



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 23, 2019

CBCA 6532-RELO

In the Matter of KIRK D. HENRY

Kirk D. Henry, Elizabeth, CO, Claimant.

James E. Hicks, Office of Chief Counsel, Drug Enforcement Administration, Department of Justice, Springfield, VA, counsel for Department of Justice.

GOODMAN, Board Judge.

Claimant, Kirk D. Henry, is a former employee of the Drug Enforcement Administration (DEA) and has asked this Board to review the agency's denial of his request to be relieved of a debt arising from his service agreement as the result of his voluntary resignation from his position.

Background

Claimant was hired by the agency on February 16, 2017, and signed a service agreement that required him "to remain in the employ of the United States Government" for a period of not less than twelve months after the date on which he reported for duty at his duty station. The service agreement stated as follows:

I agree that if I fail to fulfill the terms of this agreement by resigning . . . (as distinguished from a reason beyond my control and acceptable to the Drug Enforcement Administration) before the end of the twelve month period, I will repay the United States Government all costs the Drug Enforcement Administration has paid towards my relocation expenses.

The agency's PCS [permanent change of station] New Employee Relocation Handbook also states:

A signed Service Agreement is required before the DEA can authorize any expenses in connection with your move. . . . [If you fail] to fulfill the terms of the Service Agreement(s) by resigning, . . . as distinguished from a reason beyond your control and acceptable to the DEA before the end of the agreed upon service period(s), you will be required to repay the United States Government all costs the DEA has paid towards your relocation expenses.

Upon completion of his initial training, claimant was transferred to Portland, Oregon, and reported for duty on June 11, 2017. Less than five months later, on October 27, 2017, claimant submitted a memorandum to a special agent in charge and a supervisory special agent stating that " S.A. Kirk Henry will resign from the [agency] effective 11/13/2017 to serve the US Government in another capacity."

In his notice of claim to this Board, claimant states:

My resignation letter accurately stated that I was resigning 'to serve the US Government in another capacity.' I did so and have remained in the service of the US Government since that time. My service was and is to the Department of Defense and is compartmentalized and classified.

Once he gave notice of his resignation, the agency's exit clearance process was initiated, which claimant asserts is governed by Department of Justice (DOJ) Order 1200.1. Part 12, chapter 2.2, of this order, entitled "Clearance Procedures for Employees and Contract Employees Separating from or Reassigned within the Department of Justice" reads in pertinent part:

Policy

1. This Order prescribes responsibilities and procedures for the clearance of all outstanding property obligations and financial indebtedness to the Department prior to an employee's . . . resignation. . . . Employees . . . must return or otherwise account for all such outstanding obligations or indebtedness before receiving any final payments, such as final salary or lump-sum leave payments. . . .

Component Head

Procedures. Component heads will devise effective component procedures in accordance with this chapter to ensure that . . . all outstanding obligations and financial indebtedness to the Department are reimbursed. . . .

Separating . . . Employees. Employees . . . departing from a component are responsible for identifying, returning and/or accounting for all items received from the Government during the course of their employment. This includes, but is not limited to: . . . payments received in expectation of extended employment where the allotted time period has not been completed. . . .

The clearance procedure must include . . . [l]iquidating all debts owed to the Government . . . including [debts for] the failure to fulfill written service agreements,

Accountable Property Officers. The responsibilities of component Accountable Property Officers include:

Processing Pre-Exit Clearance Forms by reviewing records to determine whether a departing employee . . . is indebted to the Government, assuring that . . . any indebtedness [is] paid, . . . [and] [w]ithholding clearance where . . . an indebtedness is not resolved.

Claimant states that on November 3, 2017, he was given his completed Employee Exit Clearance Record, Form DEA-17 (clearance record). On the first page of the clearance record, under the heading “Immediate Supervisor,” line 4 read “Agreements (Training, PCS, EAI, Relocation, etc.)” Next to this item was a hand-written notation “N/A.” Claimant interpreted this portion of the clearance record as “specifically indicat[ing] I had no debt, including none for Agreement (Training, PCS, EAI, Relocation, etc.)” He then executed the CERTIFICATION OF EMPLOYEE, which appears on page 2 of the clearance record, which stated in part:

I am not indebted to the U.S. Government regarding my employment with the DEA.

