

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

October 12, 2006

GSBCA 16936-RELO

In the Matter of JEANNE HEHR

Jeanne Hehr, Stoughton, WI, Claimant.

Toby D. McCoy and James E. Hicks, Administrative Law Section, Office of Chief Counsel, Drug Enforcement Administration, Department of Justice, Alexandria, VA, appearing for Department of Justice.

DeGRAFF, Board Judge.

When a federal government employee signs a service agreement in connection with a transfer and does not remain in government service for the length of time specified in the agreement, the money spent by the Government in connection with the transfer is recoverable as a debt due the Government unless the employee separates from service for reasons beyond the employee's control which are acceptable to the employing agency.

Background

In 2004, the Drug Enforcement Administration (DEA) notified Jeanne Hehr it was going to transfer her from one duty station to another. In July 2004, Ms. Hehr signed a service agreement which said if she did not remain in government service for twelve months after she reported at her new duty station, she would repay DEA the total of the costs it incurred in connection with her transfer, unless she separated from government service for reasons beyond her control and acceptable to DEA.

Among other relocation expenses which DEA authorized Ms. Hehr to incur were those related to a househunting trip. Ms. Hehr says an employee in DEA's headquarters office knew she was concerned about transferring due to her father's health, which worsened when she informed him of her impending transfer. She told the headquarters employee she was thinking about moving into an apartment at her new duty station and incurring no relocation expenses so she would not owe the agency anything if her father's condition deteriorated to the point where she would have to retire before she could fulfill the terms of the service agreement. Ms. Hehr says the headquarters employee subsequently contacted her and told her that, due to her circumstances, she would not have to repay the agency for the cost of a househunting trip if she retired instead of fulfilling the terms of her service agreement, although she would have to repay any other costs the agency paid in connection with her relocation. Ms. Hehr knew this employee lacked the authority to make such a commitment, but assumed he had spoken with someone who had such authority. She took his statement to mean that DEA agreed that if she separated from government service within twelve months after she reported to her new duty station, the separation would be due to her father's health, which was a reason beyond her control and acceptable to DEA. Ms. Hehr had more than one conversation with the DEA headquarters employee and says she relayed the substance of these conversations to two co-workers, including her supervisor. According to DEA's representatives, the headquarters employee who spoke with Ms. Hehr says he did not promise or guarantee her anything. DEA has not provided a statement directly from this employee or any documentation regarding what he said to Ms. Hehr.

Ms. Hehr made the househunting trip in order to determine how she would be able to handle her new job and also care for her father. After the trip, her father's health declined at a rapid pace. Ms. Hehr retired from federal service and never reported to her new duty station. Ms. Hehr's retirement did not entitle her to an immediate annuity and leaving DEA caused her some amount of financial hardship until she was able to find other employment.

In March 2005, a DEA employee complained to the agency's Inspector General about the agency's policies regarding the transfer of employees who were eligible to retire. According to the employee's complaint, he was told by several DEA employees (including the headquarters employee who spoke with Ms. Hehr) that the agency never collected from employees who retired without fulfilling the terms of their service agreements. He knew of several employees who had transferred, retired within one year, and not been required to repay their relocation costs. The employee who filed the complaint realized that the DEA administrative manual said an employee would have to repay such costs unless DEA granted the employee a waiver. He also realized the manual was consistent with the service agreement, the Federal Travel Regulation, and federal statute. In addition, the employee who filed the complaint learned that an employee in DEA's Transportation Unit, the DEA Ombudsman, and the DEA's Chief Financial Officer were of the view that an employee who

violated a service agreement would be liable to repay whatever relocation costs the agency incurred unless DEA waived the debt, although the Ombudsman and the Chief Financial Officer did not know if DEA had ever collected from anyone in such a situation. The thrust of the employee's complaint to the Inspector General seemed to be that DEA was wasting federal funds by not collecting from employees who failed to fulfill the terms of their service agreements.

Whether it was because of the employee's complaint to the Inspector General or for other reasons, DEA decided to review its records for the past three years and determine which of its employees had left federal service within twelve months after transferring to a new duty station. In addition, DEA's Chief Financial Officer issued a memorandum to DEA employees on May 12, 2005, which discussed service agreements. The memorandum said DEA was updating its service agreements to clarify that voluntary retirement is not considered an event beyond the control of the employee. Instead, said the memorandum, voluntary retirement is considered to be within the control of the employee and is not acceptable to DEA as a basis for not pursuing repayment of relocation expenses. In June 2005, DEA issued an advisory notice regarding service agreements which was substantially the same as the May 12 memorandum.

In 2006, DEA told Ms. Hehr she had not fulfilled the terms of her service agreement and would have to repay the costs the agency incurred in connection with her househunting trip. DEA said that as a general rule, neither a desire to remain close to family members nor a voluntary retirement is an acceptable reason for not fulfilling the terms of a service agreement. DEA said it considered the facts surrounding Ms. Hehr's failure to fulfill the terms of her agreement and concluded that her reasons for not remaining in service for twelve months were not sufficient to relieve her from the application of the general rule. DEA's rationale, in its entirety, was this: "In your case, you were aware of your father's condition prior to incurring the expenses and have not demonstrated a change in circumstance after signing the agreement which was beyond your control. Therefore, this argument for not completing your service obligation is not acceptable to DEA." Letter from Frank M. Kalder to Jeanne Hehr (May 11, 2006).

