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DECISION



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

FILE: B-214282

DATE: September 5, 1984

MATTER OF: Miquel Caban

DIGEST:

1. An employee who executed an agreement to remain in the service of the IRS in Puerto Rico for 24 months but who obtained an appointment in Puerto Rico with HUD only 5 months later, did not satisfy the terms of his original agreement by remaining with HUD for an additional 19 months. An agency may condition return travel entitlement upon an employee's satisfaction of an agreement to remain in the service of that particular agency at a designated overseas post of duty for a specified period.
2. An employee who was locally hired for a position in Puerto Rico with HUD after having served 5 months with IRS in Puerto Rico claims entitlement to renewal agreement travel under 5 U.S.C. § 5728(a), based on his view that his place of actual residence is New Jersey where he had lived prior to his transfer to Puerto Rico with the IRS. Based on information evidencing his intent to relocate to Puerto Rico on a permanent basis, HUD properly determined that the employee's residence at the time of his appointment was Puerto Rico. Any prior residency determination made by IRS would not be binding on HUD.
3. Where agency determined that locally hired employee's actual place of residence was Puerto Rico, his place of residence was the same as his post of duty, and his employment in Puerto Rico does not constitute "service abroad" under 5 C.F.R. § 630.601(c) so as to entitle him to home leave under 5 U.S.C. § 6305(a). Because of that residency determination he was not given a return

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travel agreement and he, therefore, fails to meet the condition of 5 U.S.C. § 6304(b)(2)(ii) for entitlement to a 45-day leave ceiling.

This action is in response to a request from the United States Department of Housing and Urban Development (HUD) for an advance decision as to the home leave and renewal agreement travel entitlements of a HUD employee stationed in Puerto Rico.^{1/} The employee's claim was denied by HUD, the second federal agency to employ him in Puerto Rico, based on an administrative determination that his actual place of residence was Puerto Rico and that he, therefore, was not eligible for home leave or tour renewal agreement travel. We uphold that denial based on our finding that HUD's determination as to his place of residence was reasonable and that HUD was not bound by the previous employer's determination as to his actual place of residence or by the service agreement he executed with that agency.

BACKGROUND

Mr. Miguel Caban was employed by the Internal Revenue Service (IRS) in New York, New York, from August 1970 until January 1978. During that time, he resided in New Jersey with his family. He was transferred to Puerto Rico in January 1978 after having executed an Overseas Transportation Agreement by which he agreed to remain in the service of the IRS in Puerto Rico for a tour of duty of 24 months in order to be eligible for return travel and transportation expenses to his place of actual residence. Incident to his transfer to Puerto Rico, he submitted a Voluntary Request for Downgrade by which he requested a change to a lower grade "to take advantage of the opportunity to accept employment in my homeland on a permanent basis."

Shortly after the IRS transferred him to Puerto Rico, Mr. Caban applied for and was selected to fill a position with HUD in Puerto Rico. He transferred to HUD on June 25,

^{1/} The request, dated January 27, 1984, was submitted by James A. Rhoads, Director, Personnel Systems & Payroll Division, APS, Department of Housing and Urban Development.

1978, after serving only 5 months of his 24-month tour of duty with IRS. Mr. Caban claims that before he accepted this position, he inquired as to the transferability of his service agreement with the IRS and was told by a HUD official that it was binding on HUD.

After completing an aggregate of 24 months' service in Puerto Rico, Mr. Caban asked HUD to grant him home leave and tour renewal agreement travel based on his satisfaction of the IRS service agreement and his willingness to execute an agreement with HUD for a further tour of duty in Puerto Rico. His request was denied based on the determination that at the time of his appointment by HUD, his actual place of residence was Puerto Rico.

The issue to be resolved, then, is whether HUD was justified in determining that Mr. Caban's place of actual residence was Puerto Rico and that he therefore was not eligible for home leave or tour renewal agreement travel expenses.

ANALYSIS

RENEWAL AGREEMENT TRAVEL

Renewal agreement travel and transportation expenses are provided for in 5 U.S.C. § 5728(a), which provides in part that:

"(a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States * * * to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States * * * and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States * * *

under a new written agreement made before departing from the post of duty."

