

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

December 11, 2003

GSBCA 16062-RELO

In the Matter of RICHARD M. BITER

Dennis L. Friedman, Esq., Philadelphia, PA, appearing for Claimant.

John M. Atkisson, Executive Counsel, Surface Transportation Board, Washington, DC, appearing for Surface Transportation Board.

GOODMAN, Board Judge.

Claimant, Richard M. Biter, is currently an employee of the Department of Transportation. He has filed a claim for reimbursement of costs which he alleges he incurred as the result of a permanent change of station (PCS). As discussed below, we deny the claim.

Factual Background

When Congress abolished the Interstate Commerce Commission (ICC) at the end of 1995 (ICC Termination Act of 1995, Pub. L. No. 104-88), some of the ICC's functions were transferred to the Department of Transportation (DOT), some were transferred to a new entity, the Surface Transportation Board (STB), and other functions performed in several field offices around the country were eliminated. Claimant headed one of those field offices in Philadelphia, and effective January 1, 1996, was among some 450 employees who lost their jobs pursuant to a reduction in force (RIF).

Upon separation claimant received a lump-sum cash payment of \$42,228.99 for his accumulated leave and began drawing the severance pay to which he would be entitled for the next forty-five weeks. On November 24, 1996, claimant accepted a permanent position in the Senior Executive Service at DOT in Washington, D.C. and began his employment with that agency on that date. Beginning in November 1996, claimant lived on a boat on the Chesapeake Bay, commuted to his duty station in Washington during the week, and traveled to his home in Philadelphia on weekends.

Claimant and other RIF'd employees appealed their separation to the Merit Systems Protection Board (MSPB). On July 29, 1997, the MSPB issued a decision that the agency's RIF action had been unlawful. The decision ordered claimant's separation cancelled and his reinstatement at the new STB, nunc pro tunc. ("Nunc pro tunc" means "now for then.")

Thus, the MSPB's decision reinstated Mr. Biter to his position as of the date of his RIF. See Black's Law Dictionary 1069 (6th ed. 1990.) The agency reinstated claimant, calculating back pay and benefits from the RIF date to the date he went to work for DOT (November 24, 1996) and beyond that date, for the pay differential between the two jobs, up to the date of the order. The decision read in relevant part:

We order the agency to cancel appellants' separations, to restore them effective December 31, 1995, and to accord them their transfer rights to the Surface Transportation Board nunc pro tunc.

Richard M. Biter v. Interstate Commerce Commission, 76 M.S.P.B. 82, 95 (1997).

The nunc pro tunc quality of the MSPB decision necessarily dictates that claimant had not had any break in service at the new agency, and that the Government must, by law, recapture the money paid for accumulated leave, as claimant's leave would now be restored. Claimant therefore owed the agency \$42,228.99. The STB, the responding agency in this case, states:

There followed some six months of settlement correspondence between counsel for the parties, as Biter sought to offset the [approximately] \$40 thousand [owed to the Government] with claims nearly identical to the ones now before [this Board], all to no avail.

Ultimately, the STB ordered claimant to either report to the STB office for assignment on February 10, 1998, and indicate that he had resigned from DOT, or in the alternative to advise the agency that he intended to stay at DOT and resign from the STB. He chose to stay at DOT.

In August 1998, claimant sold his home in Philadelphia and moved into a home in the Washington area. Claimant seeks reimbursement of various expenses which he incurred from 1996 through 1998 which he categorizes as job search expenses (\$420.50), temporary living expenses (\$33,178.77), and relocation expenses (\$21,551.82).

Discussion

Jurisdiction

Board Rule 401 reads, in relevant part:

(b) Types of claims. These procedures are applicable to the review of two types of claims made against the United States by federal civilian employees:

- (1) claims for reimbursement of expenses incurred while on official temporary duty travel; and
- (2) claims for reimbursement of expenses incurred in connection with relocation to a new duty station.

48 CFR 6104.1 (2002).

The STB notes that claimant has never submitted a claim for relocation expenses with the agency.¹ Ordinarily, under Rule 401, we would dismiss for lack of jurisdiction a travel or relocation claim filed with the Board that had not first been presented to the agency. Leon Rodgers, Jr., GSBCA 14678-TRAV, 99-1 BCA ¶ 30,376, at 150,156. However, in the absence of a statute requiring exhaustion of remedies, application of a rule like this one is a matter of judicial discretion. Rodgers; Communications Workers of America v. American Telephone & Telegraph Co., 40 F.3d 426, 432 (D.C. Cir. 1994). Further, where a litigant can demonstrate that resort to administrative remedies would be futile because of the certainty of an adverse decision, exhaustion of administrative remedies will be excused. Id.; see also Fallick v. Nationwide Mutual Insurance Co., 162 F.3d 410, 419 (6th Cir. 1998).

As we recognized in Leon Rodgers, it is appropriate to apply this doctrine to Board Rule 401. Here, it is apparent that if claimant were to file a formal claim with the responding agency, it would be denied on the same ground articulated by the agency to claimant and in its correspondence to the Board. Rodgers, 99-1 BCA at 150,156; see also Alan R. Brooks, GSBCA 15193-RELO, 02-1 BCA ¶ 31,749. Accordingly, we resolve the claim here.

The Merits

The Federal Travel Regulation (FTR) in effect on November 24, 1996, the date that claimant began duty at the DOT in Washington, D.C., provides in relevant part:

New appointee . . . includes an individual appointed after a break in service except that an employee separated as a result of reduction in force or transfer of function may be treated as a transferee under the conditions set out in § 302-1.9.

41 CFR 302-1.4(d) (1996); see also 41 CFR 302-1.10(a). This regulation further provides:

Reemployment after separation. A former employee separated by reason of reduction in force or transfer of function who within 1 year of the date of separation is reemployed by an agency for a nontemporary appointment, at a different permanent duty station from that where the separation occurred, may

¹ The Merit Systems Protection Board stated in a subsequent decision:

In regard to the [claimant's] argument that he is entitled to reimbursement for his job search and relocation expenses, we note that there is no evidence that the appellant has submitted an itemized list to the agency. Thus, as in our previous decision, we are still unable to resolve the matter here.

Richard M. Biter v. Interstate Commerce Commission, 86 M.S.P.B. 438, 443 (2000), aff'd, 31 Fed. Appx. 696 (Fed. Cir. 2002).

be allowed and paid the expenses and other allowances . . . in the same manner as though he/she had been transferred in the interest of the Government to the permanent duty station where reemployed, from the permanent duty station where separated, without a break in service, and subject to the eligibility limitations as prescribed in this chapter.

41 CFR 302-1.9(b).

When claimant accepted his position at DOT, he was separated by reason of a reduction in force. Pursuant to the above provisions, claimant's status at that time was that of a transferree, as he was separated as the result of a RIF and reemployed by the DOT in Washington, D.C. within one year of his separation. If his separation and RIF had not been cancelled by the MSPB, he would have been entitled to the expenses and other allowances for relocation in the same manner as though he had been transferred in the interest of the Government to the new permanent duty station from his previous duty station without a break in service. See Emma Jane Medina, GSBCA 16136-RELO (Aug. 6, 2003). However, the MSPB's decision cancelled claimant's separation, effective December 31, 1995, and thereby cancelled claimant's possible status as a transferree under FTR 302-1.9(b). His employment at the DOT in Washington, D.C., cannot therefore be deemed a transfer in the interest of the Government. Accordingly, he is not entitled to reimbursement of relocation costs.

Decision

The claim is denied.

ALLAN H. GOODMAN
Board Judge