



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 10, 2014

CBCA 3619-RELO

In the Matter of KENNETH T. DONAHOE

Kenneth T. Donahoe, Winter Garden, FL, Claimant.

Erica L. Binelli, VA Services Relocation Contract, PCS Travel Section, Department of Veterans Affairs, Austin, TX, appearing for Department of Veterans Affairs.

LESTER, Board Judge.

Claimant, Kenneth T. Donahoe, M.D., appeals the decision by the Permanent Change of Station (PCS) Travel Section of the Department of Veterans Affairs (DVA), denying his request for a waiver of the time limit for completing his PCS relocation. The DVA asserts that, under the Federal Travel Regulation (FTR), it lacks authority to grant a waiver. For the reasons explained below, we sustain the agency's decision.

Background

Dr. Donahoe was employed as Chief Medical Officer at the James H. Quillen VA Medical Center in Mountain Home, Tennessee. While working in Mountain Home, Dr. Donahoe resided in La Follette, Tennessee, approximately forty miles north of Knoxville. The DVA does not dispute that Dr. Donahoe regularly commuted on a daily basis from his residence in La Follette to his work location.

Effective October 17, 2011, Dr. Donahoe was transferred, in the interest of the Government, from Mountain Home to The Villages Outpatient Clinic (The Villages OPC) in The Villages, Florida. Through a VA Form 3036c, "Travel Authority for Permanent Duty," the DVA notified Dr. Donahoe that he was entitled to reimbursement for certain relocation expenses, including, among others, certain expenses associated with the settlement

of the sale of his residence in La Follette. The form indicated that, to be eligible for reimbursement for settlement expenses, Dr. Donahoe had to “accomplish settlement for the sale . . . on residence transactions no later than” October 17, 2012, one year after his transfer date.

The DVA offered Dr. Donahoe two options for assistance in the sale of his La Follette residence: (1) Dr. Donahoe could sell his home himself and, assuming that he sold and closed on that home within one year of his new duty station report date, seek direct reimbursement from the agency for customary and reasonable sale transaction costs up to ten percent of the residence’s actual sale price, or (2) he could participate in the Buyer Value Option (BVO) program administered by the DVA’s relocation services contractor (RSC). On September 8, 2011, in anticipation of his impending transfer, Dr. Donahoe elected to participate in the BVO program. Under that program, Dr. Donahoe, using the RSC, was to list his residence for sale through a referred network agent. Although Dr. Donahoe would actively participate in selling his residence, the network agent would work directly with any potential buyer to complete the sale process and would pay the closing costs itself (for which the DVA would later reimburse the agent). The DVA informed Dr. Donahoe in a September 1, 2011, e-mail message, through which the DVA provided him with an overview of his relocation entitlements under the BVO option, that “your home needs to sell and close no later than one year from your repost date to remain in the Buyer Value Option program.” In accordance with the requirements of the BVO program, Dr. Donahoe listed his home for sale through a network agent on October 7, 2011.

As of October 2012, Dr. Donahoe’s residence in La Follette had not sold. On October 16, 2012, the DVA granted Dr. Donahoe a one-year extension to his PCS benefits, extending the time for completion of a sale of his residence in La Folette under the BVO option to and including October 17, 2013.

Just before the extended deadline of October 17, 2013, Dr. Donahoe found a potential buyer for his La Follette home. The potential buyer, however, had requested a closing date beyond Dr. Donahoe’s October 17 deadline. On or about October 9, 2013, Dr. Donahoe contacted the DVA’s PCS Travel Section to ask for another extension of the deadline to close on the sale of his La Follette property. In response, the DVA immediately contacted the RSC to encourage it to expedite the sales process so that Dr. Donahoe could meet the October 17 sale deadline. At the same time, the DVA informed Dr. Donahoe that the FTR only allows “for a one year extension to your PCS home sale benefit” and that, “[u]nfortunately, no additional time can be authorized.”

The RSC subsequently informed the DVA that the potential buyer had elected not to submit an offer on the La Follette property, and the DVA, in turn, notified Dr. Donahoe

through an e-mail message dated October 16, 2013, that it would ask the RSC “to close your file tomorrow since your BVO benefit expires at that time.”

