



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 31, 2008

CBCA 984-RELO

In the Matter of JORGE L. GONZALEZ

Jorge L. Gonzalez, Manhattan, MT, Claimant.

Linda L. Lane, Office of the Chief Financial Officer, Department of Homeland Security, Washington, DC, appearing for Department of Homeland Security.

HYATT, Board Judge.

Claimant, Jorge L. Gonzalez, transferred within the Department of Homeland Security (DHS) from the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, to DHS's Immigration and Customs Enforcement (ICE) agency in Helena, Montana. The issue presented for the Board's review is whether he is eligible for reimbursement of the real estate transaction expenses he incurred in connection with the purchase of a home in Montana.

Background

Prior to his relocation to Montana, Mr. Gonzalez was an ICE instructor assigned to FLETC. In January 2006, he submitted a formal request for rotation from the ICE Academy to an Office of Investigations field office. In accordance with ICE Academy rotation policy, he identified three locations that would be acceptable to him. His first preference was to relocate to a field office under the Special Agent in Charge (SAC) in Denver, Colorado, specifically to the field office in Helena, Montana.

In April 2006, Mr. Gonzalez spoke by telephone with the Assistant SAC for the Denver region concerning his interest in transferring to Montana. Subsequently, sometime between mid-May and mid-June of 2006, Mr. Gonzalez spoke by telephone with the Denver

Office SAC, who informed claimant that he had been selected for the position in Montana. The SAC advised claimant that the paperwork would be initiated and forwarded to him as soon as it was completed. In response to an inquiry made by the Board, Mr. Gonzalez stated that it was his understanding that this individual was the deciding official for this region with the authority to fill the position in question.

Shortly after he received verbal confirmation of his selection from the Denver Office SAC, Mr. Gonzalez looked into the availability of housing in the vicinity of Helena. He learned that there is a high demand for new housing in this area and a limited number of builders. In view of this situation, and claimant's concern that building a new home would take more time than finding an existing house to purchase, Mr. Gonzalez selected a builder and signed a contract to secure his services. The contract was dated April 18, 2006, but was actually signed by the contractor on June 8, 2006, and by claimant and his spouse on June 30, 2006. The contract required an immediate down payment of \$1000 and set forth a schedule of progress payments, or draws, to be made based on a specified schedule of milestones.

Claimant received written notification of his transfer to Helena on September 20, 2006. His travel orders were issued on September 27, 2006. Mr Gonzalez reported to his new duty station on April 29, 2007.

When Mr. Gonzalez submitted a voucher for the real estate transaction expenses he paid in connection with closing on the home in Montana, his claim was denied because the home was deemed to have been purchased before the issuance of PCS orders, and thus not purchased incident to the transfer. Mr. Gonzalez challenges the agency's disallowance of these expenses. He maintains that his selection for this position was definite and further asserts that, in any event, since he did not actually obtain a mortgage for the house until May 2007, subsequent to the issuance of written PCS orders, he should be eligible for reimbursement.

Mr. Gonzalez states that this contract could have been canceled if the transfer had fallen through for some reason, although the agreement itself does not reflect this understanding. He emphasizes that he arranged to have the house built so as to have a home ready when he relocated to Montana. As a consequence, Mr. Gonzalez and his spouse only needed to occupy temporary quarters for approximately forty of the sixty days authorized by the agency. Mr. Gonzalez limited his request for reimbursement to the expenses he incurred with respect to the mortgage loan he secured in May 2007.

Discussion

The agency explains that it disallowed these real estate transaction expenses because Mr. Gonzalez entered into a contract to construct a residence, making a deposit of \$1000 in earnest money, well in advance of the date on which the agency issued official PCS travel orders. The agency does not believe it is authorized to reimburse these expenses. It questions whether the supervisor's statements concerning the prospective reassignment could constitute the requisite manifestation of administrative intent to transfer Mr. Gonzalez to Montana such that the agency could properly pay these expenses. According to ICE, several layers of approval were required before the agency could issue written official notification of the transfer. ICE thus considers that the official date of notification of transfer -- September 20, 2006 -- was the earliest date on which claimant could properly have incurred reimbursable expenses incident to the transfer. Since Mr. Gonzalez entered into a contract for the construction of a new home in Montana several months prior to receipt of official notification of the transfer, the agency questions whether the expenses associated with the purchase of the new home could be eligible for reimbursement incident to the transfer.

Mr. Gonzalez believes that he should be entitled to reimbursement of the costs he has claimed because he did not enter into a mortgage commitment until well after the date of the issuance of his official notification of the transfer to Montana. He is not requesting reimbursement for any costs incurred prior to the issuance of travel orders, but seeks only the closing costs, which were incurred in May 2007, long after the travel orders were issued. Mr. Gonzalez adds that, by securing a builder when he did, he reduced the time for occupying temporary quarters, and avoided the need to request an extension of temporary quarters subsistence expenses, thereby saving the Government considerable expense.

