



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 9, 2016

CBCA 4958-RELO

In the Matter of PAUL T. BURNS

Paul T. Burns, Pearl Harbor, HI, Claimant.

Thomas Spahr, Director, Travel Functional Area, Enterprise Solutions and Standards, Defense Finance and Accounting Service, Department of Defense, Indianapolis, IN, appearing for Department of Defense.

SULLIVAN, Board Judge.

The agency, Defense Finance and Accounting Service (DFAS), seeks review on behalf of the claimant, Paul T. Burns, of the agency's denial of Mr. Burns' claim for unexpired lease expenses. DFAS denied reimbursement because Mr. Burns' lease was not terminated and Mr. Burns did not provide sufficient evidence that he attempted to sublet the apartment as required by regulation. Based upon our review of the record and the applicable regulations, we reverse the agency's determination and grant Mr. Burns' claim.

Background

Mr. Burns received travel orders for his permanent change of station (PCS) from Ohio to Hawaii on February 25, 2015. These orders authorized the payment of unexpired lease expenses. On February 24, 2015, Mr. Burns contacted his rental company to notify it that he would be vacating the property in April 2015. In response, the rental company informed Mr. Burns that he could vacate the premises in April, but that he would remain responsible for the remainder of the lease. On February 27, 2015, the rental company emailed Mr. Burns' transferring agency to advise that Mr. Burns and his roommates "are unable to find a roommate to replace [Mr. Burns] so he has decided to remain on the lease and honor his commitment to them."

Mr. Burns and two roommates had a lease for August 1, 2014, through July 31, 2015, at \$1895 per month. The lease permitted the property to be sublet with the written consent of the rental company, but did not contain any provisions for early termination of the lease. The lease also held Mr. Burns and his roommates jointly and severally liable for the rental obligations.

Mr. Burns vacated the property on April 23, 2015. On April 13, prior to vacating, Mr. Burns paid the rental company \$1895 for his portion of the rent for May, June, and July 2015. In return for this payment, the rental company and Mr. Burns executed an agreement that released Mr. Burns from his remaining obligations under the lease. It appears that Mr. Burns' roommates remained in the property for the remainder of the lease period and their lease agreement was not terminated.

In response to an order from the Board asking him to provide a statement regarding his attempts to sublease the property, Mr. Burns stated that the apartment was listed on Craigslist and the rental company website for sublease from February 24 to April 13, 2015. Mr. Burns was unable to provide copies of the listings on these sites because they had been taken down more than a year ago.

Discussion

Provisions for the payment of lease settlement expenses

As part of a PCS move within the United States:

an agency shall pay to or on behalf of an employee who transfers in the interest of the Government, expenses on the sale of the residence (or the settlement of an unexpired lease) of the employee at the old official station and purchase of a residence at the new official station that are required to be paid by the employee, when the old and new official stations are located within the United States.

5 U.S.C. § 5724a(d)(1) (2012). The purpose of this allowance is to reimburse an employee for costs incurred in connection with residence transactions, including “[t]he settlement expenses for a lease which has not expired on your residence . . . at your old official station.” 41 CFR 302-11.1 (2014). Employees may seek reimbursement of expenses related to “[s]ettlement of an unexpired lease at your old official station” if qualified for residence transaction expenses. *Id.* 302-11.6. Expenses for settlement of an unexpired lease are reimbursable if certain conditions are met:

When are expenses for my settlement of an unexpired lease reimbursable?

When your unexpired lease (including month to month) is for residence quarters at your old official station, you may be reimbursed for settlement expenses for an unexpired lease, including but not limited to broker's fees for obtaining a sublease or charges for advertising if:

- (a) Applicable laws or the terms of the lease provide for payment of settlement expenses; or
- (b) Such expenses cannot be avoided by sublease or other arrangement; or
- (c) You have not contributed to the expenses by failing to give appropriate lease termination notice promptly after you have definite knowledge of your transfer; or
- (d) The broker's fees or advertising charges are not in excess of those customarily charged for comparable services in that locality.

Id. 302-11.7.

The Joint Travel Regulations (JTR) further define allowable costs as "those payments made by the employee that represent unavoidable expense directly attributable to lease termination prior to the expiration date." JTR 5916-B. To claim these expenses, the JTR further requires a claimant to be prepared to provide in support of a claim for reimbursement, among other items, a "statement of the extent of bona fide attempts made to avoid penalty costs if the lease includes a savings provision for subleasing or making other arrangements to avoid penalty costs." *Id.* The obligation to mitigate the additional lease expenses does not cease when the claimant vacates the property. Comp. Gen. Dec. B-183018 (Jan. 8, 1976); Comp. Gen. Dec. B-177413 (Jan. 22, 1973).

Mr. Burns incurred qualifying lease settlement expenses

DFAS made the determination that, because Mr. Burns' roommates continued to occupy the property, the lease was not terminated. Because the JTR permits reimbursement of expenses "directly attributable to lease termination," JTR 5916-B, DFAS reasoned that Mr. Burns' expenses did not qualify for reimbursement.