On the morning of October 17, 2013, Dr. Donahoe sent an e-mail message to the DVA PCS Travel Section representative with whom he had been dealing, requesting an additional extension of his closing date deadline pursuant to section 302-2.106 of the FTR. Under that provision, the agency head or his designee is entitled to waive any regulatory limitations for an employee relocating from a “remote or isolated location” if he or she determines that failure to waive would cause the employee to suffer undue hardship:

302-2.106 May we waive statutory or regulatory limitations relating to relocation allowances for employees relocating to/from remote or isolated locations?

Yes, the agency head or his/her designee may waive any statutory or regulatory limitations for employees relocating (to/from a remote or isolated location) when determining that failure to waive the limitation would cause an undue hardship on the employee.

41 CFR 302-2.106. Dr. Donahoe asserted that he was moving from a “remote town in [Tennessee] with a mean annual income significantly below the poverty line” and that a failure to waive the time limitation for the sale and close of his La Follette home would certainly cause him undue hardship.

After receiving Dr. Donahoe’s request, the DVA representative contacted a representative of the Relocation Services Branch of the Center for Transportation Management within the General Services Administration (GSA), asking for advice about Dr. Donahoe’s request, but indicating that she did not consider his residence to be located in a remote area:

He participated in the BVO program and his benefits originally expired 10/17/2012, but he was approved a 1 year extension through 10/17/2013. He did not sell his home and is now stating he is in a remote location and feels VA has the authority to extend past the 1 year extension based on this regulation. However, his home is located in a town with 7,300 inhabitants and is 37 miles outside of Knoxville, which has 175K inhabitants. Brookfield [the relocation contractor] was able to find realtors who service the area. **I would not consider his**

home remote. The FTR does not define what it would consider remote.

(Emphasis added.) In response, a program analyst at GSA indicated to the DVA representative that, in his view, the location of the employee's residence is irrelevant to the waiver provision in section 302-2.106 of the FTR. He advised the DVA representative that the waiver under that provision can apply only if the employee's actual work station (in this instance, Mountain Home) is remote, rendering the location of the actual residence from which the employee is relocating irrelevant.

Subsequently, on the afternoon of October 17, 2013, the DVA representative notified Dr. Donahoe that the relevant location for evaluating remoteness under section 302-2.106 was his official work location, not his residence. Further, she informed him that, because she did not find the work location from which he was relocating to be remote, the DVA could not extend his relocation deadline under section 302-2.106:

The implication is the work station is remote; not the residence location. If a residence is remote it is by employee choice to live there. Your work location was . . . not remote. In accordance with the FRT, the time limitation would still apply and your entitlements expire today.

On November 15, 2013, Dr. Donahoe filed his challenge to the DVA's decision with the Board.

Discussion

I. The Time Limit For Completing Relocation

By statute, when an employee is transferred in the interest of the Government from one official station to another for permanent duty, "the agency is to reimburse the employee for the expenses of the sale of the employee's residence at the old official station." *Wayne A. Wetzel*, GSBCA 16017-RELO, 03-1 BCA ¶ 32,224, at 159,350 (citing 5 U.S.C. § 5724a(d)). The FTR implements this statutory requirement, providing "an allowance for expenses incurred in connection with residence transactions" when an employee transfers "from an old official station to a new official station . . .," 41 CFR 302-11.1, so long as the new duty station is at least fifty miles from the old station. *Id.* 302-1.1(b), -2.6. The FTR provisions governing reimbursement for real estate transactions are specifically authorized by subchapter II of chapter 57, title 5, United States Code, and, "[a]s such, they have the force and effect of law and may not be waived or modified by an employing agency."

Donald R. Stacy, 67 Comp. Gen. 395, 400 (1988); see *Keith Johnson*, CBCA 3793-RELO, slip op. at 2 (Aug. 21, 2014) (“Reimbursements under [5 U.S.C. § 5724a(d)] are subject to the [FTR], a legislative rule that has the force and effect of law”) (quoting *Linda Cashman*, CBCA 3495-RELO, 14-1 BCA ¶ 35,535).

