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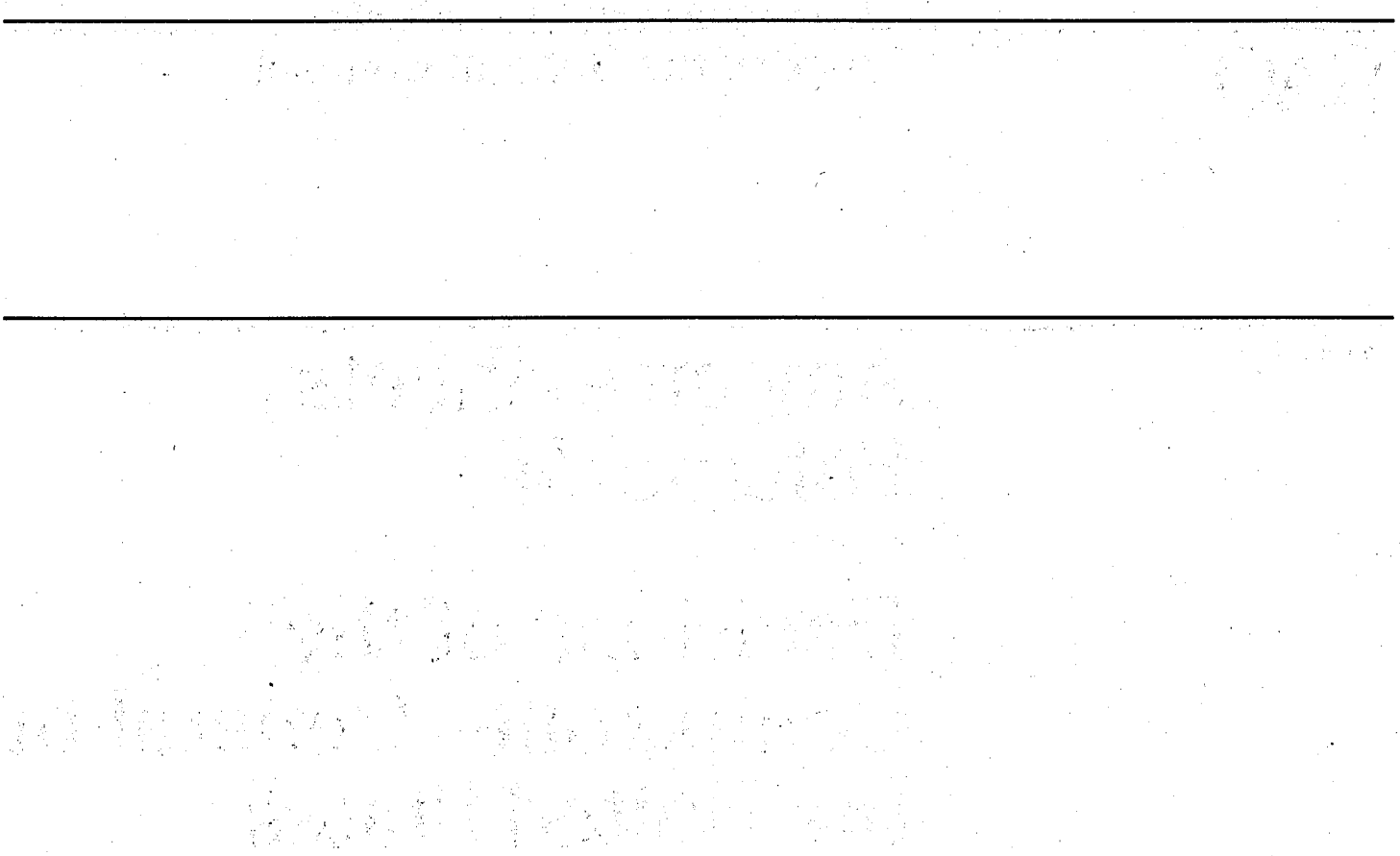

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Chief Petty Officer Stephen E. Fors, USCG--Claim for Flat Per Diem for Additional Travel Time

File: B-258265

Date: February 10, 1995

DIGEST

A member traveling to a new duty station with his dependents was delayed when his wife was hospitalized en route. His new commanding officer authorized additional travel time. Flat per diem is payable for the member and his dependents for the number of additional days authorized and actually used to complete the travel, since the Joint Federal Travel Regulations grant the commanding officer discretion to authorize additional travel time.