On November 8, 2017, claimant was issued the clearance record, which contained a CLEARANCE OFFICIAL CERTIFICATION that stated:

I certify that all required clearances have been obtained for the above-named employee and his/her final salary and lump sum payments may be released.

Claimant was issued his final paycheck. He left the employ of the United States Government in November 2017 and thereafter was not a federal employee. From November 2017 through March 2019 he was an employee of a government contractor, and from March 2019 to the present he has been an independent contractor. There is no evidence in the record that claimant informed anyone in the agency before he left the employ of the United States Government that he did not intend to remain as a federal employee after his resignation from the agency.¹

By letter dated February 26, 2019, claimant was notified by the agency that he owed a debt to the United States Government for all costs the agency had paid toward his relocation expenses, totaling \$25,217.30, as he had not remained in its employ for the time required by his service agreement. Claimant appealed the debt to the chief financial officer of the agency, and the agency denied the appeal. He then asked this Board to review the agency's attempt to collect the debt.

Claimant asserts that at the time he left the agency in November 2017, the agency made a determination, as evidenced by his clearance record, that he owed no debt under his service agreement. In claimant's response to the agency's response to his claim, claimant states:

The existence of my SA [Service Agreement] was not a secret. . . . The DEA was aware of it. My immediate supervisor was aware of it. The A[ccountability] O[fficer] in the Field Division Office who signed the Certification was aware of it. Further, every person who acted on behalf of Respondent by signing and certifying my Employee Exit Clearance knew or should have known that I had an SA **at the time they signed and certified I owed nothing.**

The right to recover relocation costs was a right of [the agency] under the terms of the SA. It was up to them, and not me, to determine whether or not they would enforce or forgive a debt under it. I knew they could waive it. I

¹ The Board could not ascertain claimant's employment status after he left the agency from the content of claimant's resignation memorandum, his notice of claim, or his response to the agency's response in this case. The Board therefore directed claimant to state his employment history after leaving the agency. In response to the Board's order, claimant identified his employment and further stated: "After resignation from the DEA, I have continuously served as an Independent Contractor, not as a federal employee."

did not know whether or not they would. I looked to them for, and awaited the decision. . . . [T]he agency's decision was important to me. It would (and did) impact future financial and other decisions I would make. I would have had a chance to reconsider my date of resignation as well as financial and other decisions I subsequently made in reliance upon their decision not to enforce the SA.

Claimant therefore maintains that the issue to be determined by this Board is “whether the Agency may retract that determination, and its Certification thereof.”

Discussion

When a federal employee is transferred to a new official duty station within the continental United States on a permanent basis, the agency is authorized to pay

travel and transportation expenses . . . and other relocation allowances . . . only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. If the employee violates the agreement, the money spent by the Government for the expenses and allowances is recoverable from the employee as a debt due the Government.

5 U.S.C. § 5724(i) (2012). This statute is implemented through the Federal Travel Regulation (FTR), which reiterates the requirement for a federal employee to sign a service agreement. 41 CFR 302-2.14 (2018). The FTR states the penalty for violation of the service agreement:

[I]f you violate a service agreement (other than for reasons beyond your control and which must be accepted by your agency), you will have incurred a debt due to the Government and you must reimburse all costs that your agency has paid towards your relocation expenses.

41 CFR 302-2.15.

As explained above, these statutory and regulatory requirements were incorporated into claimant's service agreement and reiterated in the agency's PCS New Employee Relocation Handbook. In order to fulfill the requirement of the service agreement—“to remain in the employ of the United States Government”—an employee must remain a federal employee for the stated period in the agreement. If an employee voluntarily leaves a current position and becomes a contractor to the Federal Government, the employee has not

remained in the employ of the United States Government as required. *Marilyn Fournier*, CBCA 460-RELO, 07-1 BCA ¶ 33,495. Additionally, if the employee has a break in service and then becomes re-employed by the Federal Government, the employee also has not remained in the employ of the United States Government as required. “Case law has interpreted the twelve-month period of service mandated in statute and regulation to be a consecutive period.” *Amy Oestreich*, GSBCA 16489-RELO, 05-1 BCA ¶ 32,852 (2004), (citing *Finn v. United States*, 428 F.2d 828 (Ct. Cl. 1970)).

