

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

March 22, 2005*

GSBCA 16517-RELO

In the Matter of MICHAEL L. POND

Michael L. Pond, Stevenson, WA, Claimant.

Rolando Ortegon, Director of Operations, Pacific Northwest Research Station, Forest Service, Department of Agriculture, Portland, OR, appearing for Department of Agriculture.

NEILL, Board Judge.

Claimant, Mr. Michael L. Pond, is an employee of the Forest Service in the Department of Agriculture. The Department has demanded that Mr. Pond repay relocation costs it incurred on the occasion of his transfer to Alaska in 2003. The agency claims that payment is due in view of Mr. Pond's failure to honor the service agreement he signed prior to his transfer. Mr. Pond asks that we review the agency's denial of his request that the claim be waived or, in the alternative, that he be credited for annual leave the agency allegedly forced him to use. For the reasons stated herein, we grant Mr. Pond's request for relief from the agency's claim of alleged indebtedness. We dismiss his claim for restoration of annual leave as outside our jurisdiction.

Background

In May of 2003, Mr. Pond was reassigned from a duty station in Washington State to a new duty station at the Forestry Sciences Laboratory in Anchorage, Alaska. The effective date of his transfer was June 1, 2003.

Prior to his transfer, Mr. Pond signed an overseas service agreement. The agreement read in part:

In consideration for payment by the Government of transportation and allowances in connection with my change of official station from Vancouver, Wa[shington] to Anchorage, Alaska, I hereby agree to remain in the employment of the USDA[United States Department of Agriculture]-Forest Service within the Alaska Region, for a minimum period of 12 months following the effective date of this transfer unless I am separated sooner for reasons beyond my control and acceptable to the Forest Service.

I agree that if I violate this agreement by separating for reasons not beyond my control and acceptable to the Forest Service, I will repay all moneys expended by the United States for this transfer.

On or about June 18, 2003, shortly after arriving at his new assignment, Mr. Pond sustained an injury while assisting his supervisor to load a helicopter with crew packs. The injury sustained was later diagnosed as a "recurrent hernia." Evidence of this injury did not surface until approximately a week later, while Mr. Pond and his supervisor were in the field. Claimant complained of swelling at the site of a previous surgical incision made a few months earlier to repair a hernia. On June 30, after consultation by satellite phone from the field with his personal physician in Washington State, Mr. Pond returned from the field to Anchorage. On July 3, Mr. Pond left Anchorage, preferring to return instead to Washington State for medical treatment and eventual surgery.

Mr. Pond remained in Washington State for a period of convalescence during the months of July and August and for most of the month of September. On September 3, the agency learned from Mr. Pond's physician that Mr. Pond had been released for light duty work as of August 23. On learning this fact, Mr. Pond's supervisor informed him on Friday, September 5, that light duty work was available in Anchorage. Mr. Pond, however, did not return to Anchorage to start work on the following Monday, September 8. He remained in Washington State because he had not yet completed his course of medical treatment and also because there were still problems associated with the shipment of his household goods which had not yet been resolved.¹

On September 18, Mr. Pond's program manager confirmed in writing a number of matters previously discussed with him by phone regarding his return to work in Anchorage. Among these matters was the question of Mr. Pond's failure to report for duty in Anchorage on September 8 once he had been advised that light duty work was available for him there. The program manager explained that Mr. Pond would be expected to use annual leave for the period beginning on that date and concluding on Friday, September 19. The program manger then directed Mr. Pond to return to Anchorage by Monday, September 22.

As an alternative to reporting for work in Anchorage on Monday, September 22, the program manager offered Mr. Pond the option of reporting for work at the agency's Portland lab on that date and to assume light duty work there until he completed expeditious arrangements to drive his vehicle to Seattle to put it on a barge to Alaska. Mr. Pond accepted this second option. He worked for a brief period at the Portland lab and then returned to Anchorage on Friday, September 26.

¹ To accommodate the wishes of his new supervisor and, in particular, to meet the demands of a preestablished training schedule, Mr. Pond agreed to report promptly to his new duty station in Alaska and to defer to a later date the packing and shipment of his household goods. While Mr. Pond was convalescing back in Washington State, the understandings which had been reached on this matter showed signs of becoming unraveled. Mr. Pond contends that he was required to expend much time and energy during this period to work matters out again with agency officials.

Mr. Pond writes that his relationship with his supervisor was not good. He states that, even from the time of his first arrival in early June and after his return to Anchorage in September, he was not included in broad range planning or in discussions concerning work coordination. Mr. Pond also reports that, during an appraisal of his performance, his supervisor became "irate and yelled and advised me several times loudly that he was writing everything down we discussed."

