UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 26, 2013

CBCA 3483-RELO

In the Matter of MICHAEL C. KOSTELNIK

Michael C. Kostelnik, Shalimar, FL, Claimant.

Alenda Cunningham, Acting Chief, Travel Section, National Finance Center, Customs and Border Protection, Department of Homeland Security, Indianapolis, IN, appearing for Department of Homeland Security.

DANIELS, Board Judge (Chairman).

Major General Michael C. Kostelnik, United States Air Force (retired), seeks last move home relocation benefits from Customs and Border Protection (CBP), a bureau within the Department of Homeland Security, following his retirement from civilian service with that bureau. For the reasons described below, we agree with CBP that General Kostelnik is not entitled to those benefits.

Background

On May 31, 2002, the National Aeronautics and Space Administration (NASA) hired General Kostelnik to serve as a member of the Senior Executive Service (SES) at the Kennedy Space Center in Cape Kennedy, Florida. Less than three months later, NASA sent him on a long-term temporary duty assignment to Washington, D.C.

Shortly before joining NASA, General Kostelnik had retired from military service. Upon learning of the temporary duty assignment, he took advantage of his last move entitlement from the Air Force by asking the Air Force to move some of his household goods from Niceville, Florida, to a home he had rented in the Washington suburb of Alexandria, Virginia. The Air Force paid for shipment of the goods under a government bill of lading.

In May 2003, NASA transferred General Kostelnik to Washington on a permanent basis, effective June 15, 2003. At about this time, he moved from his rented home in Alexandria to a home he purchased a few blocks away. Although the record indicates that he may have requested significant relocation benefits, and that NASA may have contemplated providing them, the agency ultimately paid him only a miscellaneous expense allowance of $1000.

On August 27, 2005, General Kostelnik resigned from his position with NASA.

On December 5, 2005, he was hired by CBP, again as a member of the Senior Executive Service, and assigned to a duty station in Washington, D.C.   He remained with CBP until December 31, 2012, when he retired. At all times during his service in Washington with NASA and CBP, he lived in Alexandria.

After retiring from CBP, General Kostelnik sold his home in Alexandria and moved to Shalimar, Florida.

Discussion

Under statute and regulation, a member of the Senior Executive Service may receive separation relocation allowances and travel expense reimbursement under certain conditions. 5 U.S.C. § 5724(a)(3), 41 CFR 302-3.304 to -3.307. One of these conditions is that the employee must have been "transferred or reassigned geographically in the interest of and at the expense of the Government from one official station to another for permanent duty." 41 CFR 302-3.307(a).

General Kostelnik maintains that because NASA transferred him geographically from Cape Kennedy to Washington in the interest of the Government, and paid some relocation benefits, he meets this test and should therefore be paid for his move from Alexandria, Virginia to Shalimar, Florida. CBP urges, based on speculation about the general's service with NASA, that he was not transferred in the interest of the Government and therefore cannot receive SES last move home benefits.

Regardless of whether General Kostelnik would have been eligible for these benefits if he had retired from civilian service from NASA, he is not eligible for them now. He was hired by CBP after a break in federal service, and "[a]n employee who is returning to the Government after a break in service (except an employee separated as a result of reduction in force or transfer of functions and is re-employed within one year after such action)" is, for the purpose of relocation benefits, a new appointee. 41 CFR 302-3.1(b) (2012); *see also Wilberto M. Sanchez*, CBCA 3397-RELO, et al. (Sept. 10, 2013); *William Arnold*

Kristapovich, CBCA 2390-RELO, 11-2 BCA ¶ 34,826; *Bruce Hidaka-Gordon*, GSBCA 16811-RELO, 06-1 BCA ¶ 33,255. Thus, when the general began to work for CBP, he was a new appointee. Any rights to a last move home he may have had as a NASA employee were consequently extinguished.

When General Kostelnik became a new appointee with CBP, his home was in Alexandria, Virginia. He was never transferred geographically from Washington, and he never moved from Alexandria, throughout his tenure with CBP. He cannot be reimbursed for his move "home" to Florida following his retirement, since he lived in the same place when he retired from the agency as when he began service with it. *Thomas T. Matteson*, GSBCA 14111-RELO, 98-1 BCA ¶ 29,413 (1997).

General Kostelnik asserts that when he was hired by CBP, he "was assured by CBP/HR [human resources] leadership that [he] would be entitled to this relocation benefit when [he] retired from the SES after 5 years of service." If this is so, it is unfortunate, but it cannot override the clear rules established under law. As we have often explained:

> Allowing an agency to make a payment for a purpose not authorized by statute or regulation would violate the Appropriations Clause of the Constitution. U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.") The Supreme Court consequently has made clear that an executive branch employee's promise that the Government will make an "extrastatutory" payment is not binding. Where relevant statute and regulations do not provide for payment for a particular purpose, an agency may not make such payment. *Bruce Hidaka-Gordon*, GSBCA 16811-RELO, 06-1 BCA ¶ 33,255; *Alexander S. Button*, GSBCA 16138-RELO, 04-1 BCA ¶ 32,452 (2003); *Teresa M. Erickson*, GSBCA 15210-RELO, 00-1 BCA ¶ 30,900 (all citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)).

Julie N. Lindke, CBCA 1500-RELO, 09-2 BCA ¶ 34,141.

<u>Decision</u>

The claim is denied.

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STEPHEN M. DANIELS
Board Judge