Under the FTR, if the employee’s old and new official stations are both in the United States, the employee can qualify for reimbursement for expenses incurred in the sale of his old residence if, at the time that he is notified of his transfer, he occupies the residence and regularly commutes to work from it and back on a daily basis. 41 CFR 302-11.5, -11.100. Nevertheless, the FTR imposes a time limit of one year (running from the date that the employee reports for duty at his new official station) for the employee to close upon the sale of his residence at the old official station, with a potential extension of up to an additional year:

§ 302-11.21 How long do I have to submit my claim for reimbursement of expenses incurred in connection with my residence transactions?

Your claim for reimbursement should be submitted to your agency as soon as possible after the transaction occurred. However, the settlement dates for the sale and purchase or lease termination transactions for which reimbursement is requested must occur not later than 1 year after the day you report for duty at your new official station. . . .

§ 302-11.22 May the 1-year time limitation be extended by the agency?

Yes, your agency may extend the 1-year limitation for up to one additional year for reasons beyond your control and acceptable to your agency.

41 CFR 302-11.21, -11.22. This time limitation is mirrored in the FTR deadline for the completion of all relocation expenses, which also requires incurrence of all relocation expenses within one year (with the possibility of a one-year extension). See 41 CFR 302-2.8, -2.11.

In lieu of direct incurrence of relocation expenses by the transferring employee and reimbursement by the agency, the FTR permits an agency to authorize the employee to use a relocation services company (RSC), selected by the agency, to assist in the relocation, see 41 CFR 302-12.1, an election that Dr. Donahoe made in this case. Because the regulations

addressing the use of RSCs expressly limit expenses incurred through RSCs “to what [the employee] would have received under the direct reimbursement provisions” of the FTR, 41 CFR 302-12.5, the one-year time limitation and one-year extension period applicable to the direct reimbursement option, *see id.* 302-11.21, -11.22, apply equally to expenses incurred by RSCs.

In this case, Dr. Donahoe was to report for duty at his new official station at The Villages OPC on October 17, 2011. Unable to sell his residence in La Follette within the one-year deadline, he requested, and the DVA granted, a one-year extension under sections 302-2.11 and 302-11.22 of the FTR, giving him until October 17, 2013, to sell and close upon his La Follette residence. Although Dr. Donahoe was unable to sell his old residence by that extended deadline, the FTR does not provide for more than a single one-year extension. *See Aresh Raychaudhuri*, CBCA 2449-RELO, 11-2 BCA ¶ 34,821, at 171,344 (section 302-2.11 does not authorize time extensions beyond the period identified in that section), *reconsideration denied*, 11-2 BCA ¶ 34,835.

II. The Viability of Dr. Donahoe’s Waiver Request

Although Dr. Donahoe acknowledges that sections 302-2.11 and 302-11.22 only provide for a single one-year extension of the residential sale deadline, he argues that the agency, pursuant to section 302-2.106 of the FTR, can waive those time limits and that the DVA improperly did not do so here.

Under section 302-2.106, an agency can waive statutory or regulatory limitations relating to relocation expenses for employees transferring from or to a “remote” or “isolated” location if it “determin[es] that failure to waive the limitation would cause an undue hardship on the employee.” 41 CFR 302-2.106. GSA added this provision to the FTR in 1996 to comply with section 1722 of the Federal Employee Travel Reform Act of 1996, Pub. L. No. 104-201, 110 Stat. 2752, 2758 (Sept. 23, 1996), which expressly directed GSA to permit an agency head or his designee to waive such statutory and regulatory limitations “notwithstanding any other provisions” of Title 5, Chapter 57, Subchapter I of the United States Code, as follows:

The Administrator of General Services shall include in the regulations authority for the head of an agency or his designee to waive any limitation of this subchapter or in any implementing regulation for any employee relocating to or from a remote or isolated location who would suffer hardship if the limitation were not waived. A waiver of a limitation under authority provided in the regulations pursuant to this paragraph

shall be effective notwithstanding any other provision of this subchapter.

