Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

December 24, 2003

GSBCA 16306-RELO

In the Matter of DEBORAH DiFALCO

Deborah DiFalco, Fairfax, VA, Claimant.

Edgardo Aviles, Chief, Travel Section, National Finance Center, United States Customs and Border Protection, Department of Homeland Security, Indianapolis, IN, appearing for Department of Homeland Security.

NEILL, Board Judge.

The Department of Homeland Security asks, pursuant to 31 U.S.C. § 3529 (2000), whether one of its employees, Ms. Deborah DiFalco, is entitled to reimbursement of certain relocation expenses resulting from her move from Norfolk, Virginia, to Fairfax, Virginia. For the reasons set out below, we conclude that the concerns expressed by the agency do not justify withholding reimbursement and that, if the claimant's requests are otherwise acceptable, her claim should be paid.

Background

In April 2000, Ms. DiFalco was advised that she was being transferred to a United States Customs office in Norfolk, Virginia. According to the agency, at the time of this transfer, Ms. DiFalco, although officially attached to the agency headquarters in Washington, D.C., worked in an office located in nearby Fairfax, Virginia. While working in the Washington metropolitan area, Ms. DiFalco resided in a one-bedroom condominium which she purchased in Arlington, Virginia. On transferring to Norfolk, Ms. DiFalco did not sell her condominium but elected instead to retain it as a rental property.

In early 2003, Ms. DiFalco was promoted to the position of Director of the agency's Cyber Crimes Center. As a result of this promotion, she was transferred to the Center's office in Fairfax, Virginia. Her travel authorization was issued on April 15, 2003, and, among other items, provided that she was entitled to a househunting trip to her new duty station and to reimbursement of certain real estate expenses associated with her transfer. Shortly thereafter, Ms. DiFalco undertook the househunting trip and, on May 23, 2003, submitted a request for reimbursement of the expenses incurred on that trip. She subsequently entered into a binding contract for the purchase of a home in Fairfax and agreed to a one-year lease of her condominium in Arlington to the then current tenant.

On June 16, 2003, the agency rejected Ms. DiFalco's claim for househunting expenses and informed her that she was not entitled to reimbursement of relocation expenses. In its report to us, the agency explains that it arrived at this conclusion based largely on the Board's decision in D. Larry Fraser, GSBCA 14034-RELO, 97-2 BCA ¶ 29,221. The agency believes that, pursuant to that decision, an employee is not entitled to reimbursement for relocation expenses, when returning to a former duty station, if the relocation occurs before the expiration of the period within which an employee may seek reimbursement for relocation expenses incurred in the prior departure from the same duty station.

On July 2, 2003, notwithstanding the agency's notice of June 16 that it would not reimburse her for relocation expenses, Ms. DiFalco closed on the purchase of her new home in Fairfax which she had contracted to purchase prior to receipt of the agency's notice.

In accordance with Board rules, Ms. DiFalco was accorded an opportunity to comment upon the agency's request for our opinion on this case. She takes issue with the agency's basic supposition that, in being transferred to Fairfax, Virginia, in 2003, she was returning to her former permanent duty station (PDS). Ms. DiFalco has submitted documentation (standard forms 50 or variations thereof) listing her assignments while residing in the Washington metropolitan area. This documentation shows that, effective June 8, 1997, her duty station was Washington, D.C.; effective March 4, 1999, her duty station was changed to Sterling, Virginia; and, effective January 17, 2000, her duty station was changed to Norfolk, Virginia. Ms. DiFalco further explains that while she was still stationed in Sterling and shortly before her transfer to Norfolk, she was detailed to Fairfax to assist in the planned establishment there of a Cyber Crimes Center. The Center did not open officially in Fairfax, however, until July 2000, several months after Ms. DiFalco was formally transferred from Sterling to Norfolk.

After reviewing a copy of the agency's administrative report in this case, Ms. DiFalco challenged the agency's fundamental assumption that, in being transferred from Norfolk to Fairfax, Ms. DiFalco was returning to her former PDS. She specifically asked the agency representative to provide documentation in support of this assumption. Although the agency representative, in a reply to her dated November 11, 2003, promised to clarify this issue, we have received nothing from the agency substantiating its contention that Ms. DiFalco's previous PDS was ever in Fairfax, Virginia.

Discussion

Generally, in dealing with relocation claims of civilian employees of the Federal Government who are transferred back to a prior PDS, we have held to the rule that once the employee is notified that he or she is being transferred back to a former PDS, then the reimbursement of relocation costs is limited to allowable and reasonable costs which were incurred before the employee learned of the return transfer and to other allowable and reasonable costs which simply could not be avoided. See Albert R. Wilcox, GSBCA 15776-RELO, 02-2 BCA ¶ 31,864 (and cases cited therein).

The rationale behind the rule is readily apparent, particularly with regard to reimbursement of costs associated with residence transactions. By statute, agencies are authorized to reimburse employees for many relocation costs associated with a transfer which

is in the Government's interest. When, however, a recently transferred employee learns that he or she is being transferred back to a location at or near the prior PDS, certain relocation costs that have not yet been incurred can and should be avoided. An employee, for example, who has not yet contracted for the sale of the residence near the prior PDS need no longer plan to sell the residence. Indeed the employee would be hard pressed to demonstrate that a subsequent sale of that residence and the purchase of another in the same area was necessitated by either the initial transfer or the return transfer.

