

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

April 4, 2001

GSBCA 15447-RELO

In the Matter of EDWARD J. CURRAN

Edward J. Curran, North Chittenden, VT, Claimant.

James G. Cole, Chief, Finance Division, Federal Bureau of Investigation,
Washington, DC, appearing for the Department of Justice.

BORWICK, Board Judge.

Claimant contests the denial by the Department of Justice's Federal Bureau of Investigation (FBI or agency), of last move home benefits upon his resignation from the position he held as a re-employed annuitant. The agency and the Office of Personnel Management (OPM) had exempted claimant from salary offset provisions of law usually applicable to re-employed annuitants. The agency determined that claimant's right to the last move home benefit had expired upon the passage of two years from the date of claimant's retirement from his permanent position in the federal service. The agency determined that claimant's resignation from the position he held as a re-employed annuitant exempted from the salary offset provisions of law did not trigger an entitlement to a last move home benefit because claimant resigned from that position.

We sustain the decision of the agency, as it correctly applied statute and regulation. Re-employed annuitants who receive a special exemption from salary offset provisions are not entitled to last move home benefits upon their separation from federal service, since they resign and do not retire from federal service.

The facts are as follows. On August 21, 1994, claimant transferred from Los Angeles, California, to Washington, D.C., to assume a Senior Executive Service (SES) position with the agency in counterintelligence matters. In early 1998, a senior manager of the agency requested that claimant accept a detail to another agency to work in an important position on a recently-arisen national security matter. Claimant declined, advising the agency's management that he intended to retire in December 1998 to take a job offer in private industry.

At this point it is necessary to discuss the law pertaining to re-employed annuitants. In the usual case, when a federal annuitant is re-employed, an amount equal to the annuity

allocable to the period of actual employment is deducted from his or her salary. 5 U.S.C. § 8344(a) (Supp. V 1999). The deduction is called a salary offset. Amounts so deducted are deposited in the Treasury of the United States to the credit of the retirement fund. *Id.* At the request of an executive agency head, the Director of OPM may, on a case by case basis, waive the salary offset, or grant the agency head the authority to waive the salary offset, for employees in positions for which there is exceptional difficulty in recruiting or retaining qualified employees. *Id.* § 8344(i)(1); 5 CFR 553.201 (2000).

A few weeks after claimant refused the detail and had announced his retirement, the agency again asked claimant to reconsider taking the assignment, with the assurance that the agency would work to ensure that claimant would not lose any retirement benefit if claimant agreed to take the position after his retirement.

According to a declassified document with the date redacted, before claimant's retirement, the agency's director requested the Attorney General to obtain OPM's assistance in re-employing claimant to work at the new position "without any forfeiture of [claimant's] retirement pay." The director stated that the agency "must obtain OPM approval under the Federal Employees [Pay] Comparability Act of 1990 (FEPCA) for re-employment without reduction of retirement benefits. Exceptions under the FEPCA can be granted based on the need to retain a particular individual who is uniquely qualified for an ongoing project." The director identified claimant as the best person for the difficult assignment.

OPM states that its director granted the requested waiver. On February 27, 1998, the agency confirmed claimant's appointment as a special advisor to the agency. The appointment, effective March 1, 1998, was subject to the condition of limited employment regulations as authorized by OPM. The salary offset waiver being in place, the agency told claimant he was ineligible to contribute to and receive enhanced future benefits from the Civil Service Retirement System, and that he would be unable to participate in the Thrift Savings Plan, but that he would be able to earn and use sick and annual leave.

Claimant did retire, effective February 28, 1998, but stayed in the Washington, D.C., area. According to claimant's Standard Form 50-B, his separation was designated a retirement and annuity payments commenced on March 1, 1998.

Claimant served in his new assignment for about two years, at which time he decided to leave federal service for good. In March 2000, claimant advised the agency's director of his intention to leave the assignment and submitted what claimant called "retirement papers" effective October 31, 2000. Claimant asked the agency, apparently informally, about the last move home benefit. According to claimant, the agency's "retirement office" first told claimant that he had to retire before claiming the benefit. Claimant then moved his separation date up one month. Claimant was then told he was not eligible for a last move home benefit because he had had a break in service before accepting his new assignment. Claimant states that he contacted OPM and that OPM advised the agency that claimant did not have a break in service. According to claimant, the retirement office then told claimant that since he retired from the agency on February 28, 1998, his eligibility for that benefit had expired, two years after date.

