UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 28, 2015

CBCA 4998-RELO

In the Matter of MILTON BROWN

Milton Brown, Rockville, MD, Claimant.

Mary Schaffer, Senior Attorney, Office of the Chief Counsel, Bureau of the Fiscal Service, Department of the Treasury, Parkersburg, WV, appearing for Department of the Treasury.

LESTER, Board Judge.

The Department of the Treasury's Bureau of the Fiscal Service (Fiscal Service), acting upon behalf of the Centers for Disease Control and Prevention (CDC), has submitted a request for review of its decision to deny reimbursement of relocation expenses that the CDC's now-retired employee, Milton Brown, incurred in purchasing a new home at the duty station to which he was transferred. The Fiscal Service asserts that, pursuant to Rule 402 of the Board's Rules, 41 CFR 6101.402 (2014), Mr. Brown requested that it submit his claim for Board review. For the following reasons, we must deny Mr. Brown's claim.[1]

[1] The Fiscal Service also indicates that the CDC itself "is seeking an advisory opinion from [the] CBCA to determine if the agency's decision . . . was proper." Pursuant to Board Rule 502(a), which implements the requirements of 31 U.S.C. § 3529 (2012) (section 3529), a disbursing or certifying official of an agency, or the head of an agency, may request from the Board what we typically call an "advance decision" regarding a claim for
(continued...)

Background

Mr. Brown was the Deputy Chief Financial Officer (DCFO) at the Nuclear Regulatory Commission in Rockville, Maryland, when he agreed to become the Chief Financial Officer (CFO) at the CDC in Atlanta, Georgia. As part of his job change, the CDC authorized relocation allowances for Mr. Brown's transfer to Atlanta, including travel costs, household goods transportation and storage, expenses associated with the sale of his residence in the Washington, D.C., area, and expenses associated with the purchase of a new residence in the Atlanta area.

Mr. Brown began his work with the CDC on June 17, 2013. Pursuant to 41 CFR 302-11.21 (2014), Mr. Brown had one year, to and including June 17, 2014, to purchase a new residence at his new duty station and receive reimbursement for the transaction expenses he incurred in making the purchase. In April 2014, Mr. Brown requested an extension of that deadline because he had not yet found a new residence that he wanted to purchase, and, on May 8, 2014, the CDC approved that request, extending the deadline by one year, to and including June 17, 2015.

On December 5, 2014, Mr. Brown notified the CDC that he was retiring from federal service. On December 29, 2014, Mr. Brown signed his final retirement paperwork and called a relocation coordinator at the Fiscal Service to notify the agency that he would officially retire effective January 2, 2015. During that telephone conversation, Mr. Brown mentioned that he had signed a contract on December 26, 2014, to purchase a home in Atlanta, but that closing on the home was not scheduled to occur until January 26, 2015. In response to Mr. Brown's inquiry as to whether the agency's 2013 relocation authorization would encompass reimbursement of the closing costs on his new home, the Fiscal Service relocation coordinator stated that those closing costs would be covered because the relocation authorization was active until June 17, 2015, and sent him an expense worksheet to assist in the reimbursement process.

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[1](...continued)
relocation expenses incident to a transfer of official duty stations. Once the agency has made and issued a decision, as the Fiscal Service has done here, it generally "is inappropriate" for the agency to seek an advance decision, or advisory opinion, under section 3529. *Andrew W. Frank*, GSBCA 16919-RELO, 06-2 BCA ¶ 33,364, at 165,403. Because the agency here has already decided Mr. Brown's claim for relocation expenses, we can and will review that decision based upon the claimant's request for review pursuant to Board Rule 402(a)(2).

Mr. Brown retired from the CDC on January 2, 2015. Subsequently, the Fiscal Service determined that its relocation coordinator's response was incorrect and, on January 15, 2015, informed Mr. Brown that, contrary to what he was told on December 29, 2014, the purchase of real estate in Atlanta after his retirement date would not be considered incidental to his relocation and the CDC could not reimburse him for the closing costs of his new Atlanta residence.

On January 28, 2015, Mr. Brown asked the agency to submit his claim to the Board for review and for a final decision. For reasons unclear from the record, the agency did not forward Mr. Brown's claim to the Board until September 28, 2015.