5 U.S.C. § 5738.

Dr. Donahoe is correct that, if he satisfied the prerequisites for application of section 302-2.106, the DVA would have discretionary authority to waive the one-year-plus-one-extension-year time limitation otherwise applicable to the reimbursement of his home sale expenses. *See Robert G. Carrell II*, GSBCA 16113-RELO, 03-2 BCA ¶ 32,358, at 160,066 (“The FTR permits the agency head or his designee to waive regulatory limitations when an employee transfers from a remote or isolated location and when the agency determines that failure to waive the limitations would cause an employee undue hardship.”). However, that waiver provision applies only if the employee is relocating to or from a “remote” or “isolated” location. *See* 5 U.S.C. § 5738; 41 CFR 302-2.106.

Here, Dr. Donahoe’s request for a waiver fails for two reasons:

First, the agency is correct that, although the FTR waiver provision does not expressly state that the “remote or isolated location” mentioned there is the employee’s official work location, the context of the regulations makes clear that the work site from which the employee is relocating is the provision’s focus. The FTR repeatedly discusses “relocation” in terms of a transfer from (and to) the employee’s “official station” or “duty station.” *See, e.g.*, 41 CFR 302-1.1 (employee is eligible for relocation expense allowances if transferring “from one . . . duty station to another for permanent duty”); *id.* 302-2.2 (“you must have the written [Travel Authorization] . . . before you relocate to your new official station”); *id.* 302-2.5 (discussing costs borne by employee if employee chooses to relocate from “a location other than the location specified in [his] relocation travel authorization”). The FTR defines the employee’s “official station” as “[a]n area defined by the agency that includes the location where the employee regularly performs his or her duties” and that cannot be “more than 50 miles from where the employee regularly performs his or her duties.” *Id.* 300-3.1. Here, it is clear that the agency defined the “official station” from which Dr. Donahoe was relocating as the James A. Quillen VA Medical Center in Mountain Home, Tennessee. It was that official station, from which Dr. Donahoe was relocating, that forms the basis of any waiver analysis under section 302-2.106.

To the extent that any ambiguity existed regarding which “location” (work site or residential) is referenced in the section 302-2.106 waiver provision, the history of the FTRs provides additional guidance. Prior to 2001, the FTR contained a definition of “official station” that, for purposes of evaluating residential relocation entitlements, expressly

designated the residence from which the transferring employee regularly commuted to and from work as falling within the employee's "official station," as follows:

Official station or post of duty. The building or other place where the officer or employee regularly reports for duty. . . .
With respect to entitlement under this chapter relating to the residence and the household goods and personal effects of an employee, official station or post of duty also means the residence or other quarters from which the employee regularly commutes to and from work. . . .

41 CFR 302-1.4(k) (2000) (emphasis added). Under that definition of "official station," the agency would have had to consider whether Dr. Donahoe's residence in La Follette was "remote" for purposes of the section 302-2.106 waiver analysis, given that the regulation expressly made his residence a location that was considered a part of Dr. Donahoe's "official station."

In 2001, however, that definition of "official station" was stricken from the FTR. *See* 66 Fed. Reg. 58,194 (Nov. 20, 2001). In its place, the FTR contained a definition of "official station" that removed the employee's residence from the equation, limiting the official station to "the location of the employee's . . . permanent work assignment." 41 CFR 300-3.1 (2002).¹ When the drafters of regulations or statutes alter or amend them, it is presumed that they intended to effect a change in application. *See United States v. Wilson*, 503 U.S. 329, 336 (1992) (discussing "the general presumption that Congress contemplates a change whenever it amends a statute"). Clearly, by changing the "official station" definition, the drafters of the FTR chose to eliminate the location of an employee's residence as a basis for creating additional rights when an employee is transferred from one official station to another. Given the drafters' affirmative effort to remove an employee's residence as the focal point of entitlements under the FTR, we understand the term "remote or isolated location" in section 302-2.106 as referencing the employee's official work location. Accordingly, Dr. Donahoe cannot obtain a waiver under section 302-2.106 based upon the remoteness of his residence.

Second, even if the "location" referenced in section 302-2.106 encompassed Dr. Donahoe's residence, the DVA actually considered whether Dr. Donahoe's residence in La

¹ That definition was later amended to its current form, which focuses on the "location where the employee regularly performs his or her duties." 41 CFR 300-3.1 (2013).