The implementing regulations, Federal Travel Regulations (FTR), para. 2-1.5h(1) (Supp. 7, July 15, 1983), incorp. by ref., 41 C.F.R. § 101-7.003 (1983), set forth the following conditions of eligibility for tour renewal agreement travel--

"h. Overseas tour renewal agreement travel

"(1) Eligibility. In order to be eligible to receive allowances for travel and transportation expenses for returning home between tours of duty overseas as authorized by 2-1.5h, an employee prior to departure from his/her post of duty outside the conterminous United States must have:

"(a) Satisfactorily completed an agreed period of service or the prescribed tour of duty as provided in 2-1.5a(1)(b) for return travel entitlement, and

"(b) Entered into a new written agreement as provided in 2-1.5a(1)(b) for another period of service at the same or another post of duty outside the conterminous United States. * * *

FTR para. 2-1.5a(1)(b) provides in part--

"* * * Except as precluded by these regulations upon separation from service the expenses for return travel, transportation, moving, and/or storage of household goods shall be allowed whether the separation is for the purposes of the Government or for personal convenience. However, such expenses shall not be allowed unless the employee transferred or appointed to posts of duty outside the conterminous United States shall

have served for a minimum period of not less than 1 nor more than 3 years prescribed in advance by the head of the agency (or for 1 school year for Department of Defense overseas dependents school system teachers as determined under Chapter 25 of 20 U.S.C.) or unless separation is for reasons beyond the control of the individual and acceptable to the agency concerned. * * *

Essentially the same regulatory language has been in effect throughout the period of Mr. Caban's assignment in Puerto Rico. See FTR paras. 2-1.5h(1) and 2-1.5a(1)(b) (FPMR 101-7, April 30, 1973).

Thus, Mr. Caban's entitlement to tour renewal agreement travel is dependent on his having satisfied an initial agreement to serve a specified tour of duty as required by FTR para. 2-1.5h(1)(a) and upon his having executed yet another such agreement for a subsequent period of service in accordance with FTR para. 2-1.5h(1)(b). It is Mr. Caban's contention that he satisfied the first condition of eligibility since he served in Puerto Rico for the 24-month period to which he agreed when he was transferred there by the IRS. Under the terms of the service agreement he executed in December 1977, he specifically agreed to remain "in the service of the IRS" at Hato Rey, Puerto Rico, for a minimum period of 24 months. Although he remained in Puerto Rico for 24 months, he in fact remained with the IRS for only 5 months. The critical question then, is whether the Overseas Transportation Agreement that Mr. Caban executed with the IRS could have been satisfied only by service with that particular agency or whether 24 months of Government service satisfied its conditions.

Where the application of a statute is expressly conditioned on an agreement to remain "in the Government service" for a prescribed period of time, an agency cannot restrict its applicability by requiring service only with that particular agency. See, e.g., 50 Comp. Gen. 374 (1970) and authorities cited. Absent statutory or regulatory language requiring Government service, however, an agency may limit service agreements to service with the particular agency. Thus, where employment "in the Government service" is not expressly required, an agency is free to condition

payment of expenses upon the employee's agreement to remain in the service of that agency for a specified period.
Robert J. Bengtson, B-191991, Dec. 1, 1978.

In contrast to other statutory provisions (see, e.g., 5 U.S.C. §§ 5723(b) and 5724(i)), 5 U.S.C. § 5728(a) does not condition an employee's eligibility for renewal agreement travel upon his satisfaction of an agreement to remain "in the Government service" and upon his execution of an agreement for further "Government service." The implementing regulations at FTR para. 2-1.5h require only that the employee satisfy the return travel agreement required by para. 2-1.5a(1)(b) and execute another such agreement. As to the specific terms of that agreement, FTR para. 2-1.5a(1)(b) contemplates only that the employee serve a period of 1 to 3 years "prescribed in advance by the head of the agency." Thus, where an employee executes an agreement contemplated by 5 U.S.C. 5728(a), to remain in the service of a particular agency at a designated location for a prescribed period of time, the agreement is satisfied only by service with that agency. Mr. Caban entered into a return travel agreement with the IRS that obligated him to remain specifically in the employ of the IRS in Puerto Rico for 24 months. He left the IRS after only 5 months, thus failing to fulfill this 24-month service requirement. Because, as indicated above, his subsequent service for HUD does not satisfy the requirements of his agreement with the IRS, he has not, on the basis of that agreement, met the condition of FTR para. 2-1.5h(1)(a) that he complete an agreed period of service as provided for in FTR para. 2-1.5a(1)(b).

