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

May 20, 2002

GSBCA 15758-RELO

In the Matter of KENNETH A. HACK

Kenneth A. Hack, San Antonio, TX, Claimant.

Bernard Marcak, Chief Legal Counsel, Headquarters, Air Force Services Agency, San Antonio, TX, appearing for Department of the Air Force.

DANIELS, Board Judge (Chairman).

Kenneth A. Hack, a former employee of the Air Force Services Agency (AFSVA), claims that he is entitled to retain relocation benefits which his agency paid to him when it transferred him to a new duty station. AFSVA maintains that for two reasons, the Board does not have jurisdiction to settle the claim. The first reason is that AFSVA is a non-appropriated fund instrumentality (NAFI), which, according to AFSVA, is not an "agency" for the purpose of the fundamental statutes governing relocation benefits for federal civilian employees. The second reason is that Mr. Hack signed a debt repayment agreement in which he acknowledged a debt to AFSVA in the amount in dispute.

We reject AFSVA's suggestion that we do not have jurisdiction over this case. On the merits, however, we agree with the agency that Mr. Hack is not entitled to retain the benefits.

Background

In May 1999, Kenneth A. Hack was employed by AFSVA in San Antonio, Texas. He was selected for and accepted a position with the agency in Youngstown, Ohio. Before assuming this position, Mr. Hack signed a transportation agreement which provided that AFSVA would pay for various expenses he and his dependents might incur in moving from San Antonio to Youngstown. The agreement contained these paragraphs:

> 2. I understand that AFSVA will not pay for these PCS [permanent change of station] expenses unless I agree, in writing, to remain an employee of my new employing nonappropriated fund instrumentality (NAFI) for a period of at least 12 months. . . .

> 3. I agree to remain an employee of my new employing NAFI for a period of at least 12 months, beginning on the date I report for duty at my new employing NAFI, unless I am separated for reasons beyond my control and acceptable to my new employing NAFI and AFSVA.
>
> 4. If I fail to fulfill the terms of paragraph 3, or if I am removed for cause before expiration of the 12-month period described in paragraph 3, I will, upon demand, repay to AFSVA a sum of money equal to the PCS expenses paid by AFSVA. I authorize my new employing NAFI, AFSVA, or any other part of the Federal Government to withhold from any payments due me any amounts necessary to pay any indebtedness arising from my failure to fulfill the terms of this agreement.

Pursuant to this agreement, AFSVA paid Mr. Hack $9,033.60 in relocation benefits. Mr. Hack began his service in Youngstown on May 23, 1999.

Mr. Hack is a member of the Air Force Reserves. In the fall of 1999, he received an opportunity to be assigned to active duty in the Air Force in San Antonio for a few months. Mr. Hack and his wife decided that they would remain in San Antonio after this assignment was over. The employee was concerned, however, about the possibility that he would have to repay the relocation benefits if he did not return to Youngstown to complete the year of service there required by his transportation agreement. He consulted AFSVA officials for advice on how to avoid this predicament. These officials told him orally that if, after the active duty tour ended, he were to be placed on leave without pay from his civilian job in Youngstown until a year had passed since he began that job, he would not have to repay the relocation benefits. With this assurance, Mr. Hack accepted the active duty assignment. He applied for leave without pay from his civilian position in Youngstown, to last until the end of May 2000, and the application was approved.

On October 15, 1999, Mr. Hack submitted two letters to his superiors in Youngstown. The first was a request for a waiver from the twelve-month requirement in the transportation agreement. The second was a resignation from the Youngstown position, effective on May 26, 2000. Mr. Hack believed that by sending these letters, he would be entitled to keep the relocation benefits he had received. He thought that if the waiver was granted, he would be relieved from fulfilling the commitment contained in the agreement, and if it was denied, he would have remained on the payroll at Youngstown until after the commitment had been met.

On December 16, 1999 – a month after Mr. Hack's reserve tour began – AFSVA denied his request for a waiver from the agreement's service requirement. After receiving the denial, the employee asked whether he had any choice other than to return to Youngstown at the conclusion of the reserve tour, and complete his year of service there, in order not to jeopardize his right to retain the benefits.