Discussion

I. Whether Mr. Brown Qualified for Real Estate Transaction Expense Reimbursement

By statute, if an agency transfers an employee from one duty station to another in the interest of the Government, the agency must authorize the reimbursement of expenses that the transferred employee incurs in selling his residence at his old official duty station and in purchasing a residence at the new official duty station:

> Under regulations prescribed under section 5738, an agency shall pay to or on behalf of an employee who transfers in the interest of the Government, expenses of the sale of the residence . . . of the employee at the old official station and purchase of a residence at the new official station that are required to be paid by the employee, when the old and the new official stations are located in the United States.

5 U.S.C. § 5712a(d)(1) (2012); *see* 41 CFR 301-11.1 (2014) ("[t]he purpose of an allowance for expenses incurred in connection with residence transaction is to reimburse you when you transfer from an old official station to a new official station for expenses that you incur due to . . . [t]he sale of one residence at your old official station, and/or the purchase of a residence at your new official station").

In implementing the statutory provision, the Federal Travel Regulation (FTR) identifies four "basic conditions" that an employee must meet to obtain reimbursement for expenses associated with either the sale of a residence at an old official station or the purchase of a residence at a new official station:

> You must meet four basic conditions to be eligible to receive an allowance for expenses incurred in connection with your residence transactions:

(1) You must be transferring from one official station to another;
(2) Your relocation must be incidental to the transfer (*i.e.*, not for the convenience of the employee);
(3) Your relocation must meet the distance test conditions of § 302-2.6; and
(4) Your new official station must be within the United States.

41 CFR 301-11.2(a).

Mr. Brown indisputably met all of these requirements. He was transferred for the benefit of the Government, not for his own convenience, from his official duty station in the Washington, D.C., area to a new duty station in Atlanta. That transfer easily satisfies the fifty-mile distance requirement set forth in 41 CFR 302-2.6. Further, there is no dispute that Mr. Brown signed a service agreement, as required by 41 CFR 302-11.3. Accordingly, he satisfied the regulatory requirements for obtaining reimbursement of expenses incurred in purchasing a "residence" in the Atlanta area.

II. Whether Mr. Brown's New Home Qualifies As a "Residence" Under the FTR

The issue before us is whether the home upon which Mr. Brown closed after his retirement from federal service constitutes a "residence" for purposes of the FTR. The Fiscal Service informs us that the mere fact that Mr. Brown retired does not automatically disqualify him from seeking reimbursement of expenses incurred after his retirement but prior to the June 17, 2015, expiration of his relocation benefits authorization, a representation that we have not questioned for purposes of our decision here. Mr. Brown's reimbursement claim fails, the Fiscal Service argues, only because, in light of his retirement, he never commuted from his new residence to his new CDC job and, therefore, cannot satisfy the regulatory requirements for reimbursement of expenses associated with the purchase of a new "residence" at the new duty station.

If we were able to apply the version of the FTR applicable to residential purchases at the new duty station that existed prior to 2001, there would be no question that Mr. Brown's new home would not constitute a "residence," as the FTR then defined that term, at the new duty station. Prior to 2001, the FTR provided for the reimbursement of "expenses required to be paid by [an eligible employee with a permanent change of station to a new official duty station] . . . for purchase (including construction) of one dwelling at his/her new official station." 41 CFR 302-6.1 (2000). The FTR expressly defined that "residence or dwelling" as "the residence as described in § 302-1.4(k)," *id.* 302-6.1(b), which, in turn, expressly required that the "residence" be the place from which the employee regularly commutes to and from work:

> 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.

Id. 302.1.4(k). Mr. Brown never commuted to his CDC job from, or from his CDC job to, the Atlanta house upon which he closed after he retired. Although his relocation authorization was effective until July 17, 2015, the pre-2001 regulatory definition of "residence" would effectively preclude him from recovering the costs that he incurred in purchasing a new home after his retirement, even though the new home was in the same area as the official duty station to which he had transferred prior to his retirement.