On or about July 27, 2000, claimant requested the agency's Travel Advance and Payment Unit to process a last move home benefit in August 2000 -- before his planned separation date, which claimant had established as November 30, 2000.

By letter of September 26, 2000, the agency advised claimant that since he had retired on February 28, 1998, the last move home benefit had expired two years from his retirement date. The agency determined that claimant's subsequent re-employment without a reduction in retirement annuity did not extend his retirement date to November 30, 2000, since claimant's contemplated separation on that date would be a resignation, not a retirement. On January 1, 2001, claimant left Government service. Claimant's separation was deemed a resignation on his Standard Form 50-B.

In a recent letter to the Board, claimant does not dispute that he retired on February 28, 1998. He argues that since he had no break in service between the time he retired on February 28, 1998, and the effective date of his new appointment, he was under the impression that his other retirement benefits would not take effect until he had finally terminated his employment with the agency. Claimant argues that the agency's denial of a last move home benefit after his resignation was a violation of the agency's promise that he would not lose retirement benefits if he was re-employed. Claimant also argues that he thought he was an FBI employee as he had always been and that no one at the FBI told him that the arrangement involved his official retirement from the FBI.

We examine the statutory and regulatory basis for the last move home benefit. Statute provides that a member of the SES, "upon separation from Federal service," is entitled to be paid certain travel and transportation expenses for himself and his family and certain costs of moving household goods and personal effects to the place where the individual will reside, within the United States. 5 U.S.C. § 5724(a)(3); see Arnett M. Flowers, GSBCA 15267-RELO, 00-2 BCA ¶ 30,953. One of the statutory conditions of eligibility, however, is that the individual is "eligible to receive an annuity upon such separation . . . under the provisions of subchapter III of chapter 83 or chapter 84 of [Title 5]." 5 U.S.C. § 5724(a)(3)(B).

The Federal Travel Regulation provides that covered individuals (career appointees to the SES and persons serving in equivalent positions) are entitled to specified benefits "upon separation from Federal service for retirement." 41 CFR 302-1.100, -1.100(a)(i), (ii)(A), (B), -1.101. As a condition of eligibility for the last move home benefit, the individual must be eligible to receive an annuity under the provisions of subchapter III of chapter 83 (Civil Service Retirement System) or chapter 84 (Federal Employee Retirement System) of title 5, United States Code. 41 CFR 302-1.101(d). All travel and transportation must be accomplished within six months of the date of separation or other reasonable period of time as determined by the agency, but in no case later than two years from the effective date of the separation from Government service. 41 CFR 302.-1.106.

Under OPM regulations, re-employed annuitants, such as claimant, whose salary offset has been waived, "are not considered employees for the purposes of subchapter III of chapter 83 or chapter 84 of title 5, United States Code." 5 CFR 553.203. Consequently when claimant left Federal service on January 1, 2001, he was not eligible to receive an annuity "upon such separation," as required by the statute. In other words, claimant's annuity payments pursuant to his 1998 retirement do not make him eligible for last move home

benefits for the separation in 2001. Further, when claimant left, he resigned -- he did not "separate from Government service for retirement" within the meaning of the FTR. Finally, under the FTR he was bound to accomplish any last move home within two years of his actual retirement, i.e., no later than February 28, 2000. Claimant did not do so.

Claimant argues that he is entitled to the last move home benefit because he was promised no reduction in retirement benefits by high agency officials. Even if we accept claimant's problematic assumption that the agency's promise of no reduction in retirement benefits included a promise of no reduction in relocation benefits, it would not assist claimant. No agency official, high or low, has authority to spend monies based upon erroneous conclusions of Government personnel when such payment would result in violation of statute or regulation. Anthony P. Belmont, M.D., GSBCA 15463-RELO (Feb. 27, 2001); Janice K. Stanfield, GSBCA 15281-RELO, 00-2 BCA ¶ 30,954.

The claim is denied.

ANTHONY S. BORWICK
Board Judge