DECISION

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

-087670

59 Comp. Gen. ____
(B-198761, Sept. 2, 1980)
modified (extended)

FILE: B-201256

DATE: April 27, 1981

MATTER OF: Frank E. Hanson, Jr.

DIGEST: Employee of National Weather Service stationed in Valdez, Alaska, applied for and was selected for merit promotion to San Antonio, Texas. Employee reclaims cost of tour renewal travel which was deducted from his relocation expenses for failure to fulfill renewal agreement. Employee may be reimbursed cost of tour renewal travel as a transfer incident to a merit promotion is not a violation of an overseas tour renewal agreement.

By letter dated October 29, 1980, Mr. C. J. Terry, an authorized certifying officer with the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, requested an advance decision regarding the reclaim voucher of Mr. Frank E. Hanson, Jr. Mr. Hanson requests reimbursement of overseas tour renewal agreement travel costs in the amount of $2,065.48 which were deducted from his relocation expenses when he received a merit promotion and a transfer from Valdez, Alaska, to San Antonio, Texas. We hold that Mr. Hanson may be reimbursed the tour renewal agreement costs claimed since his merit promotion transfer was in the interest of the Government and not in violation of his overseas tour renewal agreement.

Mr. Hanson, an employee of the National Weather Service, was transferred from Duarte, California, to Valdez, Alaska, in January 1977. At the end of 2 years he returned to the continental United States for home leave having signed an overseas tour renewal agreement on March 13, 1979. Upon his return to Alaska he applied for a position with the National Weather Service in San Antonio, Texas, advertised under NOAA's Merit Promotion Program, and was selected for that position.

On November 28, 1979, the Alaska Region of the National Weather Service informed Mr. Hanson that he must repay the cost of his tour renewal travel in the amount of $2,065.48, since he would not fulfill his overseas contract. This amount was subsequently deducted from the amount authorized for his relocation expenses to San Antonio.

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The certifying officer questions whether, under the circumstances described, Mr. Hanson is obligated to repay the Government for the cost of his tour renewal travel. He notes that a merit promotion transfer is presumed to be for the benefit of the Government. Thus, he questions the decision of the Alaska Region, NOAA, not to release Mr. Hanson from his renewal agreement when the agreement provides for such release when the employee's failure to complete the agreed tour of duty is for "reasons beyond [his] control and acceptable to the National Weather Service."

Section 5728 of title 5 of the United States Code (1976) provides that an agency shall pay the round-trip travel expenses of an employee and his immediate family from the post of duty outside the continental United States to his place of 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 a post of duty outside the continental United States under a new written agreement.

The Federal Travel Regulations (FTR) (FPMR 101-7), in paragraph 2-1.5h(1)(b) (May 1973) require as a condition of eligibility for overseas tour renewal agreement travel that the employee enter into a new written agreement for another period of service at the same or another post of duty outside the conterminous United States (the 48 contiguous states and the District of Columbia). The liability of an employee for noncompliance with the renewal agreement is set forth at FTR para. 2-1.5h(4) which, insofar as pertinent, provides:

> "(4) Liability of employee - noncompliance with new agreement. An employee who for reasons not beyond his control and not acceptable to the agency concerned fails to complete the period of service specified in a new service agreement is obligated for expenses and for allowances paid to him.

"(a) Failure to complete initial year of service. If the employee fails to complete 1 year of service under a new agreement, he is indebted to the Government for any amounts spent by the Government for (i) his transportation and per diem and transportation of his immediate family from the post of duty to his place of actual residence and from his place of actual residence to the last post of duty where he failed to complete a year of service. * * *"

Since Mr. Hanson did not complete 1 year at the same or another post of duty outside the conterminous United States, he would be responsible for repayment of renewal agreement travel and transportation expenses unless his failure to fulfill the terms of the renewal agreement was for reasons beyond his control and acceptable to the agency. In this connection we note that the Alaska Region, NOAA, determined that our holding in William A. Vischer, B-186560, December 9, 1976, was not controlling because of the differing terms of the tour renewal agreement executed by Mr. Vischer. Vischer was similar to the instant case in that the employee was initially required to repay tour renewal costs after receiving a merit promotion transfer from Alaska to the conterminous United States. In that case we ruled that the employee was not obligated to pay for tour renewal costs.