By letter dated February 1, 2000, AFSVA gave Mr. Hack sound advice regarding his predicament. Under the Uniformed Services Employment and Reemployment Rights Act

(USERRA), 38 U.S.C. §§ 4301-33,[1] a person who is absent from a position of employment to perform service in a uniformed service has certain rights of reemployment and benefit retention, provided that he returns to that position promptly after the service ends. A person whose period of uniformed service is between thirty-one and 180 days long preserves these rights only if he applies for reemployment not later than fourteen days after the completion of the service (unless making application by that date is impossible). If the individual meets this condition, and returns to his former position, he will be deemed to have been on leave of absence while performing his service. If, on the other hand, the individual "knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service, [he] is not entitled to [prescribed] rights and benefits." See especially id. §§ 4312(e), 4316(b). Consequently, AFSVA told Mr. Hack, if he wished to retain his relocation benefits, he should promptly withdraw his letter of resignation and state an intention to submit an application for reemployment or report to his position in Youngstown when his reserve tour ended. AFSVA reiterated this advice on February 24.

On February 28, Mr. Hack rescinded his letter of resignation. He was unhappy about having to return to Youngstown, however. On February 8, he had complained to the agency that if he were to return at the conclusion of the reserve assignment, and stay until the one-year anniversary of his arrival at the Youngstown facility, he would have to leave his family for more than two months and live alone in Ohio at additional expense. He told the Board, in the course of this case, that he and his wife had already decided, after receiving AFSVA's advice, that when the tour ended, he would remain in San Antonio and start looking for alternative employment.

Mr. Hack's reserve assignment ended on March 8, 2000. On April 12, his supervisor at the Youngstown facility wrote a letter to him. The letter noted that he had failed to report to duty within fourteen days of his release from military service and had provided no explanation for his absence. The supervisor placed him on absent-without-leave status and said that he might remove Mr. Hack from his position as early as April 27. On May 4, not having heard from Mr. Hack, the supervisor said that he had decided to remove the employee from his position on May 15, but that an appeal filed by May 11 would be considered. The record contains no evidence that an appeal was made. The Youngstown facility removed Mr. Hack from his position on May 31, 2000, "due to excessive absen[ce] without leave."

By letter dated September 27, 2000, AFSVA demanded repayment of the relocation benefits it had given Mr. Hack for his move to Youngstown. Mr. Hack refused to pay, saying that his decision not to return to Youngstown had been based on advice from an agency official in the fall of 1999 that remaining in San Antonio would not jeopardize his right to retain the benefits. The matter lay unresolved until the fall of 2001, when Mr. Hack began another military reserve tour. AFSVA then reiterated its demand for repayment, and when a positive response was not forthcoming from the employee, the agency issued a pay adjustment authorization which stated that beginning in December 2001, eighty percent of

[1]All citations to provisions of the United States Code are to the version of the Code in effect in 1999, when Mr. Hack was transferred to Youngstown – either the 1994 version or, for provisions modified after 1994, the Supp. V 1999 version.

Mr. Hack's military pay would be garnished each month until the entire debt of $9,033.60 had been collected.

On January 10, 2002, Mr. Hack mailed to the Board a request that we review AFSVA's demand that he repay the relocation benefits he had received.

The next day, Mr. Hack wrote to AFSVA, requesting "a payment plan that I can afford." A week later, he signed a debt repayment agreement which includes these paragraphs:

> I Kenneth A. Hack (the "Debtor") hereby acknowledge, by signing this Agreement, financial responsibility for a debt to the Air Force Morale, Welfare, and Recreation Fund (the "Creditor") in the amount of **$9,033.60**. This debt arose from my failure to satisfy my obligations under a Transportation Agreement signed on 5 May 1999, wherein I became obligated to repay the Creditor for PCS moving expenses it expended on my behalf.
>
> I hereby agree to pay the Creditor the amount of **$250.00 per month** in repayment until this debt is satisfied in full. I further agree that this debt is due and payable until satisfied regardless of my duty status in the United States Air Force Reserve.

Mr. Hack has explained to the Board that he does not really believe that he owes this debt, but that he "had no choice but to try to work something out with [the agency]" because the alternative, having eighty percent of his pay garnished each month, placed him and his family in an intolerable financial position. He had asked to have such a qualification added to the agreement, but the agency refused to permit it.

Discussion

Jurisdiction

A. We consider first AFSVA's contentions that the Board lacks jurisdiction to consider this case. The first of these contentions focuses on the nature of the funds involved. AFSVA believes that our jurisdiction extends only to claims for travel and relocation expenses involving appropriated funds, and that because AFSVA is a NAFI and the money at issue here came not from appropriations but rather from the Air Force Morale, Welfare, and Recreation Fund, we may not settle this claim.

