

NO. A11-1942

---

State of Minnesota  
 In Court of Appeals

---

In the Matter of: Jensen Field Relocation Claims

Jensen Field, Inc.,

*Claimant,*

Clay Adams, et al.,

*Relators,*

v.

The Board of Regents of the University of Minnesota,

*Respondent.*

---

**RELATORS' REPLY BRIEF**

---

Kirk A. Schnitker (#235611)  
 Jon W. Morpew (#287301)  
 SCHNITKER LAW OFFICE, P.A.  
 1330 – 81st Avenue N.E.  
 Spring Lake Park, MN 55432  
 (763) 252-0114

MARK B. ROTENBERG  
 General Counsel  
 JENNIFER L. FRISCH (#257928)  
 Associate General Counsel  
 University of Minnesota  
 360 McNamara Alumni Center  
 200 Oak Street S.E.  
 Minneapolis, MN 55455-2006  
 (612) 624-4100

*Attorneys for Relators*

*Attorneys for Respondent*

## TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	2
Argument	3
Conclusion	14
Form and Length Certification	15

**TABLE OF AUTHORITIES**

<b><u>STATUTES</u></b>	<b><u>PAGE</u></b>
<b><u>FEDERAL</u></b>	
49 C.F.R. Part 24	
Section 24.2(a)(9)(i)(B).....	5
Section 24.2(a)(15)(ii) .....	3
Section 24.2(a)(22).....	4
Section 24.301(a).....	9
Section 24.301(d)(1).....	9
Section 24.301(d)(2)(i) .....	9
Section 24.301(d)(2)(ii).....	9
Section 24.303 .....	11
<b><u>FEDERAL CASES</u></b>	
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988).....	12
<b><u>MINNESOTA STATE CASES</u></b>	
<i>Lee v. Fresenius Med. Care, Inc.</i> , 741 N.W.2d 117 (Minn. 2007) .....	6

## ARGUMENT

### **I. Relators' eligibility for relocation benefits vested on either the date they received notice they would have to move because of the wind turbine project or the date they actually moved from Jensen Field.**

In its brief, the University of Minnesota ("University") argues that because it had not yet received the formal grant award for the wind turbine project on November 17, 2009, Relators eligibility for relocation benefits could not have vested on that date.<sup>1</sup> (Resp't Br. p.27) That argument borders upon the absurd.

As noted in both Relators' memoranda of law to Vice-President O'Brien and its initial brief to this Court, a displaced person's eligibility for relocation benefits vests on the date they receive notice "that he or she will be displaced by the project *or*, if there is no notice, the actual move of the person from the property." 49 C.F.R. § 24.2(a)(15)(ii) (emphasis added).

In the November 17, 2009 letter that the University sent to Relators, it specifically acknowledged that it had recently received notice of an "award of up to \$8 million in federal stimulus funds for a research project at UMore Park involving wind energy . . . ." (Findings of Fact, Conclusions of Law and Order--Appendix B-033) As a result of that pending grant award and subsequent project, the University informed Relators that they would all have to move from Jensen

---

<sup>1</sup> In its brief the University also argues that the issue of the vesting date of eligibility was raised for the first time on appeal to this Court. (Resp't Br. p.27) This statement is simply not true. Relators raised this argument in both their initial memorandum of law to Vice-President O'Brien and their reply memorandum of law to Vice-President O'Brien. (Findings of Fact, Conclusions of Law and Order--Appendix A-025; A-103; A-131)

Field no later than October 31, 2010. This means that, at a minimum, because Relators were all lawful occupants of Jensen Field at that time, their collective eligibility for relocation benefits vested on that date.<sup>2</sup>

It is Relators' position that their eligibility for relocation benefits vested on November 17, 2009 and the University should have started providing them with the mandatory relocation advisory services and claim assistance at that time. However, as the University concedes in its brief to this Court, the University did receive the grant award funds from the DOE for the wind turbine project. (Resp't Br. p.27) Relators did end up having to move as they could no longer operate the Jensen Field airport because of the wind turbine project. (Findings of Fact, Conclusions of Law and Order--Appendix B-115) This means, at a minimum, Relators eligibility for relocation benefits vested on October 31, 2010 and the University should have started providing them with the mandatory relocation advisory services and claim assistance at that time. Either way, the date of the actual grant award is irrelevant.