As noted by the Alaska Region, the renewal agreement which Mr. Vischer signed was unlike that executed by Mr. Hanson in that it did not require him to serve overseas in order to fulfill his obligation. It only required that he remain in Government service for a minimum of 2 years "unless separated for reasons beyond his control or transferred in the interest of the Government." However, because our holding in Vischer did not turn upon the language of Mr. Vischer's agreement which required him to remain in the service of the Government, we cannot agree with the Alaska Region's view that the decision should not control in this case.

In Vischer we noted that the terms of his agreement were not in accordance with the statutory and regulatory requirement that the employee agree to remain for a specified period at a post outside the United States. Nevertheless, we held that the particular language of the agreement providing that a transfer in the interest of the Government would not be regarded as a violation of the agreement could be construed as valid. In this regard, we stated that an agency "can properly determine whether or not a transfer ultimately effected in the Government's interest which results in the employee's departure from the overseas post is for reasons beyond his control which are acceptable to the agency concerned." Since an agency could properly make such a determination, we found the language in Mr. Vischer's agreement to be valid and held he was not liable for repayment.

In Vischer we regarded the particular language of the renewal agreement as evidencing the necessary agency determination that a transfer from an overseas post in the interest of the Government would be considered to be beyond the employee's control and for reasons acceptable to the agency, hence not a violation of a renewal agreement. We there noted that the Department of Defense similarly does not regard a transfer within the same military department as a violation of a service agreement. While NOAA apparently does not have a specific policy with regard to transfers during the period of a renewal agreement, we believe that of our recent decision Eugene R. Platt, B-198761, September 2, 1980, 59 Comp. Gen. 699 (1980), has the practical effect of extending a policy like DOD's to other agencies, insofar as the transfer involved is under a merit promotion program.

In Platt we discussed the nature of a merit promotion program stating:

> "It is evident that the wide dissemination of vacancy announcements is a means of attracting qualified eligibles for vacant positions. The primary purpose of the merit promotion program is to ensure systematic means for selection for promotion according to merit. 5 C.F.R. § 335.103 (1979). Through open competition eligible

persons are given the opportunity to compete for vacancies, and agencies are able to reach a wider pool of applicants, and refer the best qualified candidates to a selecting official. The fact that employees have to apply for such vacancies, or that the promotion may be, and usually is, also in the employee's best interest, does not change the fundamental truth that the purpose and intent of merit promotion is to serve the Government's interest by obtaining the best qualified persons for vacant positions.

* * * * *

"* * * Further, in Dante P. Fontanella, B-184251, July 30, 1975, we stated that if the agency recruits or requests an employee to transfer to a different location it will normally regard such transfer as being in the interest of the Government. Our view is that when an agency issues an announcement of an opening under its Merit Promotion Program that such action is a recruitment action within the scope of Fontanella. Thus, the fact that an employee requests the position as a result of such announcement is not a proper basis to conclude that the transfer is at the request of or primarily for the convenience of the employee.* * *"
(Emphasis added.)

It would clearly be contrary to the Platt decision for an agency to conclude that an employee's selection and transfer under merit promotion procedures was for reasons which it found unacceptable within the meaning of FTR para. 2-1.5h(4). For essentially the same reasons that an employee is not to be regarded as having requested a merit promotion transfer for the purpose of determining his entitlement to relocation expenses, we believe it also would be inconsistent with the holding in Platt to regard an employee's merit promotion transfer as one within his control. Hence, a merit promotion transfer should not be regarded as a violation of a renewal agreement. To

conclude otherwise would unduly restrict employees in their participation in agency merit promotion plans and, thus, limit the effectiveness of the plans. Accordingly, since a transfer under merit promotion procedures is not a violation of an overseas tour renewal agreement, Mr. Hanson's voucher may be certified for payment, if otherwise proper.

Milton J. Socolar

Acting Comptroller General
of the United States