Our jurisdiction regarding claims settlement derives from a statute and a delegation of authority. The statute is 31 U.S.C. § 3702(a), which states:

> Except as provided in this chapter or another law, all claims of or against the United States Government shall be settled as follows:
>
> . . . .

> (3) The Administrator of General Services shall settle claims involving expenses incurred by Federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty station.

The delegation of authority was granted by the Administrator of General Services. Under this delegation, the Board –

> Resolves claims made under 31 U.S.C. 3702 for reimbursement of expenses incurred by Federal civilian employees while on official temporary duty travel or in connection with relocation to a new duty station. The Board's decisions constitute final administrative action on these claims, not subject to review within the agency.

ADM P 5450.39C CHGE 78 (Mar. 21, 2002).

Under the statute and the delegation of authority, the Board can settle a claim only if it (a) is of or against the United States Government, (b) involves expenses incurred by a Federal civilian employee, and (c) those expenses were incurred for official travel and transportation, or for relocation expenses incident to a transfer of official duty station. All three of these conditions are met here.

We consider the conditions in reverse order. The third item is obvious: The expenses in dispute were clearly relocation expenses incident to a transfer of official duty station. The second item is straightforward, too: The Supreme Court has held that generally, "employees of nonappropriated-fund activities, when performing their official duties, are employees of the United States." United States v. Hopkins, 427 U.S. 123, 123 (1976). Although a NAFI may engage the services of an individual by contract, NAFI employees are ordinarily engaged by appointment. Id.; Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982). AFSVA has presented no evidence that it hired Mr. Hack under a contract. We therefore conclude that he was an "employee of the United States," to use the Court's term, or a "Federal civilian employee," to use title 31's.

As to the first item, we can appreciate why AFSVA believes that a claim involving a NAFI, such as the one at issue in this case, is not "of or against the United States Government." Whether a NAFI is part of the Government or not – or, as the issue is generally phrased, whether it is an agency of the Government or not – is a question which brings different answers depending on the context in which it is asked. We have analyzed this subject in detail before, in the context of Government contracting, and refer the reader to Consulting Associates, Inc. v. Department of the Air Force, GSBCA 13194-P, 95-1 BCA ¶ 27,602, 1995 BPD ¶ 76, for a review of this confusing corner of the law.

In 1942, the Supreme Court issued its seminal decision regarding NAFIs, Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942). The Court made two statements which have been referenced often. First, it held that military post exchanges (which are NAFIs) "are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department." Id. at 485. Second, the Court said that "[t]he government assumes none of the financial obligations of

the exchange." These statements cut in opposite directions. The first leads to conclusions like the one reached in United States v. Tailan, 161 F.3d 591 (9th Cir. 1998) – that items owned by a NAFI are Government property. The Supreme Court's second statement in Johnson leads to conclusions like the one often reached by the Court of Appeals for the Federal Circuit and its predecessors – that absent some specific jurisdictional provision to the contrary, the Court of Federal Claims, which hears "claims against the United States," may not consider actions in which appropriated funds cannot be used to pay a resulting judgment. See, e.g., Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir. 2001).

The statute under which we settle claims, 31 U.S.C. § 3702(a)(3), does not define the term "United States Government" expressly to include or exclude NAFIs. Recent amendment of a closely allied statute indicates that our authorizing statute should be construed to include them, however. Our law is part of subchapter I of chapter 37 of title 31 of the United States Code. Subchapter II of chapter 37 is entitled "Claims of the United States Government." The Debt Collection Improvement Act of 1996 amended 31 U.S.C. § 3701 to provide that for purposes of subchapter II, the term "claim" means any amount of funds determined to be owed to the United States and includes, "without limitation," "expenditures of nonappropriated funds." 31 U.S.C. § 3701(b)(1)(B) (as amended by Pub. L. No. 104-134, § 31001(z)(1)(B), 110 Stat. 1321, 1321-358, 1321-378 (1996)). The officials charged with dealing with claims of the Government are the heads of executive, judicial, and legislative agencies. 31 U.S.C. § 3711. The term "executive, judicial, or legislative agency" is defined broadly to mean "a department, agency, court administrative office, or instrumentality in the executive, judicial, or legislative branch of Government, including government corporations." Id. § 3701(a)(4) (emphasis added). Whatever else they may be, NAFIs are "instrumentalities" of the United States. Consulting Associates, 95-1 BCA at 137,526. Thus, it is clear that at least for purposes of making claims of the Government, a NAFI is part of the Government.

