



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 18, 2015

CBCA 3875-RELO

In the Matter of CHRISTOPHER G. COVER

Christopher G. Cover, Santa Fe, NM, Claimant.

Suzanna Hartzell-Baird, Office of Assistant Chief Counsel, Customs and Border Protection, Department of Homeland Security, Indianapolis, IN, appearing for Department of Homeland Security.

KULLBERG, Board Judge.

Claimant, Christopher G. Cover, a former air interdiction officer with Customs and Border Protection (CBP), is claiming the expense of relocating from his former duty station in Puerto Rico, which was outside the continental United States (OCONUS), back to his former residence in the continental United States (CONUS) upon the termination of his employment.¹ CBP contends that Mr. Cover's claim should be denied in spite of the fact that this Board has already ruled that such expenses shall be paid in cases involving two of Mr. Cover's former coworkers under circumstances that are virtually identical to the facts in this matter and, consequently, are controlling precedent in this case. *See Matthew C. Hawk*, CBCA 3832-RELO, 14-1 BCA ¶ 35,635; *William G. Sterling*, CBCA 3424-RELO, 13 BCA ¶ 35,438, *motion for reconsideration denied*, 14-1 BCA ¶ 35,483 (2013). Mr. Cover and the claimants in *Hawk* and *Sterling* were first-time federal

¹ Previously, the Board determined that Mr. Cover's claim for the expense of relocation back to CONUS was premature because he was then employed by CBP and had taken no action to terminate his employment. *Christopher G. Cover*, CBCA 3520-RELO, 14-1 BCA ¶ 35,505, at 174,034.

employees who resided in CONUS at the time they were appointed as air interdiction officers, and all three were assigned to the same duty station in Aguadilla, Puerto Rico. *Hawk*, 14-1 BCA at 174,498; *Cover*, 14-1 BCA at 174,034; *Sterling*, 13 BCA at 173,814. Accordingly, the Board finds, for the reasons stated below, that Mr. Cover is entitled to be paid by CBP for the expense of relocation from his OCONUS duty station back to his residence in CONUS at the time of his appointment.

Background

Mr. Cover resided in Corpus Christi, Texas, when he applied for a position as an air interdiction officer with CBP, an agency within the Department of Homeland Security (DHS). By letter dated May 17, 2007, CBP notified Mr. Cover that he had been selected for employment as an air interdiction agent with CBP in Aguadilla, Puerto Rico. The vacancy announcement for Mr. Cover's position stated that newly hired federal employees would not be paid for the expense of relocation to their new duty stations. Mr. Cover was not reimbursed for the cost of moving from his home in Texas to Puerto Rico. His employment with CBP commenced on September 4, 2007. After working for almost five years at his duty station, Mr. Cover attempted unsuccessfully to obtain a transfer to another CBP facility within CONUS.

Mr. Cover submitted his letter of resignation to CBP on April 10, 2014. In his letter he said: "I hereby state my clear intent to resign from CBP Office of Air and Marine while overseas under 'Constructive Discharge/Forced Resignation' conditions on or about July 1, 2014." His letter cited the Board's decision in *Sterling* as supporting his entitlement to relocation costs. In his letter, he also requested guidance for receiving travel expenses in connection with his separation. CBP took no action regarding Mr. Cover's request to be reimbursed for his relocation expenses, and he subsequently filed his claim with the Board. Mr. Cover's resignation from CBP became final on July 1, 2014.

