

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-219473

DATE: March 12, 1986

MATTER OF: John T. Phillips - Relocation Expenses -
Release From Service Agreement

DIGEST:

Employee of Department of Housing and Urban Development (HUD) who was transferred from Dallas to Fort Worth, Texas, failed to complete 12-month service agreement when he voluntarily retired, and HUD refused to reimburse his relocation expenses. Determination whether separation is beyond employee's control and for reasons acceptable to the agency is primarily for the agency to decide. Our Office will not overturn the agency's determination, unless it is arbitrary or capricious. Here agency promulgated regulation which provided that voluntary separation of an employee upon satisfying age and service requirements for optional retirement is an acceptable reason for release from a service agreement. Accordingly, agency action in refusing to accept voluntary retirement as an acceptable reason for not fulfilling obligation under service agreement is contrary to agency's own regulation and arbitrary. Therefore, agency action is improper and employee may be paid claimed expenses to extent otherwise proper.

The issue in this decision is whether a transferred employee who did not complete the required term of Government service at his new duty station is entitled to relocation expenses incident to his transfer. We hold that the employee is entitled to relocation expenses since he failed to complete his service agreement for reasons which were explicitly made acceptable by the agency's own travel regulations. Therefore, failure to complete the service agreement under these circumstances cannot be a valid reason for agency to deny all relocation expenses.

This decision is in response to a request, submitted through counsel, from Mr. John T. Phillips, a former employee of the Office of Inspector General, Department of Housing and Urban Development (HUD), concerning his claim

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for travel and transportation expenses incident to his transfer. Mr. Phillips was transferred effective August 1, 1984, from HUD's Dallas, Texas, area office to its regional office in Forth Worth, Texas, pursuant to a HUD Region VI consolidation. As part of this consolidation, all of the positions in Mr. Phillips' office were transferred to Fort Worth.

Mr. Phillips was first advised that his position was to be transferred in a memorandum of September 1, 1983, from the HUD Inspector General. This memorandum also advised Mr. Phillips that he would be separated if he did not accept the transfer. On September 22, 1983, Mr. Phillips signed a "Travel Request and Authorization--Change of Official Station" (Travel Request) which contained the agreement mandated by 5 U.S.C. § 5724(i) requiring him to remain in Government service for 12 months following his transfer in order to be eligible for reimbursement of relocation expenses. This form also contained an anticipated reporting date at the new duty station of February 1, 1984. Because of various delays, Mr. Phillips' transfer was delayed, and on July 25, 1984, he signed a new Travel Request with a new service agreement. Mr. Phillips finally reported to his new duty station on August 1, 1984.

By memorandum dated August 9, 1984, Mr. Phillips requested that he be released from his 12-month service agreement so that he could retire at age 62 on September 2, 1984. In a memorandum of August 15, 1984, Mr. Phillips' request for release from his service agreement was denied by the HUD Regional Inspector General. In a letter of August 15, 1984, Mr. Phillips appealed this denial to the HUD Inspector General. In this appeal Mr. Phillips cited travel regulations found in HUD Handbook 2300.2, REV-3, effective May 1984, at paragraph 2-1.5 which provide as follows:

"2-1.5. Eligibility and conditions.

"a. General requirements.

"(1) Service agreements.

"(a) Transfers within the conterminous United States and appointments and assignments of new appointees and student trainees to certain positions within

the 50 States and the District of Columbia.
The Assistant Secretary for Administration has authority to waive the recovery of relocation allowances paid to employees who fail to fulfill their service agreement. The official who authorized relocation allowances is responsible for approving requests for waivers and submitting them by the Assistant Secretary for final authorization. Acceptable reasons for release from an agreement include:

"(i) Voluntary separation of an employee upon satisfying age and service requirements for optional retirement."

As the above indicates the first example given by the HUD regulation as an acceptable reason for release from a service agreement is voluntary separation of an employee upon satisfying age and service requirements for optional retirement. Nothing in this regulation indicates that there is any discretion to be exercised when an employee voluntarily retires prior to completing his required period of service. The release from the service obligation seems to be absolute upon voluntary retirement.

