services under the statutory and regulatory criteria. Therefore, the agency's appropriation may not be used for the purpose of providing home sales services for that residence.

Alternatively, PHH argues that it should be paid in accordance with the rule that a contractor who commits no wrongdoing, but who unwittingly performs under an unauthorized order, can still enforce the order if it is neither plainly nor palpably illegal. PHH cites John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964) and Trilon Educational Corp. v. United States, 578 F.2d 1356 (1978), as well as other court cases and GAO decisions in support. PHH argues that the rule applies here because it acted in good faith, did not contribute to the mistake in ordering the services, and had no notice that the FAA was not following procedures when it ordered the services for Mrs. Childress. It argues that the order was not plainly or palpably illegal.

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[2]The contractor in Burnside-Ott sought an equitable adjustment because of having been required by the Department of Labor to pay an additional amount to employees due to their reclassification to a higher classification. The contractor contended that the contracting agency had been responsible for the misclassification and that its contract price should be increased accordingly. The Claims Court ruled against the contractor, concluding that, as a matter of law, even if government contracting officials had been responsible for the misclassification, the Richmond holding bars the application of equitable estoppel against the government for monetary claims. The Federal Circuit Court reversed the lower court on the basis that the contractor's claim was based upon its contract and was not automatically barred as a matter of law.

The rule cited by PHH applies to the situation where it has been determined that an erroneous award has been made. Rather than declare the erroneously-awarded contract void, the contractor would be allowed to recover its costs of performance under a termination for convenience, unless the illegality involved is plain and palpable. See 52 Comp. Gen. 214 (1972). This rule has no application where, as here, the action is outside the bounds of the agency's contract authority. A contractor who enters into an arrangement with an agent of the government bears the risk that the agent is acting outside the limitation of his authority, even if both the agent and the contractor were unaware of the limitation. See CACI, Inc., v. Stone, 990 F.2d 1233 (1993). Since the RSC had no authority to approve relocation services for Mrs. Childress's Corona residence, the FAA is not legally bound by that action.

PHH next argues that, even if the order for Mrs. Childress's relocation services is unenforceable, the agency, by issuing such an order, breached the contract or, alternatively, constructively changed the terms of the contract, entitling PHH to an equitable adjustment. This contention is not for our consideration. Whether the RSC's failure to determine Mrs. Childress's eligibility prior to authorizing the service gives rise to a breach of the contract or to a constructive change of the contract are claims that must be submitted to the contracting officer for decision, pursuant to the provisions of 41 U.S.C. § 605 (1994).

Finally, PHH argues that, at a minimum, it is entitled to relief under the doctrine of quantum meruit. It cites Prestex, Inc. v. United States, 320 F.2d 367, 373 (Ct. Cl. 1963) in support. There, the government was held liable for the value of what it had received from the contractor before the contract was invalidated. The quantum meruit doctrine is not applicable here. Since the FAA had no statutory or regulatory authority to pay the expenses of selling Mrs. Childress's Corona residence, it received no benefit from PHH's services in connection with that residence.

CONCLUSION

PHH's good faith in performing the service approved by the RSC is not in question. It is clear, however, that the service was unauthorized and that the RSC exceeded his authority when he approved that service. Under the Supreme Court holding in Richmond, the government is not legally bound by the erroneous actions of its agents when such actions obligate the government to pay money out contrary to the clear direction of a statute. Although the Federal Circuit Court of Appeals has distinguished Richmond from a claim based on the provisions of a contract, it has

recognized that the Supreme Court holding does apply to a contract claim of entitlement contrary to a statutory appropriation. Based on the existing precedent, we affirm our prior decision.

/s/Robert P. Murphy
for Comptroller General
of the United States