After the docketing of this matter, the Board directed Mr. Cover to submit a claim to CBP for his actual incurred relocation expenses. On November 10, 2014, Mr. Cover submitted to CBP his claim in the amount of \$21,784. He also represented that he could not move his household goods, which were in storage, until CBP funded his move. The Board then directed CBP to render a decision regarding Mr. Cover's claim. In its letter to Mr. Cover, which was dated December 5, 2014, CBP's regional director stated the following:

Please be advised that CBP has been in communication with [DHS] regarding this matter to determine how best to proceed in light of CBP's concerns that both the vacancy announcement under which you were hired and the applicable law supports denying your claim, notwithstanding the Civilian

Board of Contract Appeals' (CBCA) recent rulings on separation relocation expenses. Specifically, CBP has concerns that the CBCA's recent decisions stating that separation relocation expenses are mandatory contradict and seemingly disregard the plain language of 5 U.S.C. § 5722 and 41 CFR § 302-3.207, which identify that such expenses are within the discretion of employing agencies. As a result, CBP is in the process of seeking additional guidance and is unable to provide you with a decision on your claim at this time.

On December 5, 2014, CBP filed its motion to vacate the Board's previous direction that CBP adjudicate Mr. Cover's claim. In its motion to vacate, CBP stated that it "has been in communication with [DHS] regarding this matter to determine how to best proceed in light of the fact that both the vacancy announcement under which Cover was hired and the applicable law supports denying his claim, notwithstanding the CBCA's recent rulings on separation relocation expenses." Agency Motion to Vacate at 4-5. The Board denied CBP's motion.

Discussion

The issue in this matter is whether Mr. Cover is entitled to be paid for the expense of his relocation to his former residence in CONUS even though CBP did not pay for his initial move to Puerto Rico, and he did not execute a written service agreement. Mr. Cover contends that he should be reimbursed for that expense in light of the Board's decisions in *Hawk* and *Sterling*. CBP disputes those decisions and, for that reason, contends that it cannot adjudicate Mr. Cover's claim at the agency level until it receives guidance from DHS. Even if the Board does render a decision in this matter, CBP contends that the Board should deny Mr. Cover's claim because it did not properly decide *Hawk* and *Sterling*. The Board finds no merit in CBP's position in this matter.

As an initial matter, the Board addresses CBP's request that this matter be dismissed because it disputes the Board's decisions in *Hawk* and *Sterling* and cannot, for that reason, adjudicate Mr. Cover's claim until it receives guidance from DHS. Statute provides that "[t]he Administrator of General Services shall settle claims involving expenses incurred by Federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty station." 31 U.S.C. § 3702(a)(3) (2012). That statutory authority to settle claims for the expense of relocation and official travel has been delegated by the Administrator of General Services to this Board, and under that delegation of authority, this Board's decisions "constitute final administrative action on these claims, not subject to review within the agency." ADM P 5450.39D, at 157 (Nov. 16, 2011). Additionally, that same delegation of authority by the Administrator for General

Services provides that this Board can issue, in accordance with 31 U.S.C. § 3529, an advance decision regarding a payment or voucher at the request of a disbursing or certifying official or head of an agency. *Id.* The Board's decisions on such requests "constitute final administrative action . . . not subject to review within the agency." *Id.* The Board's authority in this matter or in any other case regarding travel or relocation, therefore, is by delegation of statutory authority, and "once the Board has settled a claim, the agency must follow the Board's decision." *Janice F. Stuart*, GSBCA 16596-RELO, 05-2 BCA ¶ 33,024, at 163,668. "The law does not permit an agency to reverse the decision." *Id.* Our claims settlements, consistent with the statutory command, are final within the executive branch of Government.

In response to Mr. Cover's claim, the Board's rules provide that CBP can either grant or deny Mr. Cover's claim or request an advance decision. The Board's rules state the following:

Any claim for entitlement to travel or relocation expenses must first be filed with the claimant's own department or agency (the agency). The agency shall initially adjudicate the claim. A claimant disagreeing with the agency's determination may request review of the claim by the Board.

Rule 401(c) (48 CFR 6104.401(c) (2014)). The December 5, 2014, letter from CBP's regional director can only be construed as a denial of Mr. Cover's claim. Under the Board's rules, Mr. Cover can request a decision by this Board because he disagrees with CBP's determination. The Board's rules do not require Mr. Cover to wait until CBP has discussed this matter with DHS. If CBP had wanted to seek guidance in this matter, it could have requested, in accordance with statute, an advance decision from the Board. In any case, CBP's consultation with DHS regarding this matter is not grounds for dismissal.