In 2001, however, the General Services Administration (GSA), which is responsible for promulgating the FTR, amended those portions of the FTR applicable to relocation allowances and placed them into a question-and-answer format, with the intention of making the FTR "easier to understand and to use." 66 Fed. Reg. 58,194, 58,194 (Nov. 20, 2001). The Fiscal Service believes that the 2001 amendments did not affect the pre-2001 to-and-from-work commuting requirement for a new residence purchase at a new duty station. Yet, in creating the question-and-answer format, GSA added a requirement to the definition of a "residence" – through language that did not exist in the pre-2001 FTR – that complicates any analysis of what constitutes a new duty station "residence." Following the 2001 amendments, the FTR provision defining a "residence" for purposes of relocation expense reimbursement (which remains in effect today) was changed to require not only that the home be one from which the employee commutes "to and from work on a daily basis," but *also* that the employee be living there when receiving his or her notice to transfer to a new official duty station:

> **§ 302-11.100 For which residence may I receive reimbursement for [sic] under this subpart?**
>
> You may receive reimbursement for the one residence from which you regularly commute to and from work on a daily basis *and* which was your residence at the time you were officially notified by competent authority to transfer to a new official station.

41 CFR 302-11.100 (2014) (emphasis added). Similarly, another section of the FTR (which also remains in effect today) was written to provide that, to be reimbursed for expenses incurred in residential transactions, the employee "must occupy the residence" when he or she is notified of the transfer:

> **§ 302-11.5 To be reimbursed for expenses incurred in my residence transactions, must I occupy the residence at the time I am notified of my transfer?**
>
> Yes, to be reimbursed for expenses incurred in your residence transactions, you must occupy the residence at the time you are notified of your transfer, unless your transfer is from a foreign area to an official station within the United States other than the one you left when you transferred out of the United States, as specified in § 302-11.2(b).

41 CFR 302-11.5.

The drafters of these two FTR provisions, when adding a requirement that the employee be living in the "residence" when notified of the official transfer, plainly had in mind solely the pre-existing home at the old official duty station. These two provisions cannot conceivably apply to the employee's purchase of a new home at the new duty station because, applying the literal language of the FTR provisions, the employee would have to have "occup[ied] the [new] residence" – that is, lived in and commuted from the new residence at the new duty station – before being notified of the transfer from the old duty station. Yet, in addition to the obvious impracticalities associated with commuting to the old duty station from a new duty station "residence" on a daily basis before being notified of the transfer to the new duty station, the FTR expressly prohibits reimbursement of residential transaction expenses for the purchase of the new residence at the new duty station if they were incurred *before* the official transfer: "reimbursement of any residence transaction expenses . . . that occurs [sic] prior to being officially notified (generally in the form [of] a change of station travel authorization) is prohibited." 41 CFR 302-11.305; *see Gary J. Tennant*, CBCA 553-RELO, 07-1 BCA ¶ 33,558, at 166,223 ("[r]eimbursement [of expenses for the purchase of a new residence at the new duty station] is appropriate . . . only for expenses an employee incurs after he is notified that he will be transferred"); *Peter J. Grace*, GSBCA 16790-RELO, 06-1 BCA ¶ 33,219, at 164,635 ("when a contract for purchase or sale is entered into before an agency manifests an intent to transfer the employee, the transaction will be considered to have been entered into for some reason other than the transfer"). If the current FTR language were applied literally, it would seem unlikely that an employee would *ever* obtain reimbursement for expenses incurred in purchasing a home at a new duty station, given that he or she would already have to live in the new duty station home when notified of the transfer to that duty station, would have to be commuting to the *old* duty station from the home at the *new* duty station on a daily basis *before* the new duty station transfer notification, but could not have purchased the new duty station home before receiving the transfer notice.

Even if the employee, in very limited circumstances, might be able to obtain reimbursement for the expenses of purchasing a home in which he was already living at his new duty station at the time of his official transfer notice, he would be unable to obtain any reimbursement for the sale of his *old* home at his *old* duty station because the old home would not have been the residence from which he was regularly commuting to and from work at the time of his transfer notice, as required by 41 CFR 302-11.100. Yet, the statute at 5 U.S.C. § 5712a(d)(1) envisions reimbursement of expenses for *both* the sale of the old duty station residence *and* the purchase of the new duty station residence, which a strict application of the current FTR provisions – allowing reimbursement of expenses only if the employee lived in and commuted on a daily basis from the residence at the time of the transfer notice – would preclude.