DECISION

This is in response to a request from an authorized certifying officer of the United States Coast Guard for an advance decision regarding the claim of Chief Petty Officer (Chief) Stephen E. Fors, USCG, for per diem for additional travel time in connection with a permanent change of station (PCS).[1] The claim may be allowed.

In 1993, the Coast Guard transferred Chief Fors from Elizabeth City, North Carolina, to Kodiak, Alaska. While Chief Fors and his family were traveling to his new duty station, his wife became seriously ill and was admitted to the Ellsworth Air Force Base hospital, Rapid City, South Dakota, on July 16, 1993. She was released from the hospital on July 25, but her doctor advised her not to travel until July 27. Chief Fors and his family arrived in Kodiak on August 4. The commander at Kodiak allowed 12 days of additional travel time, and Chief Fors claimed flat per diem for himself and his dependents for those days.

The certifying officer who submitted the claim questions whether flat per diem is payable for the additional travel time allowed Chief Fors under paragraph U5160-B2 of volume 1 of the Joint Federal Travel Regulations (JFTR). He calls our attention to a sentence in paragraph U5160-A which states that the travel time allowed under paragraph U5160 is not always related to the time allowed for per diem computation purposes. He also asks hypothetically whether additional travel time

[1]The Per Diem, Travel and Transportation Allowance Committee assigned control number 94-01 to the request.

could legitimately be approved for dependents under similar circumstances if they did not accompany the member and whether per diem would then be payable for them.

Under 1 JFTR para. U5105-B, a member on PCS travel is entitled to a monetary allowance in lieu of transportation (MALT) on a "per mile" basis plus flat per diem for travel by privately owned conveyance. If he is entitled to travel and transportation of dependents, MALT and flat per diem are generally payable for his dependents if they travel by privately owned conveyance. See 1 JFTR chapter 5, Part C. Under 1 JFTR para. U5160, 1 day of travel time is generally allowed for each 350 miles of the official distance of ordered travel. However, a member may be authorized additional travel time when travel is delayed for reasons beyond his control. As examples of such reasons, the JFTR list acts of God, restrictions by government authorities, difficulties in obtaining gasoline, and other reasons satisfactory to the member's new commanding officer. See 1 JFTR para. U5160-B2.

In the present situation Chief Fors's new commanding officer accepted Mrs. Fors's hospitalization as a satisfactory reason and allowed additional travel time. Since the JFTR expressly give the member's new commanding officer the discretion to approve additional travel time, this Office will not question the payment of flat per diem for the additional days as authorized and actually used to complete his travel. See Colonel William J. Camp, USAF, B-241848, Aug. 23, 1991.

We have been advised by the Per Diem, Travel and Transportation Allowance Committee that the provision in 1 JFTR para. U5160-A, that states that travel time allowed under this paragraph is not always related to the time allowed for per diem computation, has no application to this case. That provision relates to situations unlike the instant case where the use of a privately owned vehicle is not advantageous to the government and constructive travel time is used to compute per diem.

Regarding the certifying officer's hypothetical questions on payment of travel for dependents not accompanying a member, we would prefer addressing these issues if and when they arise within the factual context of an actual case, and therefore do not offer a response at this time.