Having established that the Board may proceed with deciding Mr. Cover's claim, it is necessary to consider whether his claim can be granted in light of statute, the Federal Travel Regulation (FTR), and the Board's previous decisions in *Sterling* and *Hawk*. Statute, in pertinent part, provides the following:

- (a) Under regulations prescribed under section 5738 of this title and subject to subsections (b) and (c) of this section, an agency may pay from its appropriations—
 - (1) travel expenses of a new appointee and transportation expenses of his immediate family and his household goods and personal effects from the place

of actual residence at the time of appointment to the place of employment outside the continental United States;

(2) these expenses on the return of an employee from his post of duty outside the continental United States to the place of his actual residence at the time of assignment to duty outside the continental United States; and

....

(c) An agency may pay expenses under subsection (a)(2) of this section only after the individual has served for a minimum period of—

....

(2) not less than one nor more than 3 years prescribed in advance by the head of the agency . . . ;

unless separated for reasons beyond his control which are acceptable to the agency concerned. These expenses are payable whether the separation is for Government purposes or for personal convenience.

5 U.S.C. § 5722 (2012). As was also the case in *Hawk* and *Sterling*, the relevant FTR section in this matter states the following:

Must my agency pay for return relocation expenses for my immediate family and me once I have completed my duty OCONUS?

Yes, once you have completed your duty OCONUS as specified in your service agreement, your agency must pay one-way transportation expenses for you, for your family member(s), and for your household goods.

41 CFR 302-3.300 (FTR 302-3.300). As the Board explained in *Sterling*, “this provision is not permissive. . . . [T]he expenses an employee incurs in moving back to the United States for separation must be paid by the Government.” 13 BCA at 173,816.

Consistent with the Board’s decisions in *Hawk* and *Sterling*, Mr. Cover is also entitled to his relocation expenses for returning to his former residence even though he did not execute a service agreement. In *Sterling*, this Board stated the following:

We have already held that the absence of a service agreement will not defeat a claim for renewal agreement travel. We see no reason why it should defeat a claim for return relocation expenses, either, when an employee has served OCONUS at least the length of time generally held by the agency to constitute a tour of duty. An agency “policy of denying overseas employment rights to employees depending on whether an assignment is ‘rotational’ or ‘permanent’ . . . is unsupported.”

Sterling, 13 BCA at 173,816 (quoting *Estelle C. Maldonado*, 62 Comp. Gen. 545, 552 (1983)). The Board reached the same result in *Hawk*. 14-1 BCA at 174,500.

Mr. Cover served almost seven years as an air interdiction officer with CBP in Puerto Rico from 2007 to 2014. Had Mr. Cover executed a service agreement, CBP could have required that he serve a minimum tour of one year up to a maximum tour of three years after appointment. 5 U.S.C. § 5722(c)(2). Although he did not have a service agreement, Mr. Cover’s entitlement to the expense of his relocation back to CONUS accrued as a result of his serving at an OCONUS duty station well in excess of the maximum length of a tour that could have been required under a service agreement. See *David K. Swanson*, GSBGA 13661-RELO, 97-1 BCA ¶ 28,794, at 143,639.

CBP erroneously argues that “where a new employee is not offered initial relocation expenses . . . it follows that the employee . . . would also be responsible for paying his way if desires to go back to CONUS.” The Comptroller General has recognized the following:

[W]here a transferred employee fails to execute a service agreement, through inadvertence or otherwise, but does perform the minimum required Government service after reporting for duty at his new permanent duty station, the service agreement need not be executed in order for the employee to be entitled to reimbursement for relocation expenses incident to that transfer.