---

<sup>2</sup> Additionally, as Relators previously noted to this Court, the URA defines project as "any activity or series of activities undertaken by a Federal Agency or with Federal financial assistance received *or anticipated in any phase of an undertaking . . .*" 49 C.F.R. § 24.2(a)(22) (emphasis added). This means that even if the University had not ultimately received the grant award for the wind turbine project from the Department of Energy ("DOE"), because it anticipated that it would receive that grant and informed Relators they would have to move from Jensen Field because of the wind turbine project, Relators would still have been eligible for relocation benefits.

**II. Relators are eligible for relocation benefits because they moved as a direct result of the rehabilitation or demolition of Jensen Field for the University's federally financed wind turbine project.**

In its brief the University makes the argument that in order for Relators to be eligible for relocation benefits they have to prove that their property interest was extinguished by the wind turbine project. (Resp't Br. p.21) This is false and a misstatement of the law. The extinguishment of a property interest has no bearing upon a displaced person's eligibility for relocation benefits as that would imply the necessity of a lease for a person to be eligible for relocation benefits.<sup>3</sup>

Relators only need to prove that they were lawful occupants of Jensen Field and that they moved "as a direct result of rehabilitation or demolition for a project . . . ." 49 C.F.R. § 24.2(a)(9)(i)(B). The facts prove that this occurred:

- Relators moved to Jensen Field in 1986 for the purpose of operating a recreational airport. (Stip. Facts, ¶22)
- Relators continued to lawfully occupy Jensen Field with the full consent of the University. (Stip. Facts, ¶¶2-25; Findings of Fact, Conclusions of Law and Order--Appendix A-175 – A-182)
- On November 17, 2009, the University informed Relators that as a result of the DOE grant award for the wind turbine project they would have to remove their personal property from Jensen Field, tear down and remove their airplane hangers and restore the land to the

---

<sup>3</sup> As Relators noted in their initial brief to this Court, there is no requirement in the URA for a displaced person to have a written lease with their landlord as a precondition to their eligibility for relocation benefits. As predicted, the University is not able to cite any such portion of the URA or cases in support of its argument in this regard. The University does cite a voluminous amount of cases that allegedly support their argument. However, like the cases cited in her decision by Vice-President O'Brien, almost all of those cases were decided or involved displacements that occurred prior to the 1987 amendments to the URA. Because of that those cases cannot involve claims of eligibility based upon displacements caused by federally financed rehabilitation or demolition projects and cannot address the issue of the vesting date of eligibility for displaced persons.

condition which existed at commencement of their use of the premises. (Stip. Facts, ¶22)

- On that same date, Relators were current on the payment of their rent to the University. (Stip. Facts, ¶28)
- Neither prior to nor after that date were Relators evicted from Jensen Field for serious or repeated violations of the material terms of their lease or occupancy agreement with the University. (Stip. Facts, ¶¶29-30)
- On January 15, 2010, the University received the formal grant award for the wind turbine project from the DOE. (Stip. Facts, ¶31)
- On or before October 31, 2010, Relators removed their airplane hangers, personal property, equipment and airplanes from Jensen Field as required by the University to accommodate the wind turbine project. (Stip. Facts, ¶35)

The conclusion in this regard could not be any easier. The *only* reason the University required Relators to vacate Jensen Field was because of the construction of the wind turbine project. Any self-serving assertions made to the contrary by the University are simply not believable and should be disregarded by this Court.