DFAS's determination is contrary to regulation. Although Mr. Burns' roommates continued to occupy the property and the lease with them continued, the rental company did

release Mr. Burns from his obligations under the lease when he vacated the property and paid his share of the remaining costs of the lease. The expenses Mr. Burns incurred were settlement costs for an unexpired lease, expenses that the agency is required to pay with the transfer of an employee. 5 U.S.C. §5724a(d)(1). In similar circumstances, the Comptroller General has found the fact that the underlying lease did not end would not preclude payment of these expenses. Comp. Gen. Dec. B-177413 (“The fact that [claimant’s] move from the apartment in question did not terminate the basic written lease is not considered to prevent reimbursement to her of the settlement costs she incurred since the controlling regulation provides for reimbursement of employees whose lease obligations are shared with others.”).

DFAS relies upon a decision of the General Services Board of Contract Appeals (GSBCA) which upheld the denial of expenses because the employee was jointly and severably liable with roommates for lease payments and the lease was not terminated when the employee moved to the new duty station. *Angela Brown*, GSBCA 16523-RELO, 05-1 BCA ¶ 32,815 (2004) (citing *Daniel Janusz*, GSBCA 14653-RELO, 99-1 BCA ¶ 30,121 (1998), *motion for reconsideration denied*, 99-1 BCA ¶ 30,250. In both of these cases, the employee’s lease was not terminated. These cases also cite the decision in *Patsy S. Ricard*, 67 Comp. Gen. 285 (1988), for the proposition that the leased property must be “actually vacated” for the expenses to be reimbursed. *Daniel Janusz*, 99-1 BCA at 149,016. In *Patsy S. Ricard*, the employee sought lease termination expenses although her spouse continued to occupy the property along with the personal property of the employee through an extension of the lease in the spouse’s name only. In that case, the Comptroller General determined that the lease had not been terminated because the employee continued to enjoy the benefit of the property and, for that reason, the employee was not entitled to reimbursement.

That situation is different from Mr. Burns’ circumstance. Although Mr. Burns’ roommates continued to occupy the property, there is nothing in the record to indicate that Mr. Burns continued to derive any benefit from the property. Instead, the record shows that he vacated the property on April 23, 2015, and the rental company terminated his lease obligation with the payment of the remaining months of rent. Mr. Burns does not seek more than his share of the remaining rent and did not retain any interest in the property. Instead, Mr. Burns seeks reimbursement of lease expenses that he incurred for a space that he did not occupy as the result of his transfer by the Government, reimbursement that is permitted by statute.

Mr. Burns attempted to avoid the claimed lease expenses

DFAS also determined that Mr. Burns had not made sufficient attempts to sublet the apartment to avoid his expenses. As noted above, the statute provides for reimbursement of expenses that the employee is required to pay. 5 U.S.C. § 5724(d)(1). To implement this

limitation, as noted above, the Federal Travel Regulation requires an employee to show that the expenses could not be avoided, 41 CFR 41.302-11.7, and the JTR requires the claimant to be prepared to provide a statement of bona fide attempts to avoid the claimed expenses. JTR 5916-B. Examples of reasonable efforts to mitigate the cost would include “posting signs, placing advertisements, or contacting real estate offices to find a replacement tenant.” *Angela Brown*, 05-1 BCA at 162,373; *but see* Comp. Gen. Dec. B-183018 (simply posting notices on bulletin boards in agency office and contacting newly arrived federal employees is not a reasonable effort).

The lease permitted Mr. Burns to sublet the apartment, with permission of the rental company. There are three pieces of evidence in the record regarding Mr. Burns’ attempts to sublet the apartment: 1) the email message sent in February 2015 from the rental company to Mr. Burns’ employing agency that Mr. Burns and his roommates had been unable to find a new tenant to replace Mr. Burns, a communication that came two days after Mr. Burns received his travel orders; 2) the statement of the agency official, who approved Mr. Burn’s PCS and recommended that the adverse decision on Mr. Burns’ claim be appealed, noting that “Mr. Burns has provided information regarding his lease, his efforts to sublet, and settlement of said lease”; and 3) Mr. Burns’ statement to the Board that the apartment was listed on Craigslist and the rental company’s website between February 24 and April 13, 2015. As noted, Mr. Burns was unable to provide copies of the website listings due to the passage of time.

In response to Mr. Burns’ further submission, DFAS asserts that Mr. Burns has not provided sufficient supporting documentation to show that he made a reasonable attempt to avoid the cost by subletting. It notes that the only documentation in the record is the email sent by Mr. Burns’ leasing company in February 2015. DFAS does not dispute Mr. Burns’ statement that the apartment was listed on the two websites he identifies, nor does DFAS assert that it asked Mr. Burns for a bona fide statement of his efforts to sublease when it was processing his claim.

As noted, the JTR requires that the employee provide or be prepared to provide a bona fide statement regarding efforts that were undertaken to avoid the lease expenses. Although better evidence of Mr. Burns’ efforts to sublet the apartment would have included copies of the website listings themselves or some other documentary evidence, the regulation only requires a statement from the employee. Given the passage of time, the Board accepts Mr. Burns’ statement as sufficient evidence of attempts to avoid the claimed lease expenses. Given the length of time remaining on the lease at the time Mr. Burns vacated (three months), the Board finds his attempts to sublet by listing the apartment on these websites to be reasonable. *Jeffrey A. Tobin*, B-182276 (Apr. 10, 1975) (evaluation of reasonable efforts to sublease includes consideration of the length of time remaining on the lease).

Decision

The claim is granted.

MARIAN E. SULLIVAN
Board Judge