Claimant’s Position

Claimant states that he was aware of his service agreement, and “was aware that in its discretion the DEA could waive a Service Agreement debt.” He states that he waited until the agency issued his clearance record and concluded that the agency had determined that he owed no debt arising from his service agreement. Claimant also believes that such a determination was made because he was issued his final paycheck, based on his interpretation of 5 U.S.C. § 5512 (2012),² which states:

Withholding pay; individuals in arrears

(a) The pay of an individual in arrears to the United States shall be withheld until he has accounted for and paid into the Treasury of the United States all sums for which he is liable.

Claimant also believes his conclusion—that the agency determined he owed no debt under his service agreement—is supported by DOJ Order 1200.1. He states that “[t]he above statutes and regulations gave me the right to have a determination made, prior to my departure, of whether or not I owed the Agency any debt, including, specifically, debt under the [service agreement], and to act in reliance upon that determination as being true and accurate.” Claimant therefore asserts that he concluded from the processing of his clearance record and payment of his final paycheck that the agency had made a determination to not establish and collect a debt arising from his service agreement.

The Agency’s Position

Except for the clearance record itself, the agency provides no information from any agency personnel involved in the exit clearance process as to whether there was an intent by the agency to not hold claimant liable for a debt arising from the service agreement. The

² Claimant also cites to 31 U.S.C. § 3720, Collection of payments, which does not pertain to collection of debts owed by federal employees.

agency does not address the obligations of the DOJ order to resolve issues arising from service agreements or the issue of whether the agency officials were aware of claimant's intent not to continue in the employ of the United States Government, as discussed below. The agency's position espoused to the Board is that the clearance record did not address whether or not claimant would be assessed a penalty for violation of the service agreement, as the violation had not yet occurred. The agency asserts that on November 8, 2017, when the agency's clearance official signed the clearance record, claimant had not resigned. According to the agency, claimant's liability under his service agreement would arise following his last day of employment with DEA on November 12, 2017, if he did not continue in the service of the United States Government.

The agency justifies its later determination of debt attempt in February 2019 by stating that, "[w]hile the DEA has discretion in determining whether to collect a Service Agreement debt, the stated policy of the DEA is to deny all claims in cases where the claimant has voluntarily left the service without doing so for reasons beyond his control." The agency cites *Arthur Hubbard*, CBCA 1932-RELO, 10-2 BCA ¶ 34,540, where the employee left the DEA voluntarily before completing the required service period. The Board upheld the agency's determination to hold the employee liable for violation of a service agreement.

Claimant is Liable for Repayment of the Relocation Costs

It is claimant's burden to prove his claim. *Simeon A. Milton*, CBCA 5565-RELO, 17-1 BCA ¶ 36,753. Claimant misinterprets the applicable law and regulations, the requirements of the service agreement, and the employee's and agency's obligations pursuant to the DOJ order and in the exit clearance record.

The statutory and regulatory requirements incorporated into the terms of the service agreement are clear that when an employee voluntarily resigns before the time period specified in the service agreement expires, and does not remain in the employ of the United States Government, the relocation costs previously paid are recoverable from the employee as a debt due the Government. These requirements are reiterated in claimant's service agreement. While the agency has the discretion to determine whether it is appropriate to establish and collect a debt, given the individual circumstances of an employee's departure from federal service prior to fulfillment of the obligations of the service agreement, this discretion is exercised when the employee shows extenuating circumstances such that the resignation or separation were not considered to be voluntary. *See, eg., Jonathan E. Pearson*, CBCA 6489-RELO (Aug. 21, 2019); *Jeffrey A. Clements*, CBCA 5334-RELO, 16-1 BCA ¶ 36,445; *Melinda K. Kitchens*, GSBCEA 16639-RELO, 05-2 BCA ¶ 33,062.