**III. This Court must review *de novo* Vice-President O'Brien's decision that Relators were not eligible for relocation benefits.**

In its brief, the University argues that this Court should not “second-guess” the factual findings of Vice-President O'Brien and should defer to her conclusion that Relators are not eligible for relocation benefits. (Resp't Br. p.31) This is an incorrect statement of the appropriate standard of review on this issue.

As Relators noted in their initial brief to this Court, deference is not to be given on questions of law and quasi-judicial administrative decisions involving statutory interpretation are reviewed *de novo* by this Court. *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007). That means this Court

must analyze the facts and come to its own conclusion regarding Relators' eligibility for relocation benefits, independent of the decision rendered by Vice-President O'Brien.<sup>4</sup>

**IV. Relators provided the necessary documentation in support of the expenses they incurred in moving from Jensen Field.**

In its brief, the University argues that the decision of Vice-President O'Brien should be affirmed by this Court because "there are no facts in the record which indicate that any of the Claimants actually moved anything anywhere or incurred any costs at all." (Resp't Br. p.38) Additionally, the University goes on further in its brief to argue that even if Relators did move personal property from Jensen Field, Vice-President O'Brien's decision should still be affirmed because only the expenses that Relators were actually able to document are eligible for reimbursement. (Resp't Br. pp.38-40) These two positions taken by both the University and Vice-President O'Brien demonstrate a failure to adequately review the facts stipulated to by the parties and a fundamental lack of understanding of the requirements of the URA.

**A. Relators removed their personal property, equipment, airplanes and airplane hangers from Jensen Field.**

In the Stipulated Facts, the University agreed that Relators had airplane hangers, airplanes, personal property and equipment located at Jensen Field. (Stip. Facts, ¶35) In the Stipulated Facts the University also agreed that on or before

---

<sup>4</sup> This would seem to especially true in case such as this one where Relators were not allowed to have a hearing in which they would have submitted evidence and

October 31, 2010, Relators moved, sold or otherwise disposed of their airplane hangers, airplanes, personal property and equipment located at Jensen Field. (Stip. Facts, ¶35) This obviously begs the question of how Vice-President O'Brien could have concluded that Relators did not move "anything anywhere." Those items did not just disappear into thin air, Relators took responsibility for removing those items from Jensen Field and they were in fact moved from Jensen Field. The only question that needs to be answered is whether the steps taken by Relators in documenting the expenses they incurred in this regard satisfied the requirements of the URA.

**B. Documentation of the actual costs incurred in moving personal property is only one of three acceptable methods to demonstrate a displaced person's moving costs under the URA.**

In its brief, the University argues that "[b]ecause Claimants cannot document their actual expenses—or any expenses at all—they failed to meet their burden to establish a claim for benefits." (Resp't Br. p.38) Additionally, the University requests this Court affirm the decision of Vice-President O'Brien in which she concluded "that Claimants 'provided no competent supporting documentation to substantiate their Claims' [sic] and 'provided no information at all to support any relocation claims . . .'" (Resp't Br. p.38) These conclusions are both factually and legally incorrect and should be corrected by this Court.

The moving expenses for which a displaced person is entitled to be reimbursed are contained within Subpart D—Payments for Moving and Related

---

expert testimony in support of their claim of eligibility for relocation benefits.

Expenses section of the URA. (Findings of Fact, Conclusions of Law and Order--Appendix A-157) Pursuant to 49 C.F.R. § 24.301(a), the relocation benefit payment provisions of Subpart D apply to “[a]ny owner-occupant or tenant who qualifies as a displaced person (defined at § 24.2(a)(9)) and who moves from a dwelling or who moves from a business, farm or nonprofit organization . . . .”

