



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 29, 2015

CBCA 4411-RELO

In the Matter of JAMES A. KESTER

James A. Kester, Ashburn, VA, Claimant.

Roland D. Meisner, Assistant General Counsel, Office of General Counsel, Defense Security Service, Quantico, VA, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

The situation that befell James A. Kester gives expression to the sardonic phrase, “I’m from the Government and I’m here to help you.” Unfortunately for Mr. Kester, we can do nothing about his predicament.

Background

The Defense Security Service (DSS) actively recruited Mr. Kester, who at the time was not a federal employee, to work for that agency. DSS promised him numerous relocation benefits, including temporary quarters subsistence expenses and reimbursement of transaction expenses incurred in selling his old residence and buying a home near his new duty station. Mr. Kester accepted the position in reliance on this commitment; indeed, he says that the package of benefits “was so substantial, it was . . . the driving reason I elected to depart my previous employer, no longer consider other employer offers, relocate myself to Quantico [Virginia] (pending my family), and to take the position with DSS.” The agency issued travel orders which authorized payment of the promised benefits.

Mr. Kester began work with DSS in August 2014. In September, he submitted to the Defense Finance and Accounting Service (DFAS) his first voucher for payment of relocation benefits. DFAS informed him that although he was entitled to reimbursement for travel of

himself and his family, and transportation of his household goods, he was not entitled to other benefits which were authorized in his orders. He complained to DSS about this response. In return, he received this memorandum from the chief of the agency's human capital management office:

On behalf of the Defense Security Service, I want to extend our sincere apologies for the frustrations you have experienced with your permanent change of station (PCS) orders pursuant to accepting a position with DSS effective August 25, 2014. We recognize you accepted the job with the understanding, based on what DSS personnel told you, that you were eligible for a range of PCS allowances and entitlements that the law in fact does not allow DSS to provide.

We have researched every possible avenue for providing more of the PCS benefits that you were erroneously promised. Unfortunately, DSS does not have the authority to compensate you for more benefits than those you are legally entitled to receive.

Mr. Kester says that because DSS has not provided the benefits it promised, he and his family have suffered serious financial and emotional distress. He asks the Board to direct payment of the benefits (or a financial settlement) "to account for DSS negligence."

Discussion

The kinds of relocation benefits which may be paid to individuals who move to new locations to take on assignments from federal agencies are prescribed by statute. Benefits available to new appointees are provided in sections 5722 and 5723 of title 5 of the United States Code (2012). These benefits include travel of the individual and his family, and transportation of their household goods. Benefits available to employees who are transferred from one duty station to another in the interest of the Government are provided in sections 5724 and 5724a of title 5. These benefits include – in addition to those for new appointees – temporary quarters subsistence expenses and reimbursement of transaction expenses incurred in selling the employee's residence near his old duty station and buying a home near his new station. *Evester Edd*, CBCA 1582-RELO, 09-2 BCA ¶ 34,232; *Andrew J. Marks*, CBCA 672-RELO, 07-2 BCA ¶ 33,602.

An individual like Mr. Kester who returns to the Government after a break in service is by regulatory definition a new appointee.¹ 41 CFR 302-3.1(b) (2014); *see Michael C. Kostelnik*, CBCA 3483-RELO, 13 BCA ¶ 35,430; *Edd*. As a new appointee, Mr. Kester was entitled, under the statutory provisions cited above, to only the limited set of relocation benefits which DFAS allowed.

As we have done in previous cases which are similar to Mr. Kester's, we express dismay at actions taken by agencies which misled new employees into believing they will receive benefits which, under law, they may not receive. We strongly encourage agencies to ensure that their travel and transportation officials provide accurate advice to these individuals as to the proper scope of their first hire relocation benefits, and to ensure that travel authorizations are properly prepared. *Marks* (citing *David W. Brown*, GSBCA 16721-RELO, 06-1 BCA ¶ 33,147 (2005), and *Opher Heymann*, GSBCA 16687-RELO, 05-2 BCA ¶ 33,104).

While these measures may help other new employees, we cannot provide to Mr. Kester the benefits he was promised and then denied. As we have explained before:

Allowing an agency to make a payment for a purpose not authorized by statute or regulation would violate the Appropriations Clause of the Constitution. U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.") The Supreme Court consequently has made clear that an executive branch employee's promise that the Government will make an "extrastatutory" payment is not binding. Where relevant statute and regulations do not provide for payment for a particular purpose, an agency may not make such payment.

¹ There is an exception to this rule: an individual who was separated from government employment as a result of a reduction in force or a transfer of functions, and is re-employed within one year after such action, is not considered a new employee. 41 CFR 302-3.1(b). This exception does not apply to Mr. Kester, whose previous government employment ended in 2002.

Kostelnik; Julie N. Lindke, CBCA 1500-RELO, 09-2 BCA ¶ 34,141 (both citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), and *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)).

Whether DSS may pay to Mr. Kester a recruitment bonus, pursuant to 5 U.S.C. § 5753, is a matter not presented to us by either party. In any event, it involves a matter of compensation, rather than relocation expenses, so if a challenge to an agency determination on this matter arises, we would not have authority to settle the claim. *See* 31 U.S.C. § 3702(a)(2), (3).

STEPHEN M. DANIELS
Board Judge