In late November of 2003, Mr. Pond accepted a position with the Department of the Interior's Bureau of Indian Affairs at the Colville Agency in Nespelem, Washington, effective December 14. Mr. Pond states that his decision to continue government employment in another agency was not a matter in his control since his supervisor had made it clear in the performance appraisal meeting that the situation would not get any better.

After being reminded that an early departure from his Alaskan assignment might render him liable for certain costs associated with his transfer there earlier in the same year, Mr. Pond formally requested that the agency either credit him for annual leave he was obliged to expend during his recovery period or drop any claim for repayment of transfer costs. Mr. Pond wrote that he deemed this appropriate for several reasons. He contended first that he had been required to expend annual leave because the agency was reluctant to honor the original agreement it struck with him regarding payment for his transportation and shipment of his household goods to Alaska. Second, he complained that, while recovering from his injury, he had been required to expend not only time but also energy and worry to correct this situation. He, therefore, expressed certainty that, after an evaluation of all relevant circumstances, the agency would recognize that his departure from Alaska was beyond his control and constituted an acceptable reason for not insisting on the repayment of relocation expenses.

The agency denied Mr. Pond's request. In a brief letter, the Acting Director of Operations addressed both aspects of his request. With regard to the reimbursement or credit for annual leave expended while recovering away from Anchorage, the agency noted that it remained willing to consider restoration of some of the annual leave but needed additional information which, although previously requested, had still not been provided by Mr. Pond.

As to Mr. Pond's request in the alternative for release from any demand for repayment of transfer expenses, the agency wrote:

After your injury, appropriate light duty work was available for you in Anchorage. Therefore, your decision to leave the Forest Service in Alaska after less than 12 months was clearly within your control, and does not qualify for a waiver of the Transfer of Station repayment responsibilities.

Mr. Pond asks that we review the agency's denial of his requests.

Discussion

When a government employee travels to and from a post outside the continental United States (CONUS), including a post in Alaska or Hawaii, the expenses of travel and transportation to and from the post shall be allowed to the same extent and with the same limitations prescribed for new appointees under 5 U.S.C. § 5722. 5 U.S.C. § 5724(d) (2000).

Under § 5722, an agency may pay travel and transportation expenses of a new appointee assigned to a position outside CONUS only after the new appointee agrees in writing to remain in government service for a minimum of twelve months after his or her appointment. The agency may release the employee from this agreement, however, if the employee is separated from government service before the expiration of the twelve-month period for reasons beyond his or her control and acceptable to the agency. Otherwise, if the new appointee violates the required agreement, the travel and transportation costs of sending the employee to the position outside CONUS are recoverable from the individual as a debt due the United States. 5 U.S.C. § 5722(b).

In recognition of this statutory provision, the Federal Travel Regulation (FTR) provides the following guidance to agency officials:

May we pay relocation expenses if the employee violates his/her service agreement?

If an employee does not fulfill the terms of the service agreement, the employee is indebted to the Government for all relocation expenses that have been reimbursed to the employee or that have been paid directly by the Government. However, if the reasons for not fulfilling the terms of the service agreement are beyond the employee's control and acceptable to the agency, [the agency] may release the employee from the service agreement and waive any indebtedness.

41 CFR 302-3.506 (2002) (FTR 302-3.506).

The agency is obviously proceeding in this case on the assumption that, because Mr. Pond has violated the terms of his service agreement, money spent for his travel and transportation expenses to Alaska is recoverable under 5 U.S.C. § 5722(b) as a debt due the United States.

On close inspection of that statutory provision, we are not persuaded that such a debt exists. The agreement required under § 5722(b) is that the employee agree in writing to remain in the government service for a minimum period of twelve months after appointment.² This provision is, of course, implicit in Mr. Pond's original agreement to remain in the employment of the USDA-Forest Service within the Alaska Region for a minimum period of twelve months. It is not violated, however, by Mr. Pond's departure from Anchorage before the expiration of the twelve-month period. In accepting a position with the Government's Bureau of Indian Affairs, he remains in government service.

It is this agreement to remain in government service for twelve months after appointment which lies at the heart of § 5722(b). This is the requirement which is set out in the statute as a necessary condition precedent to the payment of an employee's travel and transportation expenses, and it is only when this requirement is not met that any travel and

² A slightly different period is specified for those selected for teaching positions but, given the facts of this case, this portion of the statute is not relevant to our analysis here.

transportation expenses spent on the employee's behalf are recoverable from the individual as a debt due the United States.

As long as Mr. Pond remained in government service for twelve months after his appointment to the Forestry Sciences Laboratory in Anchorage, Alaska, effective June 1, 2003, he is not liable under § 5722(b) for travel and transportation expenses spent by the agency to send him there.

