UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 12, 2007

CBCA 672-RELO

In the Matter of ANDREW J. MARKS

Andrew J. Marks, Corpus Christi, TX, Claimant.

Judy Hughes, Standards and Compliance, Finance Mission Area, Defense Finance and Accounting Service, Columbus, OH, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

In November 2006, Andrew J. Marks moved to Corpus Christi, Texas, to begin an assignment for which he had been hired by the Department of the Army. The vacancy announcement for the position had stated, "Permanent Change of Station (PCS) expenses will be authorized," and the travel orders the agency issued to Mr. Marks had expressly authorized, among other forms of relocation benefits, temporary quarters subsistence expenses (TQSE), a miscellaneous expense allowance, and real estate transaction expenses. Nevertheless, when Mr. Marks asked for reimbursement of these costs, the Army refused to make payment. Mr. Marks asks us to review the agency's determination.

The determination was correct. The kinds of relocation benefits which may be paid to individuals who move to new locations to take on assignments from federal agencies are prescribed by statute. Benefits available to new appointees are provided in sections 5722 and 5723 of title 5 of the United States Code (2000). Benefits available to employees who are transferred from one duty station to another in the interest of the Government are provided in sections 5724 and 5724a of title 5. Unfortunately for Mr. Marks, who was a new appointee when he assumed his position in Corpus Christi, the benefits he seeks are all authorized for transferees, but not for new appointees. TQSE are authorized in section 5724a(c) of title 5, a miscellaneous expense allowance in section 5724a(f), and real estate transaction expenses in section 5724a(d).

The decisions of our predecessor in deciding federal civilian employee relocation benefit claims, the General Services Board of Contract Appeals (GSBCA), were consistent in holding that even if an agency made a commitment to reimburse a new appointee for any of these expenses, the commitment cannot overcome the fact that Congress has not authorized such reimbursement. *E. g.*, *David W. Brown*, GSBCA 16721-RELO, 06-1 BCA ¶ 33,147 (2005) (TQSE); *Rosemary Schultz*, GSBCA 16703-RELO, 05-2 BCA ¶ 33,107 (TQSE); *Kevin R. Kimiak*, GSBCA 16641-RELO, 05-2 BCA ¶ 33,007 (real estate transaction expenses); *Charles J. Smollen*, GSBCA 16532-RELO, 05-1 BCA ¶ 32,962 (real estate transaction expenses); *John J. Churchill*, GSBCA 16419-RELO, 04-2 BCA ¶ 32,698 (TQSE and miscellaneous expense allowance); *Louis L. Lawes*, GSBCA 15577-RELO, 02-1 BCA ¶ 31,748 (miscellaneous expense allowance).

In resolving these cases, the GSBCA expressed dismay at actions taken by agencies which misled new employees into believing they will receive benefits which, under law, they may not receive. In hindsight, many agencies themselves have recognized their own errors -- as the Defense Finance and Accounting Service has here in reviewing the Army's actions. The GSBCA "encourage[d] agencies to ensure that their travel and transportation officials provide accurate advice to new appointees as to the proper scope of their first hire relocation benefits, and ensure that travel authorizations are properly prepared so that this situation does not occur" in the future. *Brown* (quoting *Opher Heymann*, GSBCA 16687-RELO, 05-2 BCA ¶ 33,104).

When the situation has occurred, however, there is no way that either we or the agency may right the wrong. *Bruce Hidaka-Gordon*, GSBCA 16811-RELO, 06-1 BCA ¶ 33,255. As the GSBCA explained:

> In considering claims like this one, . . . the arbiter must balance the harm the employee would suffer if the claim were denied against the damage which would result to our system of government if federal officials were free to spend money in ways which are contrary to the strictures of statute and regulation. In making this balance, the Supreme Court has clearly come down on the side of protecting our system of government. We follow the Court in holding that although [the employee] has undeniably relied to his detriment on [the agency's] promises, he may not be reimbursed because the law prevents the agency from honoring commitments made in its name by officials who do not have the power to make them.

Louise C. Mâsse, GSBCA 15684-RELO, 02-1 BCA ¶ 31,694 (2001); *Gary MacLeay*, GSBCA 15394-RELO, 01-1 BCA ¶ 31,210 (2000); *Pamela A. Mackenzie*, GSBCA

15328-RELO, 01-1 BCA ¶ 31,174 (2000) (all citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)).

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STEPHEN M. DANIELS
Board Judge