Mr. Caban next argues that, without regard to the IRS agreement, HUD was obligated to give him a return travel agreement when he was hired in June of 1978 and to execute another agreement with him, based on his view that his actual place of residence was New Jersey.

Under 5 U.S.C. § 5728(a) an employee may only be granted renewal agreement travel for the purpose of traveling "from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty." On the Standard Form 171 Mr. Caban submitted when he applied for the position with HUD, he listed his "legal and voting

residence" as Puerto Rico and he indicated that the purpose of his earlier transfer from New York to Puerto Rico with the IRS had been to relocate to the island "on a permanent basis." Based on that information evidencing Mr. Caban's intent to abandon whatever residential relationship he may have had with a location elsewhere, it was reasonable for HUD to determine that Mr. Caban's actual place of residence at the time of appointment was Puerto Rico. The determination of an employee's place of actual residence is the administrative responsibility of the employing agency. Estelle C. Maldonado, 62 Comp. Gen. 545 (1983); 45 Comp. Gen. 136 (1965); 39 Comp. Gen. 337 (1959); Rafael F. Arroyo, B-197205, May 16, 1980, reconsidered February 16, 1982. We will not question any reasonable determination made by the agency unless it is plainly erroneous or inconsistent with the law or regulations. Estelle C. Maldonado, 62 Comp. Gen. at 552.

In addition, we have held that an agency is not bound by the actual place of residence determination made by an individual's previous employer at the overseas post of duty. Rather, it is within the discretion of the hiring agency to make a determination of the employee's actual place of residence based on the information made available to that agency at the time of the appointment. Chester E. Whitcomb, B-190590, February 21, 1979. Therefore, regardless of the residency determination that the IRS may have made at the time of Mr. Caban's transfer to Puerto Rico, HUD was free to make an independent determination based on the information submitted by the individual seeking employment. Since HUD reasonably determined that Mr. Caban's actual place of residence was Puerto Rico at the time of his appointment, his actual place of residence is the same as his post of duty and he does not satisfy the statutory requirements for entitlement to renewal agreement travel and transportation expenses. Accordingly, we find that the agency had a proper basis for refusing to negotiate an original and a renewal agreement with Mr. Caban and for denying his request for renewal agreement travel under 5 U.S.C. § 5728(a).

HOME LEAVE

Entitlement to earn and accumulate home leave is governed by 5 U.S.C. § 6305(a), which provides in part that--

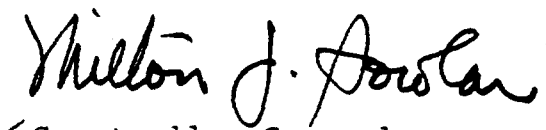
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"(a) After 24 months of continuous service outside the United States, an employee may be granted leave of absence, under regulations of the President, at a rate not to exceed 1 week for each 4 months of that service without regard to other leave provided by this subchapter. * * *"

Authority to issue regulations regarding eligibility for home leave has been delegated to the Office of Personnel Management. The implementing regulations issued by that Office condition entitlement to home leave on the employee's performance of "service abroad." See 5 C.F.R. § 630.604 and § 630.606. As in effect at the time of Mr. Caban's appointment by HUD and currently, 5 C.F.R. § 630.601(c) defines "service abroad" as:

"* * * service * * * by an employee at a post of duty outside the United States and outside the employee's place of residence if his place of residence is in the Commonwealth of Puerto Rico or a territory or possession of the United States."

Since HUD determined that Mr. Caban's residence was Puerto Rico, his post of duty is the same as his residence and his service with HUD does not constitute "service abroad" as defined above. Thus, the employee does not satisfy the statutory requirements to earn and be granted home leave. For that same reason he was not given a return transportation agreement and he, therefore, does not meet the applicable requirement of 5 U.S.C. § 6304(b)(2)(ii) that his employment be under conditions providing for his return transportation to the United States. Thus he likewise is not entitled to the 45-day leave ceiling provided for by 5 U.S.C. § 6304(b). Accordingly, the agency's denial of these leave entitlements is also upheld.

for 
Comptroller General
of the United States