Where Congress meant to exclude NAFIs from the universe of Government claims, it has done so directly. In 31 U.S.C. § 3721 (a part of subchapter III of chapter 37 of title 31), the legislature authorized Government agencies to settle and pay certain claims made by agency personnel for personal property damage or loss. For this section alone, Congress provided that the term "agency" "does not include a nonappropriated fund activity." 31 U.S.C. § 3721(a)(1). Our claims do not involve personal property damage or loss, however, and Congress has not excluded NAFIs from the kinds of claims we consider.

In any event, when we settle claims, we either direct employing Government entities to pay (or not to pay) sums of money to their Federal civilian employees, or direct such employees to pay (or not to pay) sums to such entities. Unlike the Court of Federal Claims, whose judgments may only be "paid out of any general appropriation," 28 U.S.C. § 2517(a), we do not direct the payment of funds from or to any particular source. Whether the funds come from or go to an appropriation is not of concern to us. The fact that a NAFI's money does not come from Congress is therefore not pivotal in resolving the issue of whether a claim involving a NAFI is "of or against the United States Government." We conclude that

we may consider Mr. Hack's claim, notwithstanding the fact that it involves funds of a NAFI.[2]

B. AFSVA also maintains that we should not consider this claim because Mr. Hack signed a debt repayment agreement in which he acknowledged "financial responsibility for a debt to the Air Force Morale, Welfare, and Recreation Fund" in the entire amount sought by the agency. Mr. Hack responds that he signed the agreement under duress in that had he not signed it, AFSVA would have continued to garnish eighty percent of his pay, thereby placing him and his family in an intolerable financial position. Further, according to Mr. Hack, notwithstanding his signature on the agreement, he contests liability and desires a determination on that matter by the Board.

Mr. Hack asked the Board to review AFSVA's demand for repayment even before he signed the debt repayment agreement. His actions at the time of signing show that he has not unequivocally accepted liability for repayment, and he continues not to accept liability. He contends, in effect, that the agreement is voidable because he signed it due to an agency threat which was improper in that it was a breach of the duty of good faith and fair dealing in that it left him with no reasonable alternative to suffering economic duress. See Restatement (Second) of Contracts §§ 175-76 (1981).

In this administrative proceeding, we need not decide whether the debt repayment is legally voidable or not. We simply conclude, based on all the facts before us, that Mr. Hack seeks our settlement of the merits of the claim. Our honoring the employee's request causes no harm to the agency. We will review the matter on the merits.

Merits

AFSVA maintains that we should not evaluate Mr. Hack's claim against the statutes and regulations which are generally applicable to costs of relocation of official station by Federal civilian employees, 5 U.S.C. ch. 57, subch. II, and 41 CFR ch. 302 (2001), because those laws do not apply to NAFIs. The Board has no difficulty in applying to claims for travel and relocation expenses whatever laws govern the situation at issue. For example, in cases involving Federal Aviation Administration (FAA) employees, we apply the FAA Travel Policy, e.g., Lawrence Baranski, GSBCA 15636-TRAV, 02-1 BCA ¶ 31,684 (2001); Alan D. Hendry, GSBCA 15585-RELO, 01-2 BCA ¶ 31,535; James W. Respess, GSBCA 15532-RELO, 01-2 BCA ¶ 31,450; and in cases involving foreign service officers and others who are subject to the Foreign Service Act, we apply that statute and associated regulations,

[2]We recognize that our predecessor in settling claims by Federal civilian employees for travel and relocation expenses, the Comptroller General, would not approve claims for relocation expenses involving NAFIs. The Comptroller General believed that this result was dictated because a NAFI is not an "agency" under 5 U.S.C. § 5721 (and associated statutes providing relocation benefits for Federal civilian employees) and employees of NAFIs are exempt from some general Federal personnel laws (see 5 U.S.C. § 2105). John E. Seagriff, B-215398 (Oct. 30, 1984). Whether the Comptroller General's analysis was correct or not at the time it was made, the amendment to the definition of the term "claim" made by the Debt Collection Improvement Act of 1996 dictates a contrary result.

e.g., Ms. Roberta B., GSBCA 15320-RELO, 01-1 BCA ¶ 31,215 (2000); Ira A. C. Peets, GSBCA 15294-RELO, 00-2 BCA ¶ 31,058; Carlos L. Edwards, GSBCA 15192-RELO, 00-1 BCA ¶ 30,877. Whether the statutes and regulations which generally apply to costs of Federal civilian employees' relocations apply to NAFIs and their employees is an issue we leave for another day. We need not decide it now because whether those laws apply or not, the result in this case is the same.