If that eligible displaced person moves from a business, the personal property of that business “may be moved by one or a combination of the following methods”:

1. Commercial Move—Under this option the displacing agency obtains two estimates prepared by a commercial mover, the displaced business is then allowed to hire the commercial moving company with the lower of the two estimates and the displacing agency pays that commercial moving company directly for their services. 49 C.F.R. § 24.301(d)(1). (Findings of Fact, Conclusions of Law and Order--Appendix A-163)

--OR--

2. Self-Move Based Upon Estimates—Under this option the displaced business performs the move on its own and the expenses incurred in moving that personal property are determined based upon up to two estimates obtained from commercial movers. 49 C.F.R. § 24.301(d)(2)(i). As noted in Relators’ initial brief to this Court, whether that personal property is moved, sold or otherwise disposed of it is irrelevant as the costs are capped based upon the estimate obtained.

--OR--

3. Self-Move Based Upon Actual Documented Costs—Under this option, the displaced business documents all of the expenses they incurred in performing the move based upon “receipted bills for labor and equipment.” 49 C.F.R. § 24.301(d)(2)(ii).

Relators elected to document the costs they incurred in moving their personal property, equipment and airplanes under Option #2, which is one the acceptable methods under the URA.

The argument made by the University that Relators are to blame because they did not obtain two move estimates is nothing more than a lame attempt to blame a victim for suffering an injury. The University could have obtained one, two or twenty move estimates, even if they were done just for the sake of preserving the record. But it did not do so and now it wants this Court to conclude that Relators should have done more, while it did nothing.

If this Court concludes that Relators were indeed eligible for relocation benefits, it will be impossible for the University to go back and reconstruct two move estimates because Relators' personal property is no longer located at Jensen Field. It would be unconscionable for the University to be able to successfully argue that "oops, it made a mistake" in not obtaining the two move estimates prior to the move and it should now benefit because of that failure. To do so would be to indemnify the University for its own negligence. The University's failure in this regard should not have been rewarded by Vice-President O'Brien and should not be rewarded by this Court.

If this Court determines that Relators were eligible for relocation benefits, it should also conclude that the one move estimate obtained by Relators prior to the move was sufficient in documenting their move claim.

**C. 49 C.F.R. § 24.303 is not applicable to the move costs incurred by Relators.**

The University cites 49 C.F.R. § 24.303 for the proposition that it “allows for the discretionary award of moving expenses . . . .” (Resp’t Br., p.39) As this was not a basis for Vice-President O’Brien’s denial of Relators’ moving costs claim, this argument should be disregarded by this Court.

Despite the University’s belief that 49 C.F.R. § 24.303 somehow provides a basis for the denial of Relators’ self-move claims, that section of the URA only applies to three very specific expenses incurred by a displaced business related to reestablishment of their business operations at their new replacement site. Those expenses are:

1. Connection to available nearby utilities from the right-of-way to improvements at the replacement site.
2. Professional services performed prior to the purchase or lease of a replacement site to determine its suitability for the displaced person’s business operation including but not limited to, soil testing, feasibility and marketing studies (excluding any fees or commissions directly related to the purchase or lease of such site). At the discretion of the Agency a reasonable pre-approved hourly rate may be established.
3. Impact fees or one time assessments for anticipated heavy utility usage, as determined necessary by the Agency.

49 C.F.R. § 24.303. Relators have not and will likely never make any such claims.

To date, the only claims submitted for reimbursement are for the move of their personal property, equipment and airplanes and those expenses have been properly documented pursuant to 49 C.F.R. § 24.301(d)(2)(i).

**V. The administrative appeal hearing procedure provided by the University was anything but “independent.”**

In support of its refusal to appoint a State of Minnesota Administrative Law Judge (“ALJ”) as the hearing officer, the University argues in its brief that the appointment of Michael T. Norton as “independent counsel” to Vice-President O’Brien demonstrates the extensive safeguards implemented by the University to ensure that Relators received sufficient procedural due process. (Resp’t Br. pp.15, 47) Such a position is laughable.<sup>5</sup>

Mr. Norton was not appointed in this matter to serve as “independent counsel”, he was appointed by the General Counsel for the University to be the “legal counsel to the Hearing Officer . . . .” (Add-1) Independent counsel are generally used in situations in which an employee or officer of the government is accused of wrongdoing and to avoid a conflict of interest the government uses outside/independent counsel to investigate whether there has been a violation of law. *Morrison v. Olson* 487 U.S. 654 (1988). If the independent counsel determines that there has been a violation of law, they may then prosecute the accused individual(s) on behalf of the government. *Id.*