The agency considers Mr. Pond liable for these expenses owing to the fact that his premature departure from Anchorage was not due to causes outside his control and acceptable to the agency. Although invited to do so, the agency has elected not to provide us with a report in this case but states simply that it stands by its decision not to relieve Mr. Pond of his obligation to pay travel and transportation costs incurred in connection with his transfer to Alaska. Presumably, the agency is relying on the applicable provision of the FTR already cited above.

The agency's understanding of this provision is skewed by a misunderstanding of the term "service agreement," as that term is used in the FTR. The FTR provides:

What is a service agreement?

A service agreement is a written agreement between you and your agency, signed by you and an agency representative, stating that you will remain in the service of the Government for a period of time as specified in § 302-2.13, after you have relocated.

FTR 302-2.12.

The pertinent part of 302-2.13, for purposes of this case, is that the minimum period of government service for one transferring outside CONUS is for "not more than 36 months or less than 12 months following the effective date of transfer." FTR 302-2.13(b).

The essence of a service agreement, as that term is used in the FTR, therefore, is that it is an agreement to remain in the service of the Government for a specified period of time. When a service agreement contains provisions which exact more of the employee than what is required in law and regulation for a service agreement, those provisions cannot be given effect. For payment of Mr. Pond's relocation expenses to Anchorage, it was necessary only for him to agree to remain within government service for twelve months. He has not violated this agreement and, therefore, has incurred no debt due the United States. Any argument by the agency to the contrary, based on a more exacting provision of the original service agreement, must fail. *Finn v. United States*, 428 F.2d 828, 832 (Ct. Cl. 1970) (noting that statute does not give an agency the authority to require that the requirement to remain in "government service" be further limited to "agency service").

The argument that Mr. Pond left his assignment in Anchorage for causes within his control is of no avail. The particular provision of statute and regulation on which the agency is apparently relying in speaking of such situations pertains to the agency's authority to release an employee from a service agreement when it has been violated but for reasons

beyond the employee's control. In this case, in view of our conclusion that the essential service agreement was not violated, the causes behind Mr. Pond's voluntary transfer back to Washington State are irrelevant to the issue of whether he is indebted to the Government for the costs of his relocating to Alaska.

Can the agency hold Mr. Pond liable for these costs on the grounds that the service agreement he signed with the Government constituted a contract that has been breached? Interestingly enough, Mr. Pond himself contends that he should be relieved of any obligation to pay these costs because the Government itself failed to live up to the terms of the original agreement regarding his transfer. We find either party's reliance on any alleged contractual rights inappropriate in a case such as this. Courts have consistently held, absent specific legislation, that federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the Government. *See Bessie White*, GSBCA 15775-RELO, 02-2 BCA ¶ 31,868 (and cases cited therein).

Mr. Pond has also asked that we review the agency's denial of his request in the alternative that he be credited for annual leave he was obliged to expend during his recovery period. Since we have concluded that the agency has no basis under applicable statute or the FTR to pursue any alleged debt for relocation expenses, it would appear that we need not proceed further. However, even if Mr. Pond should wish us to do so, we may not. By law, claims involving federal civilian employees' compensation and leave are reviewed by the Director of the Office of Personnel Management (OPM). 31 U.S.C. § 3702(a)(2). Accordingly, this is a matter falling within the jurisdiction of the Director of the OPM rather than the Administrator of General Services. *Hank Thompson*, GSBCA 15510-RELO, 01-1 BCA ¶ 31,370; *William H. Goggins*, GSBCA 14469-RELO, 98-2 BCA ¶ 29,842; *Darrell R. Ratliff*, GSBCA 14403-TRAV, 98-2 BCA ¶ 29,760.

Rather than refer this aspect of the case to OPM for action, however, we are returning the case to Mr. Pond for whatever action he deems appropriate. The agency decision we have been asked to review notes that the restoration of leave is still an open issue. As such, therefore, the agency's position is not yet ripe for review even by OPM. In his original request to this Board to review the agency's denial of his request, Mr. Pond writes that he is not interested in a partial restitution of his annual leave but rather now seeks a restoration of all of it. If this remains his position even after receiving our decision regarding the agency's refusal to release him from any alleged indebtedness, he may wish to raise the annual leave issue with OPM without further delay. Otherwise, he may prefer to pursue the matter of a partial restoration of annual leave first with his agency. The choice, of course, is his.

Decision

On review, we find the agency's refusal to drop its claim against Mr. Pond for amounts allegedly due for violation of a service agreement to be without justification either in statute or applicable regulation. If Mr. Pond remained in government service for twelve months following the effective date of his assignment to Anchorage, his claim for relief is granted. Mr. Pond's request that we review the agency's position regarding restoration of his annual leave is dismissed for lack of jurisdiction.

EDWIN B. NEILL
Board Judge

* This is a corrected version of this decision. The only change is the addition of the letter "e" to "provid" which appears on line 30 of Page 5.