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

FILE: B-196466 **DATE:** December 2, 1982

MATTER OF: Alexander Sambolin - Entitlement to Home Leave Travel - Place of Actual Residence

DIGEST:

1. Federal Aviation Administration determined that employee's place of actual residence precluded travel at Government expense on home leave under 5 U.S.C. § 5728(a). 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. However, place of actual residence at time of transfer must be determined by agency on basis of all available facts.

2. Following our decision Matter of Rafael F. Arroyo, B-197205, May 16, 1980, reconsidered, B-197205, February 16, 1982, Federal Aviation Administration made a factual determination on the employee's place of actual 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, the employee is not entitled to home leave and round-trip travel expenses.

Mr. Alexander Sambolin requests a formal decision of this Office as to whether Sunrise, Florida, his post of duty prior to transferring to Puerto Rico, may be considered his place of "actual residence" for purposes of travel at Government expense on home leave. In denying Mr. Sambolin's claim, we are applying the analysis set forth in Matter of Rafael F. Arroyo, B-197205, May 16, 1980, reconsidered B-197205, February 16, 1982. In those decisions, we refused to substitute our independent judgment for that of the Federal Aviation Administration in determining that

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Mr. Arroyo's place of actual residence was San Juan, Puerto Rico, and we held that he was not entitled to travel to Miami, Florida, at Government expense for home leave purposes under 5 U.S.C. § 5728(a) (1976).

BACKGROUND

Information provided by Mr. Sambolin shows that he was born in Puerto Rico where he lived from September 3, 1934, to August 1941, when he moved to New York City. Mr. Sambolin returned to Puerto Rico in January 1959 and was hired by the Civil Aeronautics Administration in June of 1959. In January 1963, he became an Air Traffic Control Specialist in Puerto Rico with the Federal Aviation Administration (FAA). Mr. Sambolin states that, upon completion of a tour of duty in Alaska from August 1967 to August 1969, he was assigned to work in the San Juan Air Traffic Control Center until he transferred to the Miami, Florida, Air Traffic Control Center in August 1972.

Mr. Sambolin resided in Sunrise, Florida, for a period of 3 years and considers Sunrise to have been his principal actual dwelling place. The record shows that on April 29, 1975, Mr. Sambolin designated Sunrise, Florida, as his actual place of residence incident to his reassignment to San Juan, and that this designation was approved by the FAA on June 22, 1975, the date of his transfer. Accordingly, the SF-50 personnel action issued incident to his reassignment to San Juan stated that he was entitled to return rights and 45 days' leave accumulation.

On August 16, 1979, Mr. Sambolin was advised by the agency that its determination that his actual place of residence was Florida at the time of his transfer to San Juan was an administrative error since he had been initially appointed by the FAA on January 20, 1963, while he was in San Juan. Thus, he was informed that he was a "local hire" with a place of residence in Puerto Rico. Accordingly, a Standard Form 50, dated August 22,

1979, was issued to correct the personnel action of June 22, 1975, to show that he was ineligible for 45 days' leave accumulation and home leave travel.

GENERAL LEGAL AUTHORITY

The authority for the granting of round-trip travel expenses for an employee for the purpose of taking home leave upon completion of a tour overseas is 5 U.S.C. § 5728 which provides as follows:

> "(a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty."

Paragraph 2-1.5g(3)(c) of the Federal Travel Regulations (FTR) (FPMR 101-7) (May 1973) provides guidance in the determination of an employee's actual place of residence. It provides in part that this concept views residence as the employee's principal actual dwelling place in fact, without regard to intent. Thus, one of the guidelines in the FTR, para. 2-1.5g(3)(c)(ii) provides, in pertinent part, that "the

place at which the employee physically resided at the time of selection for appointment or transfer frequently constitutes the place of actual residence and shall be so regarded in the absence of circumstances reasonably indicating that another location may be designated as the place of actual residence."

In 39 Comp. Gen. 337 (1959), we stated that the "law and regulations do not preclude correction of errors in the overseas assignment or transfer records when it is later shown clearly that, in fact, the place of actual residence was other than the place named in the agreement and related papers.' Decisions of this Office have consistently held 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 require the agency's determination to be made on the basis of all available facts. 45 Comp. Gen. 136 (1965); 39 id. 337 (1959); 37 37 id. 048 (1958); 35 id. 101 (1955). 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 ARROYO CASE

In Matter of Rafael F. Arroyo, B-197205, May 16, 1980, our Office held that an agency could not properly predicate its determination of an employee's actual place of residence solely on our decision in B-157548, September 13, 1965, 45 Comp. Gen. 136, as the applicable regulations require an independent determination based on the facts of each case. Furthermore, in Arroyo we held that the fact that an employee was originally a "local hire" should not be made the sole criterion of residency determinations as such action would have the arbitrary and capricious effect of preventing a local hire from ever establishing a different place of

residence. Accordingly, we held therein that the determination of the employee's actual place of residence was to be made on the facts after giving the employee a full opportunity to provide evidence in support of his residence designation.