Accordingly, the claim for flat per diem for additional travel time may be allowed for the number of days he utilized to complete his PCS travel if otherwise correct.

for Seymour Efros
Robert P. Murphy
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hubert G. Calloway

File: B-257971

Date: March 3, 1995

DIGEST

1. An employee, whose temporary promotion to grade GM-13, step 00, was canceled, should have reverted to his former grade and pay as a GS-12, step 6. Although the employee brought the error to the attention of his supervisor, he continued to be paid at the grade GM-13 level. Waiver of the debt is denied. Since the employee accepted payments known to be erroneous, he cannot reasonably expect to retain them and should make provision for eventual repayment. The fact that the employee may have brought the situation promptly to the attention of proper authorities does not alter that result.

2. An employee, whose temporary position as a grade GM-13, step 00, was canceled, should have reverted to his former grade and pay as a GS-12, step 6. Because of administrative error, he continued to be paid at the GM-13 level until he was transferred. On transfer, his pay should have been established at step 6 of grade 12, however, it was erroneously established at step 8 of that grade, which was a rate of pay higher than the erroneous GM-13 pay rate he had been receiving. Waiver of the debt is denied. Since he was aware of the earlier erroneous payment, he also had to know that he was not entitled to the pay of a grade GS-12, step 8, or at least should have questioned it.

DECISION

This decision is in response to an appeal by Mr. Hubert G. Calloway from our Claims Group's settlement Z-2926509, May 11, 1994, which denied waiver of his debt to the United States in the amount of $2,133.60. We sustain our Claims Group action, for the following reasons.

Briefly, the facts are that Mr. Calloway, an employee of the Department of the Army stationed in Germany, received a temporary promotion from grade GS-12, step 6, to grade GM-13, step 00, effective October 7, 1990, not to exceed February 6, 1991. After several extensions, the temporary position he occupied was canceled on November 16, 1991. However, because of administrative error, he continued to receive pay as a grade GM-13, step 00, until he was transferred from Germany to the Red River Army Depot (RRAD) in Texarkana, Texas, effective February 26, 1992. Since his official personnel file was not forwarded then, the RRAD Civilian

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Personnel Office erroneously established his grade as GS-12, step 8. When his official personnel file was received in May 1992, his grade was corrected to step 6 of grade GS-12, effective November 17, 1991, the day after his temporary grade GM-13 was canceled. As a result, he was overpaid $2,133.60, representing the excess salary paid as a GM-13, step 00, through February 25, 1992 ($1,042.40), and the excess salary paid as a GS-12, step 8, instead of step 6 of that grade, from February 26, 1992, through June 27, 1992 ($1,091.20).

Mr. Calloway argues that the personnel action reducing him from grade GM-13, step 00, to grade GS-12, step 6, was neither processed nor dated until after he had been returned to the RRAD in February 1992, thus suggesting that he did not know that he was being overpaid. We point out that in his letter to the Civilian Personnel Office of RRAD, dated August 4, 1992, seeking waiver, he acknowledged knowing that his GM-13 position was canceled in November 1991 and discussing it with his superior and that he continued receiving GM-13 pay until shortly after his transfer to RRAD. Later in correspondence dated September 21, 1993, addressed to the Commander, RRAD, in which he appealed the agency denial of waiver, he reiterated the fact that he had discussed the overpayment with his supervisor in Germany in December 1991.

Section 5584 of title 5, United States Code (1988), authorizes the Comptroller General to waive, in whole or part, claims of the United States against employees for overpayments of pay when collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, misrepresentation, fault, or lack of good faith by the employee. In the present case, the agency determined that the overpayments were due to administrative error and that there is nothing to suggest that the error was induced by Mr. Calloway. Notwithstanding that, the record shows that Mr. Calloway has admitted knowing that he was being overpaid as early as December 1991. Further, having admitted knowing that he should not be receiving pay at the GM-13 rate, he also had to know that he was not entitled to the pay of a GS-12, step 8 ($47,926), following his transfer to RRAD, at least he should have questioned it, since that pay rate was even higher than the erroneous GM-13 rate he had been receiving ($47,304).

