UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 20, 2011

CBCA 2291-RELO

In the Matter of LELAND G. NEWPORT

Leland G. Newport, Lakeland, FL, Claimant.

Tam Nguyen, Authorized Certifying Officer, Controller Operations Division, Office of the Chief Financial Officer, Department of Agriculture, New Orleans, LA, appearing for Department of Agriculture.

DANIELS, Board Judge (Chairman).

The Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) and National Finance Center (NFC) are thoroughly confused as to how to deal with the financial ramifications of APHIS's treatment of one of its plant protection and quarantine officers, Leland G. Newport. After several years of dithering by these two entities, NFC has asked the Board to issue a decision as authorized by 31 U.S.C. § 3529 (2006) (also known as an "advance decision") which provides guidance in response to several questions. The questions may be stated briefly as: Is Mr. Newport entitled to temporary duty (TDY) benefits, and if so, which ones? Is he entitled to relocation of duty station benefits, and if so, which ones? Or, more concisely, Whatever should we do about this messy situation?

Mr. Newport has proposed an administrative solution to the matter which would not impose any financial burden on the department. In an effort to resolve the situation in a way which could be beneficial to both the employee and his agency, we directed our chief counsel to inquire of APHIS's counsel whether the agency would agree to the employee's proposal. After more than a month of considering the proposal, APHIS has not made a determination. Consequently, we proceed to issue this decision.

Background

At all times relevant to this case, Mr. Newport has been working for APHIS in the State of Florida. In 2001, he was stationed in Gainesville. He was selected for a position in Orlando which was designated as a temporary position "for up to 5 years" with reduced per diem benefits. The assignment was effective on February 10, 2002.

Although his supervisors told him they expected the position to be made permanent, and it was advertised as such on several occasions, it never became so. Instead, the assignment ended by its initial terms on February 9, 2007.

For the first few months that Mr. Newport worked from Orlando, he was paid TDY benefits. Agency personnel began to quarrel about the status of Mr. Newport and four other employees who were similarly situated, however, with people in Marketing and Regulatory Program Business Services in Minneapolis squaring off against Mr. Newport's supervisors in Florida.

In June 2002, Mr. Newport sold his home in Gainesville, and his parents – allegedly on his behalf – purchased a home in Lakeland, which is much closer than Gainesville to Orlando. Mr. Newport moved to the Lakeland residence, where he continues to live. He has paid all expenses associated with residing in this house. After this move, the uncertainty about his status began to involve whether he was entitled to TDY benefits or relocation benefits.

The agency's confusion was reflected in its determination of Mr. Newport's official duty station. The February 2002 documents noting his assignment to Orlando specified that his duty station was Gainesville. In December 2002, the duty station was changed to Orlando. In April 2004, designating Bartow, Florida, as his duty station was discussed; there is no record that Bartow was ever so designated, however. Instead, the duty station was changed to Gainesville in August 2005, Orlando in December 2005, Gainesville in September 2006, Orlando in December 2006, and finally Gainesville in February 2007 (when the temporary assignment ended).

In early 2007, Mr. Newport again raised the question of his entitlement to TDY or relocation benefits. The APHIS regional office asked him to submit vouchers covering the last four and one-half years of TDY expenses. He did so and says that the total sought was approximately $76,000. After seeing the magnitude of the expenses, the regional office asked him to submit a different voucher, for relocation benefits, on the theory that he had been transferred to Orlando in February 2002. He provided this voucher, as well, seeking reimbursement for the costs of the home sale and purchase, as well as moving his household goods between those residences.

The agency has not completed processing of either voucher. In August 2007, Mr. Newport asked an official of the NFC to work with him to resolve the matter. Electronic mail messages in January, May, and June 2008, however, state that at those times, the vouchers were still under review. In 2009, someone in the department deobligated funds for any benefits for Mr. Newport, on the belief that he had appealed a determination denying all benefits and the appeal had been denied. In January 2010, someone else realized that this belief was false and sent the papers back to a certifying official. Then the papers were lost, and in May 2010, an APHIS travel specialist required Mr. Newport to resubmit them. She attempted to move the matter toward resolution. By December 2010, however, she reported to APHIS management, "NFC is not being responsive."

On February 2, 2011, an NFC certifying official asked the Board for an advance decision as to how to handle Mr. Newport's requests for benefits. In response, Mr. Newport wrote:

> My preferred outcome to this case is to be made permanent as I was originally promised. I am currently in a new 5 year NTE [not to exceed] position with CHRP [the Citrus Health Response Program], in the same position, and the same geographic location. If this is a possible judgment, it would be a budget neutral decision. If that happens, as a show of good faith I will not pursue reimbursement for either the relocation or the per diem.

This is the proposal as to which APHIS has not made a determination.