Although claimant carefully avoided incurring any monetary expenses that would be presented to the Government for reimbursement prior to receiving the official notification of his transfer, this is not the determining factor in resolving his eligibility for reimbursement of the expenses of purchasing a home at the new duty station.¹ He entered into a contract to purchase a house in Montana as of June 30, 2006, nearly three months before he received written confirmation of the transfer and travel orders. This is the date on which he became obligated to purchase the home and, as such, is the date that is used to evaluate eligibility for reimbursement of the costs incurred at closing.

¹ Nor may claimant's intent to save the Government money serve to justify payment of an expense that is otherwise unauthorized. *See, e.g., Gene Kourtei*, CBCA 793-RELO, 08-1 BCA ¶ 33,724 (2007); *James L. Landis*, GSBCA 16684-RELO, 06-1 BCA ¶ 33,225.

Relocation expenses may be reimbursed only when they are incident to the transfer from the old to the new station. *Marko Bourne*, GSBCA 16273-RELO, 04-1-BCA ¶ 32,544 (2003). The Federal Travel Regulation (FTR), applicable to civilian agency employees, specifies that “reimbursement of any residence transaction expenses . . . that occurs [sic] prior to being officially notified (generally in the form [of] a change of station travel authorization) is prohibited.” 41 CFR 302-11.305 (2006). It is well settled that when a contract for purchase or sale is entered into prior to the agency’s manifestation of an intent to transfer the employee, “the transaction will be considered to have been entered into for some reason other than the transfer. That reason may have been in anticipation of a transfer, but unless the transfer has been announced, anticipation is insufficient to make the sale incident to the transfer.” *Peter J. Grace*, GSBCA 16790-RELO, 06-1 BCA ¶ 33,219, at 164,635 (citing *Bourne*); see *Gary J. Tennant*, CBCA 553-RELO, 07-1 BCA ¶ 33,558. The rationale for this rule is that, if the transfer does not materialize, either the employee or the Government may “lose money for no purpose.” *Connie F. Green*, GSBCA 15301-RELO, 01-1 BCA ¶ 31,175, at 153,998 (2000) (citing *Rosemary H. Sellers*, GSBCA 13654-RELO, 97-1 BCA ¶ 28,714); accord *Byron L. Wells*, CBCA 1206-RELO (Sept. 29, 2008). At the same time, as discussed below, the rule is not intended to automatically preclude reimbursement of these costs when, despite the lack of formal written notification of the transfer, a definite selection for the position has been made and all parties concerned had good reason to expect the transfer would be approved and effectuated.

The controlling consideration is whether, prior to the issuance of travel orders, the agency may be deemed to have manifested a clear administrative intent to transfer the employee at the time the expenses were incurred. *Larry A. Rives*, CBCA 805-RELO, 07-2 BCA ¶ 33,684 (citing *Michael L. Scott*, GSBCA 16310-RELO, 04-1 BCA ¶ 32,526 (2003)); *Shirley Rae Vanderburg*, GSBCA 15626-RELO, 02-1 BCA ¶ 31,782. While the FTR states that this manifestation is generally regarded to have occurred when the transfer is approved in writing, there is still flexibility for finding that the requisite administrative intent was manifested prior to issuance of the requisite paperwork. In particular, it has been recognized that telephone contacts, in which a definite offer, even though contingent upon higher level approvals or receipt of medical and security clearances, is made, may also establish the requisite administrative intent. See *Green*, 01-1 BCA at 153,998 (citing *Deborah A. Osipchak*, B-270196 (Mar. 22, 1996); *Travis D. Skinner*, B-198880 (Oct. 21, 1980)).

Of particular relevance to this claim is whether the statements of the Denver Office SAC qualify as a sufficient manifestation of administrative intent to transfer claimant. Claimant’s response to the Board’s inquiry in this regard is that he understood the SAC, who informed him of his selection, to be the deciding official with authority to fill the position. Mr. Gonzalez apparently had no reason to believe that his selection was tentative. The agency did not respond to the Board’s inquiry and has not rebutted Mr. Gonzalez’s

explanation. Although the agency stated in its initial response to the claim that “several layers of approvals were still to be completed before the final, official notification was issued by the agency,” it has not refuted claimant’s statement that the SAC had the authority to make a definite offer. Under *Green* and the cases cited therein, the need for additional approvals to issue the paperwork does not automatically establish that the administrative intent to effect a transfer was lacking if the approvals were of a routine nature and unlikely to prevent the eventual issuance of permanent change of station travel orders. Thus, claimant has come forward with evidence to suggest that the requisite administrative intent to effect this transfer existed as of June 30, 2006, the date on which he became obligated to purchase the house he had built. The agency has not disputed his contentions. On the record before us, the agency has the authority to pay the allowable expenses of purchasing a home at the new duty station, and should do so.

CATHERINE B . HYATT
Board Judge