Therefore, since Mr. Calloway was aware of the overpayment when it first occurred and continued to accept the payments known to be erroneous, he cannot reasonably expect to retain them and should have made provision for eventual repayment.[1] This is true, even though the employee may have brought the matter promptly to the attention of the proper authorities and sought an explanation or

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[1]Martha C. Barrios, B-245449, Nov. 26, 1991, and decisions cited. See also Terry R. Allison, et al., B-256934, Sept. 20, 1994.

correction of the error.[2] In view thereof, recovery of the overpayments would not be against equity and good conscience, nor contrary to the best interests of the United States. Accordingly, we sustain the denial of waiver in Mr. Calloway's case.

for Seymour Efros
Robert P. Murphy
General Counsel

[2]Richard W. DeWeil, B-223597, Dec. 24, 1986, and decisions cited.

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Deborah L. Childress

File: B-253202.2

Date: March 9, 1995

DIGEST

Upon the request of a transferred employee, an agency official authorized the agency's relocation service contractor to purchase the employee's residence listed on its travel documents. After the contractor had purchased the residence, the agency discovered that the listed residence was not the employee's residence at her old official station, and denied payment of the relocation service contractor's fee. The denial is sustained. Relocation service contracts entered into pursuant to 5 U.S.C. § 5724c (1988) and 41 C.F.R. Part 302-12 (1994) are subject to the limitations and restrictions found in 5 U.S.C. § 5724a and in Chapter 302 of the Federal Travel Regulation (FTR). See 41 C.F.R. § 302-12.6(b)(2). Under these provisions, residence sales expenses may be reimbursed only if the residence is the one from which the employee regularly commuted to the old official station. Since the listed residence does not qualify as the employee's commuting residence at her old official station, the contractor's fee for purchasing the employee's residence may not be paid, even though the agency authorized the contractor to act.

DECISION

This decision is in response to a request from the Federal Aviation Administration (FAA), U.S. Department of Transportation,[1] concerning the entitlement of PHH Homequity, a relocation service company, to be paid its fee for the purchase of a residence incident to the inter-agency transfer of Mrs. Deborah L. (Phelps) Childress in October 1992. In our opinion, the relocation service company should not be paid.

BACKGROUND

The employee, then Deborah L. Phelps, was employed by the United States Customs Service during 1992 and permanently stationed at Davis-Monthan Air Force Base, Tucson, Arizona. On July 16, 1992, Ms. Phelps, who was engaged to marry Mr. Richard Childress, leased her residence in Tucson to a third party for 1 year

[1]The request was submitted by Frank P. Cantrell, Accounting Division, Western-Pacific Region.

effective August 8, 1992. On or about July 28, 1992, she vacated that residence and shipped her household goods at her own expense to the residence of Mr. Childress in Corona, California, approximately 425 miles away. On August 7, 1992, she married Richard Childress, and thereafter considered his Corona residence as her permanent residence.

On August 23, 1992, Mrs. Childress began a temporary duty assignment for the Customs Service at nearby March Air Force Base, California, where she remained until September 26, 1992. On September 23, 1992, she received a job offer from the FAA for employment in San Pedro, California. She accepted the offer and received written confirmation of her acceptance by letter dated October 2, 1992, with instructions to report for duty on or about October 5, 1992.

The FAA issued travel orders to her authorizing permanent change-of-station travel for herself, her husband, and stepson, from Corona, California, to San Pedro, California; transportation and storage of household goods; and real estate transaction expenses.[2] Mrs. Childress requested the use of relocation services, listing her home in Corona, California, as her address on the requesting documents. On October 9, 1992, the FAA relocation services coordinator, after noting that the address listed on Mrs. Childress's travel order and on the documents requesting relocation services was the same, authorized the use of PHH Homequity to purchase and subsequently resell the residence owned by her husband in Corona.[3]

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[2]The FAA's initial decision not to pay the employee for the move of the household goods from Corona to San Pedro was appealed to this Office. We allowed payment because the Federal Travel Regulation provides for payment of such shipments from any point to any other point, and does not require that the shipment originate at the old duty station. Deborah L. Childress, B-253202, Oct. 8, 1993.