There is no dispute that claimant voluntarily resigned from his position before the twelve-month period specified in his service agreement and thereafter was not employed by the United States Government. Under such circumstances, the statutory and regulatory requirements incorporated into the service agreement provide for repayment of relocation costs. *Daniel V. Moren*, CBCA 5750-RELO, 17-1 BCA ¶ 36,899; *Hubbard*; *Benjamin A. Hanfelder*, CBCA 1294-RELO, 08-2 BCA ¶ 33,987.

Even so, claimant asserts that through the exit clearance process, the agency determined that he did not owe a debt, as he understood that the DEA could “waive” the debt. This could not have been the result of the exit clearance process, however. While those in the exit clearance process have the obligation to determine and collect debts, they do not have the authority to waive them. Waiver only occurs after an executive agency establishes a debt and demands collection from the employee, as in this case, by the agency’s letter dated February 26, 2019. Once the debt is established, the Director of the Office of Management and Budget or the head of the agency, depending on the amount of the debt, has the authority to waive. 5 U.S.C. § 5584(a). In addition, while the exit clearance process did not establish a debt, there is no indication that those involved in the process understood this was an issue to be resolved, as there is no evidence that claimant supplied accurate information with regard to this issue.

While claimant asserts that DOJ Order 1200.1, part 12, chapter 2.2 requires that he receive a determination of his debt liability under the service agreement, he does not address the requirements of that order which place affirmative obligations upon the employee to “identify payments received in expectation of extended employment where the allotted time period has not been completed” and “account for all such outstanding obligations or indebtedness.” Even though claimant asserts that agency officials “knew or should have known that I had an SA,” there is no evidence in the record, nor does claimant assert, that he identified to his immediate supervisor or those responsible for his clearance record the relocation payments he received that were conditioned on his fulfilling the period of employment specified in his service agreement.

There also is no evidence that claimant informed the two individuals to whom his resignation memorandum was addressed, the individuals who participated in his exit clearance, or anyone else in the agency that he would not remain employed by the United States Government, nor is there evidence that any of these individuals inquired as to claimant’s future employment. Claimant’s resignation memorandum leaves the issue of his future employment unresolved, as it states that he is resigning “to serve the U.S. Government in another capacity.” While claimant maintains that this statement was accurate, it did not state compliance with the terms of the service agreement that he would remain in the employ of the United States Government. If the agency officials were not informed of claimant’s

intent to leave the employ of the United States Government, they would not have understood that the issue of a debt arising from the service agreement needed to be resolved.³ Without evidence that the individuals involved in the exit clearance process were aware of claimant's intention to leave the employ of the United States Government as defined by the service agreement, claimant's conclusion that the agency determined that he was not liable for a debt lacks merit.

Finally, claimant's assertion that he would have postponed his resignation if the agency had determined he owed the debt is not persuasive, as claimant's memorandum of resignation specified an effective date that was not conditioned on the agency's determination of claimant's obligation to reimburse relocation costs. This Board resolves disputes based on the actual circumstances that occurred. A party's suggestion as to how this dispute could have been avoided is not relevant. *Justin M. Kearns*, CBCA 2842-RELO, 12-2 BCA ¶ 35,065; *see also*, *Roger G. Greening*, GSBCA 13924-RELO, 97-1 BCA ¶ 28,883; *Harlan C. Thiel*, GSBCA 13668-RELO, 97-1 BCA ¶ 28,710 (1996).

The agency's assertion of debt arising from the claimant's voluntary resignation prior to the period specified in the service agreement comports with the requirements of the service agreement, the circumstances of claimant's voluntary resignation, and his leaving the employ of the United States Government thereafter. Claimant is liable to repay the relocation costs, as required by his service agreement.

Decision

The claim is denied.

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

³ On the first page of the clearance record, under the heading "Immediate Supervisor," line 4 reads "Agreements (Training, PCS, EAI, Relocation, etc.)" next to which was a hand-written notation "N/A." Claimant interprets this as a determination of no debt arising from the service agreement. There is no evidence that this is the meaning intended. Additionally, claimant confirms that he is unaware of the thought processes of the individuals who participated in the exit clearance. In his notice of claim, he states, "I was not given the reason for the no debt determination." In his final filing, he states, "There is no evidence in the record as to, nor am I aware of, the reasons for the Agency's November 2017 determination of no debt."