The rule we follow is essentially the same as that previously enunciated by the General Accounting Office (GAO), our predecessor in settling relocation and travel cases of civilian employees of the Federal Government. E.g., Howard L. Peterson, 69 Comp. Gen. 242 (1990); Gerald L. Rooney, B-235336 (Oct. 26, 1989); Robert T. Celso, 64 Comp. Gen. 476 (1985); Warren L. Shipp, 59 Comp. Gen. 502 (1980). As this rule first evolved under the auspices of GAO, the issue arose of whether there was any limit on its application based upon the period of time between the employee's departure from a PDS and subsequent return to it. In the above-mentioned Celso decision, the employee transferred back to his former PDS after an absence of twelve years. In that case, GAO declined to apply the rule, pointing out that its application was based on the assumption that the period between the employee's original transfer from a PDS and later return to it was relatively brief.

Recognizing the need for an objective standard in applying the rule, GAO stated in Celso that the rule is applicable only if the employee is notified of his or her transfer back to the former PDS before the expiration of the maximum time allowed for reimbursement of real estate expenses incident to the original transfer. In adopting the former GAO rule, we have followed the same objective standard set out in Celso. E.g., Thomas J. Liebscher, GSBCA 14132-RELO, 97-2 BCA ¶ 29,227; George S. Lu, GSBCA 13659-RELO, 97-1 BCA ¶ 28,797.

In this case, the agency is uncertain as to just how long this maximum time allowed for reimbursement is. Under the regulation in effect at the time Ms. DiFalco was transferred to Norfolk, the period for reimbursement of real estate expenses was two years. The same regulation also permitted the agency to extend this period of time by an additional year if the employee submitted a timely written request and if the agency deemed the reasons for the extension acceptable. See 41 CFR 302-6.1(e)(1)-(2) (1999) (FTR 302-6.1(e)(1)-(2)).[1]

The agency's concern in this case stems from the fact that Ms. DiFalco never requested an extension of the initial two-year period but was transferred back to the Washington metropolitan area before the expiration of the third year. The question posed, therefore, is whether the maximum time allowed for reimbursement includes this third year even if the extension is not given by the agency. The agency quite correctly notes that in Fraser, the claimant returned to his former PDS during this third year but the decision does not indicate whether the agency was actually asked to extend the initial two-year period.

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[1] Under the current version of the Federal Travel Regulation (FTR), the agency is now authorized to extend the two-year period by an additional two years. FTR 302-11.420 (2002).

Given the recognized need for an objective standard in dealing with cases such as this, we find that the maximum time allowed for reimbursement should be determined solely by what has actually occurred in each individual case -- as opposed to what *might* have occurred. If an extension has not been sought and granted, then the maximum time allowed by the regulation is no more than the initial period stated in the regulation. Extension of the initial period is far from automatic. It is subject to various conditions. Principal among these conditions is the agency's approval of the reason given in support of a requested extension. If these conditions have not been met, then it simply cannot be said that the maximum period allowed by regulation extends beyond the initial two-year period. If, on the other hand, the extension has been granted, then the maximum period allowed by regulation clearly includes the extension as well. For this reason, we insist that, if any additional extension has not actually been granted, then it should not enter into the calculation of the maximum time allowed for reimbursement.

Because Ms. DiFalco did not seek an extension of the initial two-year period and learned of her transfer after the expiration of that period, the rule regarding reimbursement of relocation expenses for returning employees is not applicable to her. The fact that she learned of her return transfer before the expiration of the next, or third year, has no bearing on her case and this third year should not enter into the calculation of the maximum period allowed for reimbursement of expenses.

Ms. DiFalco has raised a different argument for why the rule for reimbursement of returning employees should not apply to her. She contends that she has never had a PDS in Fairfax, Virginia, where her new PDS is located. It would appear that the agency's initial assumption that Ms. DiFalco was previously assigned to a PDS in Fairfax is, in fact, incorrect. The claimant has submitted documentation indicating that, while assigned to a PDS in Sterling, Virginia, she was detailed to Fairfax prior to her transfer to Norfolk. However, nothing has been provided by the agency to support its assumption that Ms. DiFalco's PDS was actually in Fairfax before she was transferred to Norfolk. Nevertheless, we find this argument of Ms. DiFalco less than convincing. Given the fundamental rationale behind the rule regarding reimbursement of relocation costs for returning employees, we see no reason why it would not apply in this case but for the fact that the period for reimbursement of relocation expenses had, in fact, expired. If the new PDS to which the employee is assigned is within easy travel distance of the prior PDS and the period for reimbursement of relocation expenses from the prior transfer has not yet run, then it may well be appropriate to apply the rule.

In submitting this case for our consideration, the agency has asked us to comment on the factors which should be considered in determining whether particular expenses are nonetheless necessary even where it is determined that the rule for reimbursement of returning employees is applicable. We decline the agency's request. Since we have concluded that the rule is inapplicable in this case, the agency's query becomes hypothetical at best. As we have stated in the past, we will not address matters of purely hypothetical or academic interest. John R. Durant, GSBCA 15726-TRAV, 02-1 BCA ¶ 31,827; William R. Thygerson, GSBCA 15244-RELO, 01-1 BCA ¶ 31,283.

Accordingly, it is our recommendation Ms. DiFalco's requests for reimbursement of expenses associated with her househunting trip and with the purchase of a new residence in Fairfax be paid if otherwise acceptable.

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EDWIN B. NEILL
Board Judge