



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 15, 2009

CBCA 1290-RELO

In the Matter of MICHAEL F. McGOWAN

Michael F. McGowan, Knoxville, TN, Claimant.

Benjamin B. Hamlow, Office of Chief Counsel, Customs and Border Protection, Department of Homeland Security, Indianapolis, IN, appearing for Department of Homeland Security.

STERN, Board Judge.

Claimant, Michael F. McGowan, requests this Board's review of the denial by the United States Customs and Border Protection of the Department of Homeland Security (Customs and Border Protection) of claimant's request to be released from a relocation service agreement. Customs and Border Protection seeks reimbursement from Mr. McGowan of \$33,563.70 for the alleged breach of the service agreement.

Background

Mr. McGowan was stationed in Ottawa, Canada, and completed his two-year tour of duty in 2004. He agreed to relocate to Port Canaveral, Florida. As part of his transfer, on August 17, 2004, Mr. McGowan executed an employment agreement pursuant to which he agreed,

That in consideration of any monies expended by the Government for travel, transportation and relocation allowances in connection with [claimant's] transfer [claimant] will remain in the service of the Government and at [claimant's] duty station for [twelve months after the date of transfer] unless separated for reasons beyond [claimant's] control that are acceptable to [DHS].

The employment agreement also provided that in the event claimant violates the agreement, any funds expended by Customs and Border Protection would be recoverable from claimant as a debt due the United States.

Mr. McGowan began his service at Port Canaveral on October 4, 2004. Customs and Border Protection paid for claimant's relocation. On March 1, 2005, Mr. McGowan retired from government service. On September 9, 2005, Customs and Border Protection sent a letter to Mr. McGowan, based upon his failure to fulfill his employment agreement, seeking reimbursement in the amount of \$33,563.70, representing the excess amount, according to DHS, that it spent in relocating Mr. McGowan, over that which it would have paid had he retired in Ottawa.

By letter of September 12, 2005, Mr. McGowan requested a waiver of the assessment. Mr. McGowan claimed that extenuating circumstances related to medical concerns of both him and his wife necessitated his retirement.

Mr. McGowan requests that the Board grant him a waiver of the assessment, the right to return to work to pay off the assessment, or to pro-rate the amount allegedly due to reflect the months that he worked at Port Canaveral.

The United States Customs Service (now Customs and Border Protection) and the National Treasury Employees Union (NTEU) executed a collective bargaining agreement (CBA) in 1996, which, by its terms, governs all nonprofessional employees, like Mr. McGowan, employed by Customs and Border Protection.

Discussion

A threshold issue for us to decide is whether Mr. McGowan is subject to the terms of the CBA, and if so, whether that agreement deprives us of authority over this matter.

Customs and Border Protection claims that the Board does not have jurisdiction or authority over this matter since the matter is subject to the terms of the CBA. Mr. McGowan claims that since he resigned from the union in 2002 and is now retired, he is not subject to the terms of that agreement.

The CBA provides that Mr. McGowan may be represented by the union "without regard to labor organization membership." CBA art. 3, §§ 3, 4. Thus, Mr McGowan is subject to the terms of and may pursue those rights afforded him by the CBA, whether or not he is a union member.

Mr. McGowan further asserts that he is not covered by the CBA since he has retired. The incident in question here, the alleged breach of his employment agreement, occurred while he was still employed. Thus, the terms of the CBA which pertain to Mr. McGowan continue to apply. *Muniz v. United States*, 972 F.2d 1304, 1311-13 (Fed. Cir. 1992).

A remaining issue is whether there is a dispute provision in the CBA which applies and deprives us of authority over this matter. Federal statute provides that the procedures established in a collective bargaining agreement for the settlement of disputes “shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.” 5 U.S.C. § 7121(a)(1) (2000). Unless a matter is specifically excluded, it is covered by the provisions of the collective bargaining agreement. 5 U.S.C. § 7121(a)(2). In accordance with this statute, the CBA provides for the settlement of grievances of employees. CBA art. 3, § 8.

Article 31 of the CBA contains the grievance procedure. A grievance is defined in the CBA as any issue raised by an employee in the bargaining unit concerning any matter related to the employment of the employee. CBA art. 31, § 3. A. A grievance includes “any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment,” by an employee in the bargaining unit. CBA art. 31, § 3. C. The dispute here is one involving the application of the law and regulations involving employment agreements to Mr. McGowan’s situation. The CBA contains no exclusion for this type of dispute. It is clear to us that Mr. McGowan, as a member of the bargaining unit, has a right under the CBA to file a grievance regarding his dispute with the Government.

In a prior case involving the reimbursement of subsistence expenses, we stated,

Under the Civil Service Reform Act of 1978, where a collective bargaining agreement provides procedures for resolving grievances which are within the scope of the agreement, and the agreement does not explicitly and unambiguously exclude the disputed matter from these procedures, the procedures are the exclusive administrative means for resolving the dispute. *Claudia J. Fleming-Hewlett*, GSBCA 14236-RELO, 98-1 BCA ¶ 29,534; *Larry D. Morrill*, GSBCA 13925-TRAV, 98-1 BCA ¶ 29,528. This matter, therefore, must be dismissed for lack of jurisdiction, since the claimant must follow the disputes procedure mandated by the collective bargaining agreement.

Byron D. Cagle, GSBCA 15369-RELO, 01-1 BCA ¶ 31,333; *see also Roy Burrell*, GSBCA 15717-RELO, 02-2 BCA ¶ 31,860; *Robert M. Blair*, GSBCA 15570-RELO, 01-2 BCA ¶ 31,511. *But see Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (the Court

distinguished between judicial and administrative relief and found that a judicial remedy was available to resolve a matter otherwise covered by a collective bargaining agreement).

The grievance procedure in the CBA provides the exclusive administrative means to resolve this dispute. If he chooses, Mr. McGowan must avail himself of that procedure to solve this dispute. We lack authority to resolve it. Mr. McGowan's claim is dismissed.

JAMES L. STERN
Board Judge