[3]Before relocation services may be authorized for an employee, the FAA Travel Manual provides at pages 5-107 and 5-108 that the relocation services coordinator should compare the former duty station location to the address shown on the employee's travel authorization and relocation services authorization forms. Further, paragraph 5-107 states that Travel Authorizing Officials "must ensure that the residence address shown on the travel authorization is the dwelling from which the employee regularly commutes to and from the duty station." If these instructions had been followed, the error in Mrs. Childress's documents would have been discovered before, rather than after, relocation services had been authorized.

On November 18, 1992, PHH Homequity contracted to purchase the Corona residence for $161,000 and closed the transaction on November 24, 1992. It sold the house in August 1993, and submitted fee invoices totaling $82,834.50.[4]

Following purchase of the Corona residence by PHH Homequity, the FAA discovered that it was not the residence from which Mrs. Childress had commuted to her old official 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 the claim of PHH Homequity. On the other hand, the Director of Accounting for the FAA, by letter dated March 2, 1994, takes the position that PHH Homequity acted properly and in good faith and that it would be improper for the government to deny the propriety of the order retroactively.

OPINION

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. . . ."

Regarding residence relocation services, section 5724c of title 5, United States Code (1988), 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 but need not be limited to arranging for the purchase of a transferred employee's residence."

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[4]The first invoice was for $16,100 representing 10 percent of the sales price. The second invoice was for $66,734.50 representing an additional fee of 41.45 percent of the sales price for 264 days during which the residence was in inventory and did not sell. The residence was eventually sold by PHH on August 9, 1993, for $149,500.

The regulations implementing the above code provision are those found in Chapter 302, Part 12, of the Federal Travel Regulation (FTR).[5] Section 302-12.6(b) thereof,[6] entitled "Requirement that contracts not violate other regulatory or statutory provisions," specifically states that:

> "(2) . . . Agencies must recognize that the statute and provisions of this chapter [302] contain certain limitations and restrictions which are not overridden by the new authority for relocation services. . . ."

The limitations and restrictions on reimbursement of expenses for the residence transactions of transferred employees are found in Chapter 302, Part 6, of the FTR.[7] Specifically, FTR section 302-6.1(b)[8] provides for reimbursement to an employee for the expenses of selling a residence at the old official station, provided that it is the residence as described in section 302-1.4(k) of the FTR.[9] With respect to entitlement under Chapter 302 relating to an employee's residence, section 302-1.4(k) defines the term "official station or post of duty" to mean, "the residence or other quarters from which the employee regularly commutes to and from work."

Sections 302-1.4(k) and 302-6.1(b) of the FTR, when read together, establish the requirement 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.[10] 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.[11]

Mrs. Childress's permanent duty station with the Customs Service at the time she was assigned to temporary duty at March Air Force Base, California, was Davis-Monthan Air Force Base, Tucson, Arizona, and it remained her official duty station through the period of her temporary duty and until she reported for duty at

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[5]41 C.F.R. Part 302-12 (1994).

[6]41 C.F.R. § 302-12.6(b) (1994).

[7]41 C.F.R. Part 302.6 (1994).

[8]41 C.F.R. § 302-6.1(b) (1994).

[9]41 C.F.R. § 302-1.4(k) (1994).

[10]Donjette Gilmore, B-241196.7, Aug. 13, 1993; Roger W. Montague, B-251211, Feb. 4, 1993.

[11]John E. Wright, 64 Comp. Gen. 268, 272 (1985); 52 Comp. Gen. 834 (1973).

her new official station with the FAA in San Pedro, California. Because she never regularly commuted from the residence in Corona to her official permanent duty station in Tuscon (the Corona residence was approximately 425 miles away from Tucson), the Corona residence does not qualify as her commuting residence at her old official station.[12]

The FAA's Director of Accounting recognizes that Mrs. Childress's Corona residence does not qualify as her commuting residence and that she was not entitled to receive home sales services on that property. Nonetheless, he believes that PHH Homequity's claim should be paid since it responded in good faith to an FAA order and that FAA should not be permitted to deny the validity of its own order.

