

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

November 7, 2001

GSBCA 15686-RELO

In the Matter of LARRY SMITH

Larry Smith, Palmetto, GA, Claimant.

M. Ray Bolyard, Director, Budget Division, Food Safety and Inspection Service, Department of Agriculture, Washington, DC, appearing for Department of Agriculture.

GOODMAN, Board Judge.

A certifying officer of the United States Department of Agriculture (USDA) has requested the Board's opinion, pursuant to 31 U.S.C. § 3529 (Supp. V 1999) ("section 3529 decision"), as to whether the USDA Food Safety and Inspection Service (FSIS) is correct in its interpretation of the Federal Travel Regulation (FTR) with regard to an employee's entitlement to real estate expenses. The employee was appointed following a break in service, and based upon his specific circumstances, the agency determined that upon his subsequent employment the employee could not be treated as a transferee for reimbursement purposes, but rather as a new employee. Accordingly, the agency denied reimbursement of real estate expenses.

Background

Claimant, Dr. Larry Smith, resigned from FSIS on May 8, 1999. Claimant states that prior to his resignation, he was informed orally on several occasions that his position would be abolished and that he would be reassigned in lieu of a reduction in force. However, no specific positions for reassignment were ever offered to claimant. The following year he applied and was selected for a position with FSIS as Assistant District Director in Atlanta, Georgia, effective April 30, 2000. At that time, his home was in Wetumpka, Alabama.

On May 10, 2000, the agency sent Dr. Smith a letter stating that, as a new Government employee, he was entitled to reimbursement for mileage for him and his family members, per diem for him if in travel status for more than twelve hours, transportation of up to 18,000 pounds of household goods, and temporary storage of household goods for ninety days. The letter did not say anything about entitlement to reimbursement of real estate transaction expenses. Claimant states:

Before accepting my current position I was told by the selecting official and the highest ranking agency official in the district to which I was to report, that I had been competitively selected for the position and would receive all relocation benefits including real estate, etc. This fact is not denied by the agency and was confirmed by the agency in writing by the managing official.^[1] I was not told of any change in that decision until after reporting to work in my new duty station.

The agency has requested that we confirm its interpretation of the FTR and denial of reimbursement of real estate expenses.

Discussion

The agency is correct that claimant is not entitled to reimbursement of real estate transaction expenses.

The FTR reads in relevant part:

302-1.10 New Appointees

(a) Coverage. New appointees to any position are eligible for payment only of those travel and transportation expenses listed in paragraph (e) of this section in relocating to their first official station. New appointees include student trainees who are assigned upon completion of college work. New appointees include not only individuals when first appointed to Government service but also individuals appointed after a break in service except that employees separated as a result of reduction in force or transfer of function may be treated as transferees instead of new appointees under the conditions set forth in § 302-1.9.

.....

(e) Allowable expenses. Items of expense listed in paragraphs (e)(1) through (6) of this section are payable under the conditions prescribed in this chapter governing the allowance in question. Note particularly that not all of the listed items will be applicable in each situation covered by this part.

(1) Travel expenses including per diem for the appointee or student trainee as set forth in § 302-2.1;

(2) Transportation for immediate family of appointee or student trainee as set forth in § 302-2.2(a);

¹ Claimant does not identify, nor does the record contain, any writing by the agency that states that claimant would be entitled to real estate expenses. As stated above, the record does contain a letter dated May 10, 2000, from the selecting official to claimant, which details that claimant would receive certain relocation expenses, but not real estate expenses.

- (3) Mileage if privately owned vehicle is used in travel as set forth in § 302-2.3;
- (4) Transportation and temporary storage of household goods as set forth in part 302-8;
- (5) Nontemporary storage of household goods if appointed to an isolated location as set forth in § 302-9.1; and
- (6) Transportation of mobile homes as set forth in part 302-7.

(f) Expenses not allowable. Items of expense not listed in paragraph (e) of this section which are authorized for reimbursement in case of transfers under this chapter (e.g., per diem for family, cost of house-hunting trip, subsistence while occupying temporary quarters, a miscellaneous expense allowance, residence sale and purchase expenses, lease-breaking expenses, and relocation services) are not allowable to appointees and student trainees eligible under this section.

41 CFR 302-1.10 (1999).

The agency's determination, contained in several communications to claimant dated June 29, 2000, and July 6, 2000, discussed the above referenced portions of the FTR and explained to claimant that he met the definition of a new appointee, as he was appointed after a break in service that was not the result of a reduction in force or a transfer of function. Accordingly, he was only eligible for payment of those travel and transportation expenses listed in paragraph (e) of the above provision of the FTR.

The agency's determination was correct, and this Board has upheld prior denials of entitlement to real estate expenses under similar circumstances. See, e.g., Wendy Castineira, GSBCA 15092-RELO, 00-1 BCA ¶ 30,740; Mukesh Nigum, GSBCA 15140-RELO, 00-1 BCA ¶ 30,820. Even though claimant alleges that agency employees had advised that he was entitled to reimbursement of real estate expenses, such erroneous advice does not entitle him to reimbursement. It is well-settled that a Government official may not obligate the Government to spend money in violation of statute or regulation. E.g., Kevin S. Foster, GSBCA 13639-RELO, 97-1 BCA ¶ 28,688 (1996). Additionally, claimant has questioned how he can be considered a "new appointee" when he was a former federal employee who was reinstated and allowed by the Office of Personnel Management to retain his previous leave categories and balances. This is not inconsistent with the definition of a "new appointee" in the above regulation, as former federal employees may be deemed "new appointees" if they have had a break in federal service. Wendy Castineira; Lawrence D. Morderosian, B-156482 (June 23, 1975).

The agency further states:

Dr. Smith is maintaining two households and has been doing so since his re-employment with the Agency. We understand that Dr. Smith feels that it is a difficult situation; and he may have to resign his position if he is compelled to continue to maintain the two separate residences. He has asked if he takes a

different job in his present office, if the relocation benefit could be added to his previous move packet or if a new move packet could be issued. He states that he realizes that it is the same duty station, but he has never relocated his family since he has been unable to sell his house in Alabama. Since he was not an agency employee when he accepted his present position and was not allowed relocation, he is now requesting the relocation benefit as he is an Agency employee.

The Agency is not aware of any way in which relocation could be offered; but, in the wish to proceed in all fairness and in order to explore all options, we are submitting these questions to you.

The above-described circumstances and employment options do not afford claimant any possibility of relief. Claimant's inability to sell his home at his old duty station is not the result of the agency's denial of real estate expenses. His suggestion that he resign his current position and assume another position in his present office so that possibly relocation benefits could be allowed in connection with his previous hire or in connection with his new position does not present an alternative that would allow him entitlement pursuant to statute or regulation.

Decision

The agency's denial of reimbursement of real estate expenses was correct.

ALLAN H. GOODMAN
Board Judge