Ms. Hehr asks us to review the agency's decision. She contends DEA's decision to ask her to repay the cost of her househunting trip represents a change in DEA policy. In addition, Ms. Hehr contends her reason for retiring was her father's declining health. She says DEA correctly determined before she made her househunting trip that if she retired due to her father's health, this would be a reason beyond her control and acceptable to the agency, so as to relieve her from the obligations imposed by the service agreement.

Discussion

When the Government transfers a civilian employee from one duty station to another, the Government pays many of the employee's relocation expenses. 5 U.S.C. §§ 5724, 5724a (2000). The Government may pay such expenses, however, only after the employee agrees in writing to remain in government service for twelve months following the effective date of the transfer, unless the employee is separated from service for reasons beyond the employee's control which are acceptable to the agency. If the employee violates the agreement, the relocation expenses paid by the agency are recoverable as a debt due the Government. 5 U.S.C. § 5724(i); 41 CFR 302-2.14 (2004). If an employee signs a service agreement and does not complete a transfer, this constitutes a violation of the agreement and the agency may recover its costs the same as if the employee had completed the transfer. *Thomas M. Stan*, GSBCA 16679-RELO, 05-2 BCA ¶ 33,063.

DEA implemented the statute in a permanent change of station handbook and an administrative manual, both of which have been in effect since at least 2000. The handbook and the manual say if an employee does not fulfill the terms of a service agreement, the employee will have to repay the Government for the transfer expenses it incurred unless a waiver is granted by the Chief Financial Officer.

According to the statute and the regulations which implement the statute, Ms. Hehr owes no debt if DEA determines she separated from government service for reasons beyond her control which are acceptable to DEA. It is within an agency's discretion to determine whether, under the particular circumstances presented, a separation from service which appears to be voluntary was for a reason beyond the employee's control and acceptable to the agency as a reason for not fulfilling the terms of a service agreement. We will not question the agency's exercise of its discretion so long as it has a reasonable basis. *Melinda K. Kitchens*, GSBCA 16639-RELO, 05-2 BCA ¶ 33,062; 46 Comp. Gen. 724 (1967); B-174,823 (Jan. 26, 1972). Below, we consider whether DEA properly exercised its discretion when it rejected Ms. Hehr's arguments and decided her separation from service violated the terms of her service agreement.

Ms. Hehr argues that DEA's decision to ask her to repay the cost of her househunting trip represents a change in DEA policy. DEA's policy is set out in its administrative manual and its handbook. This policy is consistent with the controlling statute and the Federal Travel Regulation, and was in effect when Ms. Hehr signed her service agreement. The policy says employees who do not fulfill the terms of their service agreements will have to repay the Government for any transfer expenses the agency incurred, unless DEA waives the debt. Based upon the information presented by Ms. Hehr, it appears that some DEA employees were of the view that a person who retired within twelve months after transferring

had fulfilled the terms of the service agreement and would not have to repay the Government for relocation expenses. It also appears that several DEA employees who retired within twelve months after their transfers did not repay the Government for their relocation expenses. DEA's policy, however, as set out in its administrative manual and handbook, gave DEA the discretion to determine whether a separated employee had fulfilled the terms of a service agreement, and nothing in the manual or the handbook suggests that DEA had made a blanket exercise of its discretion and determined that all retired employees had fulfilled the terms of their service agreements regardless of the circumstances surrounding their retirements. When DEA management employees became aware of how some of its employees were reading the manual and the handbook, they took steps to remedy the situation by issuing guidance which said it was intended to clarify DEA's policy. Based upon the information we have available to us, we conclude that DEA's intention was to clarify, not change, its policy.

Ms. Hehr contends that before she made the househunting trip, DEA determined that if she retired due to her father's health, her separation would be for a reason beyond her control and acceptable to the agency. Ms. Hehr believes someone with the authority to do so made this determination and that it was relayed to her by the headquarters employee who told her she would not have to repay the expenses of her househunting trip. Ms. Hehr does not know for certain, however, whether her belief is correct. Therefore, we cannot conclude that someone with authority did, in fact, determine at one point that Ms. Hehr's separation from service due to circumstances surrounding her father's health would be beyond her control and acceptable to the agency.

This leaves the question of whether DEA properly exercised its discretion when it determined that Ms. Hehr did not fulfill the terms of her service agreement. Although Ms. Hehr did not remain in government service for twelve months, the issue is whether DEA properly determined her separation was not for a reason beyond her control and acceptable to the agency. DEA concluded Ms. Hehr's separation from service was voluntary and was for a reason within her control and not acceptable to the agency because she was aware of her father's condition before she signed the service agreement and before she made the househunting trip. The facts do not support DEA's conclusion because Ms. Hehr's father's condition changed during the months after she received notice of her transfer. When DEA notified Ms. Hehr of her transfer, she knew her father was ill. However, his health changed for the worse after she received her transfer notice. Ms. Hehr made the househunting trip in an effort to determine how she could remain in federal service. When she did so, she intended to complete the transfer, not retire. Her father's decline accelerated after the trip and this caused her to retire from federal service before she was eligible for an annuity. All of these facts lead to the conclusion that Ms. Hehr's retirement was not, in the truest sense, voluntary. DEA's determination that Ms. Hehr's retirement was voluntary and, therefore,

that she did not fulfill the terms of her service agreement is contrary to the facts. Thus, the determination is not the result of a proper exercise of DEA's discretion and we will not endorse it.

The claim is granted.

MARTHA H. DeGRAFF
Board Judge