Baltazar A. Villarreal, B-214244 (May 22, 1984). The fact that Mr. Cover was not paid for the expense of moving to Puerto Rico and, for that reason, did not execute a service agreement, has no bearing on his claim in this matter, which is the expense of returning to CONUS. As discussed above, his entitlement is pursuant to statute and the FTR. CBP, consequently, cannot assert that Mr. Cover’s acceptance of his position in Puerto Rico under the terms of the vacancy announcement and without a service agreement caused him to waive his entitlement to the expense of relocating back to his former residence. See *Amy Preston*, CBCA 3434-RELO, 13 BCA ¶ 35,465, at 173,913 (an agreement by an employee to waive a statutory pay or allowance is not binding).

In its response to Mr. Cover's claim, CBP argues that it has the discretion under 5 U.S.C. § 5722 to decide whether Mr. Cover should be paid his relocation expenses because that section of statute states that an agency "may" pay such expenses, and FTR 302-3.300 contradicts statute by requiring such payments. In response to CBP's motion for reconsideration in *Sterling*, the Board addressed CBP's concerns about the difference between the language in 5 U.S.C. § 5722 and FTR 302-3.300. 14-1 BCA at 173,961. The Board explained then that there was no such conflict, and the Board again addresses this issue.

The prefatory language in 5 U.S.C. § 5722 (a) states: "[u]nder regulations prescribed under section 5738 of this title . . . an agency may pay from its appropriations." Under 5 U.S.C. § 5738(a)(1), "the Administrator of General Services shall prescribe regulations necessary for the administration of this subchapter." It is pursuant to that statutory authority that the Administrator of General Services has promulgated the FTR. 41 CFR 300-1.2. The following is well established:

[T]he FTR is a "legislative rule" – a regulation issued under express authority from Congress, for the purpose of affecting individual rights and obligations by filling gaps left by a statute, after following the Administrative Procedure Act's notice and comment provisions. It therefore has controlling weight – the force of law – unless the provision in question is arbitrary, capricious, or manifestly contrary to statute. Any agency rule which is inconsistent with an FTR provision is consequently trumped by the FTR and must give way.

Kevin D. Reynolds, CBCA 2201-RELO, 11-1 BCA ¶ 34,756, at 171,061. As the Board explained in response to CBP's request for reconsideration in *Sterling*, "agencies must . . . follow regulations prescribed by the Administrator of General Services." 14-1 BCA at 173,961. That part of 5 U.S.C. § 5722 was "key" to the Board's decision. *Id.* The word "may" as it is used in 5 U.S.C. § 5722, therefore, relates to an agency's authority to make payments subject to regulations prescribed by the Administrator of General Services, which is the FTR. Consequently, applying statute, 5 U.S.C. § 5722, in this case necessarily requires applying the FTR. Conversely, applying statute while ignoring the FTR, which is CBP's position, would amount to acting contrary to statute.

CBP argues, at length, that Congress must have meant for the word "may" to give it discretion to determine Mr. Cover's entitlement. Conspicuously absent from CBP's submissions is any statement from Congress that the authority of the Administrator of General Services to promulgate regulations pursuant to statute has been qualified or limited so as to give agencies the unfettered discretion to ignore those regulations. Such an interpretation as put forth by CBP that it has discretion apart from the FTR to determine

Mr. Cover's entitlement to his relocation expenses would make the statutory authority behind the FTR meaningless. It is a well established principle that "[n]o statutory construction should be adopted that would render statutory words or phrases meaningless, redundant, or superfluous." *Ace American Insurance Co.*, CBCA 2876-FCIC, et al., 14-1 BCA ¶ 35,791, at 175,061 (citing *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 489 n.13 (2004)).

Decision

Mr. Cover is entitled to be reimbursed for his relocation expenses from his previous OCONUS assignment back to his residence in CONUS at the time of his appointment.

H. CHUCK KULLBERG
Board Judge