UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 15, 2017

CBCA 5647-RELO

In the Matter of ADAM L. DIEHL

J. Pat Ferraris of Disenhouse Law APC, Riverside, CA, appearing for Claimant.

Jean Harris, Section Chief, Permanent Change of Station Section, Interior Business Center, Department of the Interior, appearing for Department of the Interior.

CHADWICK, Board Judge.

Adam L. Diehl works for the U.S. Fish and Wildlife Service in Southern California. He transferred to that agency from another federal agency in May 2016. In August 2016, as had been agreed prior to his transfer, Fish and Wildlife changed Mr. Diehl's duty station. Although the new duty station was not "at least fifty miles distant from [his] old duty station," as Federal Travel Regulation (FTR) 302-1.1 (41 CFR 302-1.1 (2015)) generally requires, the agency granted an exception under 302-2.6(b) to allow it to reimburse him for certain relocation expenses. Mr. Diehl timely challenges the disallowances of separate vouchers he later submitted for (1) $40,220.65 relating to the sale of a residence, and (2) a total of $4868.89 for mileage, per diem, and lump sum temporary quarters subsistence expenses (TQSE). We grant the claim as to the first voucher and deny the remainder.

Mr. Diehl's relocation authorization was ambiguous. It appears that most of the expenses at issue here were itemized in an attachment to the authorization (Form 3-139), which the agency had Mr. Diehl fill out, but were excluded by the text of the authorization, which included the sentence, "No real estate entitlements are available." In addition, the internal memorandum by which Mr. Diehl's supervisor obtained authority, before his appointment, to reimburse him for short-distance relocation expenses stated that the allowances were "limited" to the costs of transporting and storing Mr. Diehl's household goods, but the agency did not share this memorandum with Mr. Diehl at the time, and the letter confirming his job offer simply stated, "Travel and relocation expenses will be

authorized in accordance with the Federal travel regulations excluding contractor-provided home sale." Mr. Diehl makes a strong case that the agency misled him in the course of bringing him on board. Ultimately, however, the agency's communications to Mr. Diehl do not matter, because his entitlement is governed by statute and regulation, which the agency cannot override. *E.g.*, *Brendan J. Moynahan*, CBCA 4351-RELO, 15-1 BCA ¶ 35,929, at 175,609 ("The authorization . . . does not alter the requirements of the regulation."); *Todd E. Johanesen*, CBCA 3124-TRAV, 14-1 BCA ¶ 35,539, at 174,163.

The rules for residence transaction expenses and TQSE appear in different sections of the FTR. Residence transaction expenses are addressed in FTR 302-11.2. *See also* 5 U.S.C. § 5724a(d)(1) (2012) (agencies "shall pay" such expenses "[u]nder regulations"); *Milton Brown*, CBCA 4998-RELO, 16-1 BCA ¶ 36,205, at 176,660 (2015). An employee "must meet four basic conditions" to be eligible for this allowance. FTR 302-11.2(a). The agency acknowledges that Mr. Diehl meets three of the four conditions, but it argues that it cannot defray his residence transaction expenses because his relocation did not "meet the distance test conditions of [FTR] 302-2.6," as required by FTR 302-11.2(a)(3). The agency's position is consistent with its relocation handbook, which advises employees that residence transaction expenses are reimbursable "[o]nly when the distance between your old residence and your new official station is 50 miles further from your current residence than your old official station is from the residence (per FTR Part 302-11.2)."

We disagree with the agency as to the application of the distance test. Only the FTR, not the agency's handbook, has the force of law. *See, e.g.*, *Kevin D. Reynolds*, CBCA 2201-RELO, 11-1 BCA ¶ 34,756, at 171,061. There are two ways to meet the distance test conditions of FTR 302-2.6. Under subsection (a), "[t]he distance test is met [automatically] when the new official station is at least 50 miles further from the employee's current residence than the old official station is from the same residence." FTR 302-2.6(a). Under subsection (b), "[t]he . . . agency . . . may authorize an exception to the 50-mile threshold on a case-by-case basis when . . . it is in the best interest of the Government." FTR 302-2.6(b). When the agency makes an exception under subsection (b), as happened here, it is deciding that the "distance test conditions" are met in a particular case, even though the "50-mile threshold" is not. An agency that exercises its discretion to approve a short-distance relocation under FTR 302-2.6(b) may not then rely on the fifty-mile test to deny reimbursement of residence transaction expenses. *See* FTR 302-3.101, table A (listing residence transaction expenses as mandatory relocation benefit); *see also Charles J. Wright*, CBCA 4799-RELO, 15-1 BCA ¶ 36,138, at 176,386 ("When an employee transfers in the interest of the Government, the payment of relocation expenses is a right under statute and regulation."); *Ross K. Richardson*, GSBCA 15286-RELO, 00-2 BCA ¶ 31,131, at 153,772 (noting that when employee transfers in the interest of the Government, "the Government is required to reimburse the employee for some relocation expenses," including "real estate

transactions"). That the responsible official here did not intend to approve reimbursement of Mr. Diehl's real estate transaction expenses is irrelevant.

Recognizing that the drafters of the agency's handbook construed the FTR differently, we considered whether regulatory history supports the agency's interpretation. It does not. From 2001 to 2011, the FTR unambiguously provided that a transferred employee's real estate transaction expenses would be reimbursed *either* if the fifty-mile test was met, *or* if a short-distance relocation was "otherwise authorized in accordance with § 302-2.6." 41 CFR 302-11.2 (2011). In 2011, the FTR was amended to a question-and-answer format, "to make [it] easier" for nonlawyers "to understand and to use." 66 Fed. Reg. 58,194, 58,194 (Nov. 20, 2011); *see Brown*, 16-1 BCA at 176,664. In this revision, the "unless otherwise authorized" language was removed from FTR 302-11.2 and replaced with the current cross-reference to "the distance test conditions of [FTR] 302-2.6." FTR 302-11.2(a)(3). We see no clear indication in either the text or the preamble of the regulation that this amendment was intended to change the substantive standard of entitlement to this allowance.

TQSE eligibility is governed by a separate regulation, which requires that the "old and new official stations [be] 50 miles or more apart (as measured by map distance) via a usually traveled surface route," and does not allow for exceptions. FTR 302-6.4; *see Moynahan*, 15-1 BCA at 175,608 (noting this is "a different test" from FTR 302-2.6(a)). Because this regulatory condition was not met here, the agency properly denied reimbursement of TQSE.

The remaining expenses claimed in Mr. Diehl's second voucher were $48 in per diem and $5.89 for mileage. Mr. Diehl does not discuss either of these amounts in his submissions to the Board, and we see no basis to question the agency's reasons for denying them.

Decision

The claim is granted in part. The agency should reimburse Mr. Diehl for his documented residence transaction expenses in accordance with regulation. The claim is otherwise denied.

KYLE CHADWICK
Board Judge