Discussion

APHIS designated Mr. Newport's position in Orlando as temporary and said, both in advertising for the position and in sending him on the assignment, that reduced per diem benefits would be paid. At the end of the assignment, after much confusion, the agency sent him back to the duty station from which he had permanently been assigned, Gainesville. These markers indicate that for the five years that Mr. Newport was in Orlando, he was on temporary duty. The Federal Travel Regulation (FTR) provides agencies "an alternative to a long-term temporary duty travel assignment which will . . . save the Government money." That alternative is called a temporary change of station. 41 CFR 302-3.401 (2002). There is no indication in the record that APHIS took advantage of this option. We conclude that throughout the five-year period, Mr. Newport was on temporary duty. He is therefore entitled to TDY allowances as provided in the FTR, 41 CFR ch. 301.

The FTR establishes three categories of expenses which are to be paid to employees on TDY: transportation, per diem, and miscellaneous expenses. 41 CFR 301-2.2. The first two of these are at issue in this case.

Mr. Newport is entitled to the costs of his transportation from Gainesville to Orlando (in 2002) and back (in 2007) by the means of travel most advantageous to the Government, plus the costs of his travel on official business while on his temporary duty assignment. 41 CFR pt. 301-10.

Mr. Newport is also entitled to per diem expenses, a term which includes the costs of both lodging and meals and incidental expenses (M&IE). The General Services Administration (GSA) establishes maximum per diem rates for both lodging and M&IE for locations within the United States. 41 CFR 301-11.6, -11.7.

This case involves two matters regarding per diem expenses which merit discussion. First is the rate applicable to Mr. Newport's time in Orlando. APHIS said that the employee would be paid reduced per diem benefits. A per diem rate lower than the maximum may be prescribed by an agency under two circumstances:

> (a) [an] agency can determine in advance that lodging and/or meal costs will be lower than the per diem rate; and
>
> (b) [t]he lowest authorized per diem rate must be stated in [the employee's] travel authorization in advance of [his] travel.

41 CFR 301-11.20. We can appreciate that APHIS could determine in advance of sending Mr. Newport to Orlando that his lodging and meal costs would be lower than the GSA-established per diem rate. That rate is set for short-term travel, and one can secure long-term lodging arrangements with cooking facilities, often at a lower daily cost, while on a five-year assignment. The agency did not meet the second requirement for a lower per diem rate, however – it did not state in the travel orders what the "reduced per diem" rate would be. In other circumstances, where an agency has made a determination but failed to reduce it to writing, we have held that an expression of clear administrative intent will suffice to create an authorization for benefits. *Jorge L. Gonzalez*, CBCA 984-RELO, 08-2 BCA ¶ 34,004; *Gary J. Tennant*, CBCA 553-RELO, 07-1 BCA ¶ 33,558; *Connie F. Green*, GSBCA 15301-RELO, 01-1 BCA ¶ 31,175 (2000). We believe that applying this rule in this case is equitable: If APHIS enunciated the rate of reduced benefits, before sending Mr. Newport to Orlando, so clearly that the employee understood what that rate would be, it may apply that rate in calculating his benefits. If the agency did not do so, it should pay the employee benefits at the rate prescribed by GSA. (The GSA rates change over time; in either event,

APHIS should use the applicable GSA rate or percentage of GSA rate for each of the days Mr. Newport was assigned to Orlando.)

The second matter regarding per diem expenses relates to Mr. Newport's choice of a place of abode for much of the time he was on this long-term temporary assignment: rather than renting lodgings, he lived in a house he or his parents purchased to serve as his residence while he was on TDY. The costs he incurred in staying in the house – mortgage interest, property taxes, utility charges, and maintenance expenses – are consequently reimbursable. *Jeanne S.*, CBCA 1237-TRAV, 08-2 BCA ¶ 33,942; *Christopher L. Andino*, CBCA 957-TRAV, 08-1 BCA ¶ 33,817 (both citing numerous Comptroller General and General Services Board of Contract Appeals decisions).

Mr. Newport is concerned about the income tax consequences of his receipt of temporary duty benefits. These benefits are indeed taxable, since he was on an extended TDY assignment of more than one year at one location. 41 CFR 302-3.502(b). The FTR provides a means of ameliorating the impact of the taxation, however. If the employee so requests, the agency must pay him an Income Tax Reimbursement Allowance (ITRA), which is designed to cover additional income taxes he might incur on both amounts received as reimbursement for TDY expenses and the amount received as an ITRA. The agency must follow the detailed guidelines in subpart F of part 301-11 of the FTR, 41 CFR 301-11.601 to -11.640, to determine the size of the ITRA to which Mr. Newport is entitled.

Because we hold that Mr. Newport was on temporary duty, and that his duty station was not permanently changed to Orlando, he is not entitled to relocation benefits. He is therefore not entitled to be reimbursed for the costs of selling his former residence in Gainesville and purchasing his current home in Lakeland. Whether he or his parents were the true purchasers of the Lakeland house is consequently irrelevant to this case, for even if Mr. Newport were determined to be the buyer, he could not be reimbursed for the costs of the transaction. Similarly, Mr. Newport may not receive the relocation benefit of reimbursement for the costs of moving his household goods from Gainesville to Lakeland.

____

STEPHEN M. DANIELS
Board Judge