

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

February 6, 2002

GSBCA 15714-RELO

In the Matter of EDWARD QUEAIR

Edward Queair, Pearl Harbor, HI, Claimant.

Larry Bedker, Acting Director of Finance, Office of the Chief Financial Officer, General Services Administration, Washington, DC, appearing for General Services Administration.

DANIELS, Board Judge (Chairman).

Edward Queair was living in Washington State when he was hired by the General Services Administration (GSA) to work there. GSA transferred Mr. Queair to Korea in 1986 and then to Hawaii in 1989. Mr. Queair has announced plans to retire. GSA asks us, pursuant to 31 U.S.C. § 3529 (Supp. V 1999) and Board Rule 502 (48 CFR 6105.2 (2000)), whether it may pay return travel expenses incurred by this employee in moving back to Washington State.

GSA's uncertainty arises from its review of the Federal Travel Regulation (FTR) and GSA's internal Administrative Manual, whose provisions it thinks may be in conflict.

The FTR says that generally, when an employee who has been transferred to a post of duty outside the continental United States, and remains there for a prescribed minimum period of time, separates from Government service, "the expense for return travel, transportation, and moving and/or storage of household goods shall be allowed whether the separation is for the purposes of the Government or for personal convenience." 41 CFR 302-1.5(b)(2) (2001). The term "continental United States" means "the 48 contiguous States and the District of Columbia." *Id.* 300-3.1, 302-1.4(a). Thus, Hawaii is outside the continental United States. The minimum period of time must be prescribed before an employee begins his service outside the continental United States and cannot be more than three years. *Id.* 302-1.5(b)(2)(i). Mr. Queair has clearly served more time than whatever period was prescribed before he began his service in Korea and Hawaii. Based on the FTR alone, as GSA observes, it would appear that Mr. Queair is entitled to return travel expenses upon his retirement.

We note that the FTR chapter governing employee relocation allowances has been thoroughly rewritten, with the revisions to take effect on February 19, 2002. 66 Fed. Reg. 56,194 (Nov. 20, 2001). The new chapter is to the same effect as the old one, though the format and order are substantially different. The new chapter provides that "[a]n employee returning from an overseas assignment for separation from the Government" is "generally eligible for relocation expense allowances." FTR 302-1.1(e).¹ The following question and definitive answer are included:

Subpart D – Relocation Separation Overseas to U.S. Return for Separation

§ 302-3.300 Must my agency pay for return relocation expenses for my immediate family and me once I have completed my duty OCONUS [outside the continental United States]?

Yes, once you have completed your duty OCONUS as specified in your service agreement, your agency must pay one-way transportation expenses for you, for your family member(s), and for your household goods.

Id. 302-3.300 (emphasis added); see also id. 302-3.101 (table F).

GSA's internal Administrative Manual contains a section entitled "Overseas Employment" which includes sentences the agency fears may conflict with the current FTR provision described above. The first paragraph of this section says that the section "prescribes the procedures and instructions which govern the employment of persons overseas. Overseas positions are defined as those in foreign countries and in other areas beyond the continental limits of the United States, except Hawaii, Puerto Rico, the Virgin Islands, Alaska, and on the Isthmus of Panama." OAD P 5410.1 ch. 3, pt. 3, § 3.3, ¶ 39.25 (Apr. 11, 2000) (emphasis added). The section further provides that a GSA employee who accepts an "overseas" assignment must meet certain medical requirements for appointment, has reemployment rights to return to the office from which he left to go overseas, and must execute an agreement to serve for a certain period of time at his foreign duty post (or be liable for costs of travel and transportation to the post and back). Id. ¶¶ 39.28, .30, .31.

If the GSA Administrative Manual were in conflict with the FTR, the provisions of the regulation would govern. The FTR is a "legislative rule" – a regulation issued under express authority from Congress, for the purpose of affecting individual rights and obligations by filling gaps left by a statute, after following the Administrative Procedure Act's notice and comment provisions. See National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365, 1375 (Fed. Cir. 2001); Paralyzed Veterans of America v. West, 138 F.3d 1434, 1436 (Fed. Cir. 1998); Lorrie L. Wood, GSBCA 13705-TRAV, 97-1 BCA ¶ 28,707 (1996). It therefore has controlling weight – the force of law – unless demonstrated to be arbitrary, capricious, or manifestly contrary to statute, which defect clearly does not plague the cited provisions. See Rite Aid Corp. v. United States, 255 F.3d 1357, 1359 (Fed. Cir. 2001). The GSA Administrative Manual, on

¹Citations to "FTR" are to the version of the regulation which was published in the Federal Register on November 20, 2001.

the other hand, is simply an internal agency directive which is "used by Central Office officials for the promulgation of policies, procedures, information, instructions, and information concerning GSA activities." OAD P 5410.1 ch. 1, pt. 1, § 3, ¶¶ 12-13. To the extent that this document of lesser standing conflicts with the legislative rule, it must give way. Vera A. Wood, GSBCA 15637-TRAV, et al. (Nov. 13, 2001).

We do not see any conflict here, however. In our view, the provisions of the Administrative Manual do not address the question of whether an employee stationed in Hawaii is entitled to be paid "the expense for return travel, transportation, and moving and/or storage of household goods" when he separates from Government service – the subject of 41 CFR 302-1.5(b)(2) (2001) and new FTR 302-3.300. The Manual speaks to employees posted "overseas," and employees stationed in Hawaii are not among them. Indeed, the provisions of the Manual do not address entitlement to return travel and transportation expenses at all, except to preclude their payment to employees who do not fulfill their minimum required tours of duty. The FTR, on the other hand, requires that Mr. Queair, as an employee who has been working for GSA in Hawaii for a period of time greater than any conceivable specified minimum, be paid these expenses for his return to the home he left to serve his Government outside the continental United States.²

The new version of the FTR chapter governing relocation allowances requires agencies to establish how they will implement the regulation's policies. FTR 302-3.500. GSA should review its Administrative Manual to clarify how the agency intends to implement FTR provisions regarding employees assigned to posts of duty in all locations outside the continental United States, not merely those stationed "overseas." Use of the word "overseas" clearly creates the possibility for confusion – as seen by the revised FTR's inclusion of the term in the heading above section 302-3.300. The word is not defined in the FTR, and its placement in the heading, immediately above a provision which incorporates the defined term "OCONUS," could make a reader wonder why "overseas" is used. We think the best interpretation is that the word has no particular meaning for the purpose of understanding this portion of the FTR.

STEPHEN M. DANIELS
Board Judge

²We note that under both the version of the FTR currently in effect and the amended version which takes effect on February 19, 2002, the regulatory provisions in effect on the date the employee reports for duty at his new duty station are used for payment or reimbursement purposes. 41 CFR 302-1.3(d) (2001); FTR 302-2.3. We construe these provisions to mean that the version in effect on the day Mr. Queair retires should be used in determining the agency's obligation to him for reimbursement of expenses he incurs in returning to Washington State.