If the usual laws do not apply, we will look to AFSVA's methods of handling employee relocation benefits. These methods were effected, in this case, through the transportation agreement Mr. Hack actually signed prior to his reassignment to Youngstown, Ohio, as the standard against which to judge the agency's demand for repayment. No suggestion has been raised that this agreement is inconsistent with applicable AFSVA or Youngstown facility rules. According to the agreement, if Mr. Hack did not remain an employee of the Youngstown facility for at least twelve months from May 23, 1999, and he was not separated for reasons beyond his control which were acceptable to the agency, he would be required, "upon demand, [to] repay to AFSVA a sum of money equal to the PCS expenses paid by AFSVA." Mr. Hack did not remain an employee of the Youngstown facility until May 23, 2000. Instead, he left his position there in November 1999, and by not returning within fourteen days of the completion of his military reserve tour, he lost the reemployment and benefit rights afforded him by USERRA. He was not separated for reasons beyond his control. Thus, he must, in accordance with the transportation agreement, repay the benefits to the agency.

We understand that AFSVA officials advised Mr. Hack to the contrary before he left Youngstown. The fact that this mistake was made does not allow the agency or the Board to deviate from USERRA's restrictions, however. In similar situations of advice by agency representatives which is contrary to law, we have consistently followed the Supreme Court's direction that the Government cannot be held to its representatives' promises; subjecting the Government to estoppel in these circumstances would allow it to spend money in ways which have been forbidden by Congress. E.g., Louise C. Mâsse, GSBCA 15684-RELO, 02-1 BCA ¶ 31,694 (2001) (citing Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)). It is also worth noting that here, after the initial misstep, AFSVA went out of its way to explain to Mr. Hack exactly what he needed to do to retain the relocation benefits it had paid him when he moved to Youngstown. Mr. Hack had plenty of time to adjust his plans to accord with that helpful counsel. He made a decision, with full knowledge of the alternatives, that remaining with his family for two months, and avoiding the additional costs of living alone during that period in Youngstown, was preferable to retaining the relocation benefits in question.

Now let us assume that NAFIs and their employees are subject to the statutes and regulations which generally govern costs of relocation of official station by Federal civilian employees, 5 U.S.C. ch. 57, subch. II, and 41 CFR ch. 302.[3] Under 5 U.S.C. § 5724(i) –

[3]As AFSVA notes, the Department of Defense's (DoD's) Joint Travel Regulations (JTR), which supplement 41 CFR ch. 302 as to DoD civilian employees generally, do not apply to "NAF [nonappropriated fund] officials and employees traveling on NAF business (unless (continued...)

> An agency may pay . . . relocation allowances . . . when an employee is transferred within the continental United States only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. If the employee violates the agreement, the money spent by the Government for the . . . allowances is recoverable from the employee as a debt due the Government.

As can be seen, this provision of law is much like a provision in the transportation agreement Mr. Hack signed before he moved to Youngstown. The only significant difference between the law and the agreement, for our purposes, is that the law allows an employee to retain his relocation benefits if he remains in Government service for twelve months after his transfer, whereas the agreement allowed Mr. Hack to keep his benefits only if he remained with one particular Government facility – the Youngstown NAFI – for that period of time. If Mr. Hack is properly subject to this law, he may keep his benefits if he stayed in Government service from May 23, 1999, through May 23, 2000, or was separated for reasons beyond his control that were acceptable to AFSVA. He did not stay in Government service for this length of time, however, and he was not separated for reasons beyond his control. After his military reserve tour was over, in March 2000, he made a personal decision to remain in San Antonio to look for new employment instead of continuing in Government service. Thus, if the law applies to him, it does not allow him to keep the benefits.

Decision

Whether or not the statutes and regulations which generally govern costs of relocation of official station by Federal civilian employees apply to NAFIs and their employees, Mr. Hack may not retain the relocation benefits AFSVA paid to him when he moved to Youngstown. The amount of those benefits, $9,033.60, is owed as a debt by Mr. Hack to AFSVA, to the extent that this debt has not already been repaid.

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STEPHEN M. DANIELS
Board Judge

(...continued)
adopted by the NAF activities." JTR C1001-C.1. We do not know whether AFSVA and/or its Youngstown facility have adopted the JTR. Whether they have or not does not matter in this case. DoD's decision to restrict application of the JTR does not control our determinations as to the application of statutes or Government-wide regulations.