Counsel on behalf of Mr. Phillips points out that our Office has held that the voluntary separation of an employee upon satisfying the age and service requirements for optional retirement may be considered as a reason beyond the control of the employee, and that such retirement prior to the completion of the 12-month period of Government service is not a bar to recovery of relocation expenses if acceptable to the agency. 46 Comp. Gen. 724, 726 (1967).

The payment of travel, transportation and relocation expenses of transferred Government employees is authorized under 5 U.S.C. §§ 5724 et seq. as implemented by the Federal Travel Regulations, FPMR 101-7 (September 1981) incorp. by ref., 41 C.F.R. § 101-7.003 (1984) (FTR). Section 5724(i) of Title 5, United States Code, specifically provides that:

"An agency may pay travel and transportation expenses * * * and other relocation

allowances under this section and sections 5724a, 5724b, and 5726(c) of this title when an employee is transferred within the continental United States only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. If the employee violates the agreement, the money spent by the United States for the expenses and allowances is recoverable from the employee as a debt due the United States."

The regulations implementing the above statute further provide at FTR para. 2-1.5a(1)(a) that "[a] signed agreement for 12 months' service shall be required in connection with each permanent change of station." It also should be emphasized that the 12 months of required service are counted from the time the employee reports to his new duty station.

Thus, if an employee violates a service agreement executed in connection with his transfer, the agency must take steps to recover any funds it expended in relocating the employee, unless he was separated from his position for reasons beyond his control and acceptable to the agency. Dr. William Post, Jr., B-196795, June 5, 1980. Our Office has previously stated that the employing agency is primarily responsible for determining whether an employee's separation from service was for a reason that was beyond his control and is otherwise acceptable to the agency. Arnold M. Biddix, B-198938, March 4, 1981; Ralph W. Jeska, B-193456, December 28, 1978. In the absence of clear and convincing evidence that the agency's decision was arbitrary or capricious, we will not substitute our judgement for that of agency officials who are in a better position to investigate and resolve the matter. Arnold M. Biddix, cited above; William C. Moorehead, 56 Comp. Gen. 606 (1977).

In response to Mr. Phillips' request and in reply to his reasons for retiring after completing only 1 month of the 12 months required by his service agreement, HUD stated that the essential factors influencing Mr. Phillips decision, i.e., travel considerations, the state of both his health and that of his wife, and his disappointment with

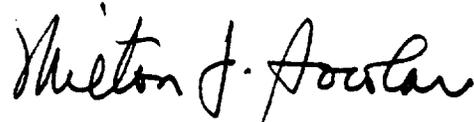
the medical facilities at Carswell Air Force Base, and the Fort Worth area generally, were factors which were all present prior to his transfer. It is HUD's position, therefore, that his retirement was voluntary and entirely a matter within his discretion, thereby making a waiver of his service agreement unjustified. Accordingly, HUD denied his request for release from his service agreement, and has never considered his claim for relocation expenses totaling \$16,379.17.

The HUD position, however, fails to apply its own regulation quoted above which makes a categorical determination that a voluntary separation of an employee upon satisfying age and service requirements for optional retirement, such as Mr. Phillips has done, is an acceptable reason for release from a service agreement. By virtue of HUD's regulation, Mr. Phillips must be deemed to have been released from his service agreement. Since the regulation makes release from a service agreement absolute upon voluntary retirement, the failure to follow that regulation and release Mr. Phillips from his service obligation was arbitrary and may not stand.

We note, however, that nothing in the controlling statute or FTR provisions cited above requires HUD to relinquish by its own regulations all discretion in determining whether an employee who is eligible for voluntary retirement must be paid his relocation expenses if he elects to retire before completing his service agreement. In fact the HUD regulation cited above places HUD at risk of having to pay relocation expenses for only minimal service from transferred employees eligible or approaching eligibility for retirement. We believe that an agency should maintain discretion so that the underlying reason for an employee's retirement and the agency's staffing requirements are the controlling considerations in determining whether an employee may be released from a service agreement. Additionally, good travel management policies may indicate that an agency should not be transferring retirement eligible employees, or that service agreements, where warranted, should explicitly cover expectations concerning retirement. We suggest that HUD may wish to consider modifying its regulations to deal with these issues.

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Accordingly, assuming that no other impediments exist, Mr. Phillips should be reimbursed his relocation expenses to the extent authorized by law.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States