What do we do, then, with regulatory provisions that, like those at issue here, conflict with one another and that contain language which, when taken literally, conflicts with the authorizing statute? Because tribunals "can only interpret the regulations as written," we cannot rewrite the regulatory provisions to clarify that the parts of the regulations requiring residency at the time of the official transfer notice only apply to the old duty station residence, and not the new duty station residence. *C&G Excavating, Inc. v. United States*, 32 Fed. Cl. 231, 242 (1994); *see Consumers County Mutual Insurance Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362, 367 n.7 (5th Cir. 2002) (rejecting a context-specific approach to regulatory interpretation and mandating that a regulatory definition must "appl[y] generally throughout the regulations regardless of whether its application directly promote[s] a regulatory goal"). Yet, as discussed above, a strict application of the existing language would bar a relocating employee from *ever* receiving relocation expenses associated with the purchase of a new residence at the new duty station (or, at least, would bar reimbursement of both the selling expenses of the old duty station residence and the purchase expenses of the new duty station residence), contrary to the requirements of the authorizing statute. If a regulation, as written, conflicts with its authorizing statute, the conflict renders the regulation "void and unenforceable." *Enfield v. Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977); *see Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity."). Here, the language in 41 CFR 302-11.5 and 302-11.100 that effectively precludes any reimbursement of expenses incurred in the purchase of a new duty station home – or at least precludes the reimbursement of both the selling expenses of the old duty station home and the purchase expenses of the new duty station home – conflicts with the authorizing statute and, therefore, is unenforceable as applied to new duty station residence purchases.

At first blush, the absence of an enforceable definition of a "residence" at the new duty station within the FTR itself would seem to require us to conduct an analysis of the

ordinary and natural meaning of that word. *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214 (11th Cir. 2008) ("[b]ecause there is no statutory or administrative definition of 'residence' [under a different statutory scheme], we look to its ordinary, everyday meaning"); *Bortone v. United States*, 110 Fed. Cl. 668, 677 (2013) ("when a statute or regulation does not provide the definition of a term, [tribunals] construe the term in accordance with its ordinary or natural meaning"); *see also Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation . . . that undefined terms in a statute are deemed to have their ordinarily understood meaning."). In conducting such an analysis, we typically would refer to dictionaries or other reliable sources to assist in defining what the word should mean, while also considering the context of the word's use in the regulations and the purposes of the underlying statute. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *Massachusetts Mutual Life Insurance Co. v. United States*, 782 F.3d 1354, 1367 (Fed. Cir. 2015); *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1370-71 (Fed. Cir. 2003).

In this instance, though, no such analysis is necessary or warranted. The General Services Board of Contract Appeals (GSBCA), our predecessor board for relocation and travel matters, and the General Accounting (now General Accountability) Office long ago adopted a practice of defining the term "residence," as it applies to a newly purchased home at a new duty station, as including a requirement that it be the place from which the employee commutes to and from work on a daily basis, a practice that we have adopted as our own:

> The General Services Board of Contract Appeals, our predecessor in settling claims by federal civilian employees for relocation expenses, repeatedly held that a residence is "at the new official station" only if it is the one from which the employee regularly commutes to and from work on a daily basis. *Wendy J. Hankins*, GSBCA 16324-RELO, 04-2 BCA ¶ 32,686; *Vincent P. Mokrzycki*, GSBCA 16142-RELO, 04-1 BCA ¶ 32,468 (2003); *Richard H. Mogford*, GSBCA 15958-RELO, 03-2 BCA ¶ 32,348; *Claude N. Narramore*, GSBCA 15445-RELO, 01-2 BCA ¶ 31,562; *Elmer L. Grafford*, GSBCA 14176-RELO, 98-1 BCA ¶ 29,700; *David M. Whetsell*, GSBCA 14089-RELO, 98-1 BCA ¶ 29,610. In so holding, the General Services Board was continuing the practice of the General Accounting Office, which previously settled such claims. *See Jesse Jackson, Jr.*, B-251559 (Mar. 31, 1993); *Johnny W. Reising*, B-238086 (June 8, 1990). We follow that practice here.