---

<sup>5</sup> Relators find this position to be laughable because had the University really been interested in ensuring that they received full procedural due process protections a simple process was available. Even if it was not legally required to do so, the University could have just allowed Relators to have their hearing before an ALJ. Presumably, the University had a reason it did want Relators to have a hearing before an ALJ. Relators believe it was because the University knew it had a much better chance of winning in front of its own employees than before an ALJ. However, Relators will allow this Court to come to its own conclusion on this issue.

That was not Mr. Norton's role in this case. He did not perform any independent fact-finding or investigations to determine if the University violated the URA by not providing relocation benefits to Relators. Mr. Norton was retained and appointed by the General Counsel's Office (the same office that was also representing the University) to act as legal counsel for Vice-President O'Brien.

The University argues in its brief that because of this it provided Relators with "all process that was due", but its actions speak otherwise. (Resp't Br. p.48) Relators requested that the University provide them with a hearing before an ALJ pursuant to Minnesota Statute § 117.52, Subd. 4, as we know that request was denied. Relators will let this Court decide the merits of that denial.

The University also argues in its brief that the hiring of outside counsel, who they call "independent", proves its compliance with the requirements of due process. Relators have no idea what the "independent counsel" did because the record shows no investigatory work that he may have performed. As a result of this, Relators must assume that he did as he was appointed to do.<sup>6</sup> He provided legal counsel to Vice-President O'Brien and then the University calls this proof of compliance with the notions of due process. Relators call this argument laughable

---

<sup>6</sup> However, Relators do not know for sure what occurred between Vice-President O'Brien and Mr. Norton. As Vice-President O'Brien would not allow Relators to have a hearing, Relators can only speculate as to the substance of the discussions that occurred between Vice-President O'Brien and Mr. Norton because they are not part of the record.

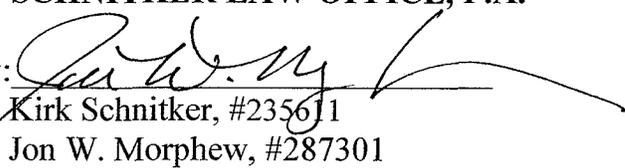
and believe that this absolute lack of objectivity should call into question all of the University's arguments in this matter.

**CONCLUSION**

Based upon the foregoing, Relators again respectfully request that this Court reverse the decision of Vice-President O'Brien, determine that they are displaced persons eligible for relocation benefits and that they are entitled to be reimbursed \$141,825.00 for the costs they incurred in moving their personal property, equipment and airplanes from Jensen Field.

Respectfully submitted, this 8<sup>th</sup> day of FEBRUARY, 2012.

**SCHNITKER LAW OFFICE, P.A.**

By: 

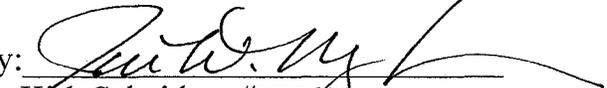
Kirk Schnitker, #235611  
Jon W. Morpheu, #287301  
1330 81<sup>st</sup> Avenue Northeast  
Spring Lake Park, MN 55432  
763/252-0114  
Attorneys for Relators

**FORM AND LENGTH CERTIFICATION**

I certify that this brief conforms to the rules contained in the Minnesota rules of Appellate Procedure for a brief produced using the following font: Times New Roman, 13 point. The word count for the brief is 3,214.

Dated: 02/08/12

**SCHNITKER LAW OFFICE, P.A.**

By: 

Kirk Schnitker, #235611

Jon W. Morphey, #287301

1330 81<sup>st</sup> Avenue Northeast

Spring Lake Park, MN 55432

763/252-0114

Attorneys for Relators