We would agree with the Director's position if PHH Homequity's claim simply involved its rights under the provisions of its contract with FAA. As a matter of law, the government may be held legally responsibility for the contract actions of its contracting officials, even when they make mistakes, so long as they act within the scope of their authority and not contrary to law. Burnside-Ott Aviation Training Center v. United States, 985 F.2d 1575 (Fed. Cir. 1993); Broad Avenue Laundry and Tailoring v. United States, 681 F.2d 746 (Cl. Ct. 1982).

The government, however, is not bound nor estopped by the actions of its contracting officials ". . . in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." Utah Power & Light Co. v. United States, 243 U.S. 389, at 409 (1917). In Broad Avenue Laundry, supra., for example, while the Federal Circuit stated that a contracting officer has actual authority to embody mistakes of law in his or her decisions, the court recognized that the decision must be within the contracting officer's subject matter jurisdiction, not contrary to any express authority limitation, and must not call upon the contracting officer to do something illegal. Id. at 749. Similarly, in Burnside-Ott, the court distinguished the plaintiff's contract claim for an equitable adjustment after its employees were reclassified to a higher wage classification from a claim for the payment of money contrary to a statutory prohibition. In the latter situation, the court recognized that, consistent with the Supreme Court's holding in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), an agency would not be authorized to pay a contract claim contrary to a statutory prohibition, even if its contracting officer agreed to do so. Id. at 1581.

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[12]In her submission to GAO, Mrs. Childress presents evidence supporting her contention that she made the Corona, California, address her permanent residence before she requested relocation services for that residence. We do not dispute this contention. However, the eligibility of the residence for the services of a relocation contractor depends not on whether residence was the permanent residence of the employee, but on whether it was the residence from which the employee commuted to his or her former official duty station.

The Supreme Court in Richmond stated:

> "Extended to its logical conclusion, operation of estoppel against the Government in the context of payment of money from the Treasury could in fact render the Appropriations Clause a nullity. If agents of the Executive were able, by their unauthorized oral and written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive.... Estoppel would give this advice the practical force of law, in violation of the Constitution."

496 U.S. at 428.

Although PHH Homequity seeks payment under the terms of a contract, we believe the reasoning of Richmond 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 for the purpose of paying 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.

In CACI, Inc., v. Stone, 990 F.2d 1233 (1993), the Federal Circuit declared a contract void because the agency lacked procurement authority to enter into the contract. Citing Richmond, the court stated that a contractor who enters into an arrangement with an agent of the government bears the risk that the agent is acting outside the bounds of his authority, even when the agent himself was unaware of the limitation on his authority. Supra at 1236. Therefore, although FAA requested PHH Homequity to purchase Mrs. Childress's Corona residence, the agency lacked authority to do so and the order would result in an expenditure of agency funds contrary to a statutory limitation.[13]

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[13]Most recently, the Court of Federal Claims declared void a Navy contract with American Telephone and Telegraph Co., finding that the government had failed to comply with a statutory requirement that the agency make certain written determinations before awarding contracts of the type and dollar amount at issue in the case. The court explicitly tied the authority to obligate funds with the authority to contract:

> "[T]he authority to obligate funds is synonymous with the authority to contract. It follows, therefore, that absent compliance with the written

(continued...)

Accordingly, PHH Homequity should not be paid.

for Seymour Efros

Robert P. Murphy
General Counsel

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[13](...continued)
determinations requirement of Section 8118 [of the FY 1988 Defense Appropriations Act, PL 100-202], no authority to obligate funds came into being and thus no valid contract was created."

American Telephone and Telegraph Co. v. U.S., US Fed Cl, No. 93-483 C, (Feb. 7, 1995) at 15.