Following our decision of May 16, 1980, the agency made a factual determination regarding Mr. Arroyo's residence based on an independent review of all available evidence. 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, the FAA reaffirmed its determination that Mr. Arroyo's actual place of residence was San Juan, Puerto Rico.

At Mr. Arroyo's request we reconsidered the entire matter and by decision B-197205, February 16, 1982, we reasoned and concluded as follows:

> "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 circumstances.

"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)."

DEVELOPMENT OF THE SAMBOLIN CASE

Following our reconsideration of the Arroyo decision on February 16, 1982, we communicated with Mr. Sambolin by letter dated February 18, 1982, concerning his substantially similar claim involving his actual residence determination. We advised Mr. Sambolin that in view of our conclusions in the Arroyo case, it would be necessary--prior to any final adjudication by this Office--for him to request reconsideration of his residence determination by his administrative agency. In this way the agency could review the individual evidentiary facts of his case and make an actual residence determination under 5 U.S.C. § 5728(a), paragraph 2-1.5g(3) of the Federal Travel Regulations, and the interpretive guidance contained in the Arroyo decision.

On June 9, 1982, the Southern Regional Office of the Federal Aviation Administration responded with its final determination regarding Mr. Sambolin's petition to designate Sunrise, Florida, as his place of actual residence, stating as follows:

"In accordance with recent Comptroller General Decisions on the above subject matter, we have completed our review of your records and have made the following decision. Notwithstanding the fact that you resided in Sunrise, Florida during the time you were assigned to the Miami ARTCC from July 23, 1972 to June 1975, it is our determination that your residence there was only incident to your employment. We, therefore, reaffirm our previous decision that your place of actual residence for the purposes of biennial travel and home leave is San Juan, Puerto Rico."

Mr. Sambolin now requests a formal decision of this Office as to whether Sunrise, Florida, may be designated his place of actual residence for travel at Government expenses for home leave purposes under the provisions of 5 U.S.C. § 5728(a).

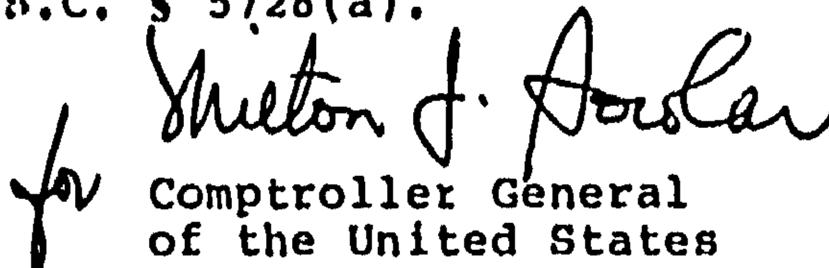
DISCUSSION AND CONCLUSION

As the Arroyo decisions make clear, the General Accounting Office has consistently construed the entitlement provisions of 5 U.S.C. § 5728(a) and the implementing regulations set out at paragraph 2-1.5g(3) of the Federal Travel Regulations as placing the responsibility for determining the actual residence of an employee on the employing administrative agency. Since such a determination must, of necessity, be based on the individual facts and circumstances of each case, this Office ordinarily will not question or otherwise interpose our judgment in regard to any reasonable determination made by the agency of the employee's actual residence.

Although there are conflicting considerations surrounding the designation of Mr. Sambolin's actual residence, we are unable to conclude on the basis of the

record that the agency's determination was clearly arbitrary, capricious, or contrary to law. Mr. Sambolin is a native of Puerto Rico and was initially hired while living in Puerto Rico to work in Puerto Rico. In approximately 20 years of service with the Federal Aviation Administration, about 15 of those years have been at a single duty station in San Juan, Puerto Rico. Mr. Sambolin resided in Sunrise, Florida, while he was assigned to duty in Miami, Florida, only from July 23, 1972, to June 22, 1975, when he again transferred and returned to Puerto Rico. Therefore, the FAA's determination that Mr. Sambolin's actual residence is San Juan and that his residence in Florida was only incident to his duties there must be accorded great deference. This Office will not substitute our independent judgment for that of the agency under these circumstances.

Accordingly, Mr. Sambolin is not entitled to travel to Sunrise, Florida, at Government expense for home leave purposes under 5 U.S.C. § 5728(a).



for Comptroller General
of the United States