John Nobles, CBCA 1131-RELO, 08-2 BCA ¶ 33,872, at 167,667; *see Jack C. Jacobs*, CBCA 3247-RELO, 13 BCA ¶ 35,280, at 173,164 (allowing reimbursement of new home purchase at new duty station "only if the employee actually commutes to and from the residence in question on a daily basis"); *Robert L. McCall*, CBCA 1247-RELO, 08-2 BCA

¶ 33,998, at 168,126 ("a claimant [is] not entitled to transaction costs associated with a home purchase [if] the home . . . was not the residence from which the employee regularly commuted on a daily basis") (discussing *Nobles* decision); *Jagdish D. Patel*, CBCA 1130-RELO, 08-2 BCA ¶ 33,878, at 167,675 (section 302-11.100 of the FTR "suggests that a purchased residence must be one from which the employee commuted to and from work on a daily bais"); *Andreas Frank*, CBCA 557-RELO, 07-1 BCA ¶ 33,531, at 166,115 n.1 ("employee will be reimbursed for the expenses of . . . the purchase of a residence from which the employee makes the daily commute to and from the official duty station").

We are bound by the past decisions of the GSBCA and of this Board that have adopted this longstanding definitional understanding of what constitutes a newly purchased "residence" at a new duty station. *See Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,989 (per curiam) (adopting decisions of predecessor boards as precedent). Further, the Court of Appeals for the Federal Circuit has made clear that we must interpret undefined terms in regulations in light of their common-law history, a rule that supports the Board's prior adoption of this definitional understanding. *See Alpough v. Nicholson*, 490 F.3d 1352, 1357 (Fed. Cir. 2007) (citing *Siemens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Co.*, 420 F.3d 1243, 1252 (11th Cir. 2005) ("we should interpret statutes and regulations in light of their common-law backdrop")). Nothing in the 2001 amendments to the FTR suggests an intent to change that definitional understanding. In such circumstances, we must apply that longstanding definition to Mr. Brown's Atlanta home purchase, despite the absence of a regulation that clearly defines a "residence" at a new duty station. Because Mr. Brown did not commute to his CDC job from that home on a daily basis, the agency properly declined to reimburse him for closing costs that he incurred in purchasing the home after he retired from federal service.

The fact that the Fiscal Service relocation coordinator initially told Mr. Brown that the post-retirement closing costs would be reimbursable does not affect this result. No one has the authority to authorize payment by the Federal Government for a particular purpose that is contrary to relevant statutes and regulations. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990); *Benjamin A. Knott*, CBCA 4579-RELO, 15-1 BCA ¶ 36,019, at 175,922. Accordingly, even if an employee relies to his detriment upon the erroneous advice of seemingly knowledgeable agency employees, we cannot order payment if payment would contravene the requirements of a statute or a regulation. *Knott*, 15-1 BCA at 175,922; *James A. Kester*, CBCA 4411-RELO, 15-1 BCA ¶ 35,966, at 175,729-30; *Bruce Hidaka-Gordon*, GSBCA 16811-RELO, 06-1 BCA ¶ 33,255, at 164,834.

Although we cannot provide Mr. Brown with any relief here, the internally contradictory and confusing nature of the FTR provisions at issue associated with

reimbursement of a transferred employee's purchase of a residence at a new duty station is unfortunate. The purpose of placing the FTR provisions into a question-and-answer format was to make them easy for everyday federal employees to read and understand, without the need for consulting with experts or lawyers. 66 Fed. Reg. at 58,194. The regulatory provisions applicable to new residence purchases at new official duty stations fail in that regard. We can only hope that, in the near future, those responsible for drafting the FTR will correct the deficiencies in these provisions to provide better assistance to Federal employees facing official transfers to new domestic duty stations.

Decision

For the foregoing reasons, we must deny Mr. Brown's claim.

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HAROLD D. LESTER, JR.
Board Judge