Follette was “remote” when evaluating his waiver request and concluded that it was not.² On the record here, we have no basis upon which to overturn that determination. Neither the statute nor the FTR contains any definition of the terms “remote” or “isolated.” *Charles T. Oliver*, GSBCA 16346-RELO, 04-1 BCA ¶ 32,614, at 161,405. “Given the absence of a specific definition of ‘remote area’ in the FTR, the determination of whether a particular location fits this description is a matter left to the discretion of the employee’s agency.” *William T. Orders*, GSBCA 16095-RELO, 03-2 BCA ¶ 32,389, at 160,290; *see Oliver*, 04-1 BCA at 161,405 (because “there is no definition of ‘remote area’ in the FTR,” the “determination of whether a particular locaiton fits this description is . . . a matter left to the reasonably exercised discretion of the employee’s agency”). “[W]e will not disturb an agency’s discretionary judgements unless we are convinced that they are arbitrary, capricious, or clearly erroneous.” *Orders*, 03-2 BCA at 160,290.

Here, the City of La Follette, Tennessee, is less than forty miles from Knoxville. Further, it is accessible to Knoxville from Interstate 75. In such circumstances, it was well within the agency’s discretion to find that La Follette is not “remote” under section 302-2.106.

III. The Effect Of The DVA’s Alleged Misinformation About Time Limitations

Finally, Dr. Donahoe asserts that the agency initially provided him with inconsistent information about the length of time that he had to complete the sale of his Tennessee residence. He indicates that, although the DVA initially provided him with documents indicating that he had one year, plus a possible one-year extension period, to complete the sale of his La Follette residence, it also provided him a document stating that he had two years, plus the possiblity of an additional two years, to do so. Although he has not provided the Board with a copy of the latter document, the information allegedly contained within it was outdated, and incorrect, by the time of Dr. Donahoe’s relocation.

Entitlements to relocation expenses “are determined by the regulatory provisions that are in effect at the time” that the transferred employee reports for duty at his new official station. 41 CFR 302-2.3 (2013). Prior to August 1, 2011, the FTR provided for a two-year relocation period, with the potential for an additional two-year extension. *See* 66 Fed. Reg. 58,194, 58,198 (Nov. 20, 2001). In a final rule published on April 1, 2011, however, the

² Although the agency did not notify Dr. Donahoe of this remoteness determination in its written response to his waiver request, the record is clear that the agency internally made this determination, and Dr. Donahoe has had a full opportunity to present to the Board his views regarding La Follette’s remoteness.

GSA Office of Governmentwide Policy announced that the time period for completing relocations would be reduced from two years (with the potential for a two-year extension) to one year (with the potential for a one-year extension). *See* 76 Fed. Reg. 18,326, 18,336 (Apr. 1, 2011). That change became effective August 1, 2011. *Id.* at 18,326. Because the effective date of Dr. Donahoe’s transfer was October 17, 2011, the one-year-plus-one-extension-year limitation applies to his relocation, and the agency lacks authority to extend it beyond the regulatory limits. “It is well-established that the Government may not authorize the payment of money if not in accordance with statute and regulation.” *Orders*, 03-2 BCA at 160,290 (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), & *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)); *see Oliver*, 04-1 BCA at 161,405 (“absent a specific provision in statute or regulation granting an exception under certain circumstances, neither an agency nor this Board has the authority to waive, modify, or depart from the Government’s official travel regulations for the benefit of any federal employee who is subject to them”). Accordingly, the agency’s communication of information that conflicts with the regulation cannot bind the agency. *See Bruce Hidaka-Gordon*, GSBICA 16811-RELO, 06-1 BCA ¶ 33,255, at 164,834 (even if employee relies to his detriment on agency’s assurances, the law prohibits agency from honoring commitments made outside its authority).

Decision

For the foregoing reasons, we sustain the agency’s decision denying Dr. Donahoe’s request to waive the time limitations on his relocation benefits.

HAROLD D. LESTER, JR.
Board Judge