



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 13, 2010

CBCA 2092-RELO

In the Matter of JUDITH A. SUKOL

Judith A. Sukol, Montgomery, AL, Claimant.

Tim Beyland, Assistant Deputy Chief of Staff, Manpower and Personnel, Department of the Air Force, Washington, DC, appearing for Department of the Air Force.

BORWICK, Board Judge.

Ms. Judith A. Sukol, claimant, submitted a claim to the Board contesting the agency's denial of her request for an extension of the two-year window to sell her house incident to a permanent change of station (PCS). The agency, the United States Department of the Air Force, denied the request for budgetary considerations, which is not a factor specified in the Federal Travel Regulation (FTR) for considering whether an extension of the two-year window should be granted. The FTR provides that in exercising its permitted discretion, the agency must focus on the employee's alleged extenuating circumstances. We thus grant the claim in part, but we remand the claim to the agency to allow it to exercise its discretion considering the factors specified in the FTR.

Background

On March 24, 2008, the agency authorized claimant's PCS in the interest of the Government from Fort Huachuca, Arizona, to Maxwell Air Force Base, Alabama. Claimant's reporting date was June 9, 2008. Among other benefits, the agency authorized claimant reimbursement of her allowable real estate transaction expenses incurred in connection with her PCS.

Claimant moved to her new duty station on or about May 30, 2008, and immediately placed the house at her old residence in Sierra Vista, Arizona, on the market. Claimant initially listed her house at \$419,000 but was unable to sell it at that price. On June 27, 2008, she reduced the listing price to \$375,000. On February 28, 2009, claimant reduced the listing price to \$359,000. On August 15, 2009, she extended the listing agreement, and on January 1, 2010, having retained a new broker, she further reduced the listing price of her house to \$339,000.

On January 11, 2010, claimant requested the agency to grant an extension of the time period for which she could seek reimbursement of real estate transaction expenses. In that request claimant explained to the agency the above efforts to sell her house and the series of reductions in the listing price. The agency asked claimant to list any events that may have occurred before or after the scheduled PCS that were beyond the employee's control, such as natural disasters that affect the marketability of the house. Claimant responded:

[T]he reasons for my inability to sell the house within the two year time period were beyond my control as the market conditions . . . particularly in Sierra Vista, Arizona, have made it impossible to find a buyer for my house within the usual time period, despite my best efforts to sell the house, which . . . have included aggressively marketing the house and steadily dropping the price to \$70,000 less than the price at which I purchased it.

As further explanation to the agency, claimant noted the "generally depressed real estate market across the country" that made it difficult to sell the house, and that this condition was especially true in Arizona, which she viewed as one of the states most affected by the home sales slump. She also noted that due to the small size of the location of her former residence, Sierra Vista was even less able to withstand the depressed market conditions.

The agency Assistant Deputy Chief of Staff, Manpower and Personnel, being fully cognizant of the above explanations, by memorandum of July 13, 2010, denied claimant's request, stating:

The Joint Travel Regulations (JTR) requires that the Agency find there are "extenuating circumstances" that justify the time extension. Based on legal precedent, a slow real estate market does not constitute extenuating circumstances. As a result, I do not find that there are extenuating circumstances that support the request for time extension and the request is disapproved.

From that determination, claimant submitted her claim to the Board. In its submission to the Board, the agency argues: (1) that regulations, particularly the JTR, require a finding of extenuating circumstances for granting an extension of the two-year reimbursement period; (2) that both the FTR and the JTR vest broad discretion in an agency as to whether to approve such extensions; and (3) such determinations are subjective and those determinations will not be overturned unless the Board finds the determinations to be arbitrary and capricious.

In its submission to the Board, the agency relies on the case of *Nhat D. Nguyen*, GSBICA 15859-RELO, 02-2 BCA ¶ 31,986, for the proposition that a slow real estate market may never constitute an extenuating circumstance justifying a time extension for reimbursement of real estate expenses. As further support for its position, the agency states:

Here the [agency] did consider [claimant's] assertion of a "slow real estate market." . . . Further, the [agency] considered the fact that the approval of a two year extension under the circumstances presented by [claimant] would set new policy whereby the [agency] would be obliged to approve more extensions based simply on a slow real estate market. In light of the current economy such a policy would result in more time extension approvals, increase the cost of PCS moves, and extend the time frame within which the PCS moves are accomplished/finalized. Based upon these considerations, the [agency] Official determined . . . that a slow real estate housing market does not constitute extenuating circumstances.

Discussion

Statute provides that under regulations prescribed by the Administrator of General Services, agencies "shall pay" real estate transaction expenses to an employee who transfers in the interest of the Government when the old and new official stations are located within the United States. 5 U.S.C. § 5724a(d)(1) (2006).

The FTR provides transferred employees with a two-year window for claiming real estate transaction expenses; that two-year window starts the day after the employee reports for duty at his or her new duty station. 41 CFR 302-11.21 (2008). The agency, however, may extend the two-year window for up to two additional years, for reasons beyond the control of the employee and for reasons acceptable to the agency. *Id.* at 302-11.22.

In this regard, the FTR provides:

What must we consider when authorizing an extension of time limitation?

When authorizing an extension of time limitation, you must determine that the:

- (a) Employee has extenuating circumstances which have prevented him/her from completing his/her sale and purchase or lease termination transactions in the initial authorized time frame of two years; and
- (b) Employee's residence transactions are reasonably related to his/her transfer of official station.

41 CFR 302-11.421. The JTR echoes the FTR. JTR C5750-C.7.

Decisions from our predecessor board in deciding these cases, the General Services Board of Contract Appeals (GSBCA), hold that the governing regulations require the agency official to make three determinations: (1) Did extenuating circumstances prevent the employee from completing the sale within the two-year window? (2) Were those circumstances acceptable to the official? (3) Were the residence transactions reasonably related to the permanent change of station? *David B. Yorkowitz*, GSBCA 15337-RELO, 00-2 BCA ¶ 31,052; *Stephanie P. Riddle*, GSBCA 15027-RELO, 99-2 BCA ¶ 30,533. The decisions also recognize that determinations to extend the time for reimbursement of real estate transaction expenses are discretionary and will not be overturned except in cases of abuse of discretion. *Yorkowitz*. However, the agency's exercise of discretion must be reasonably based. *Benjamin A. Hanfelder*, CBCA 1294-RELO, 08-2 BCA ¶ 33,987 (agency's exercise of discretion in determining not to excuse employee from obligations of service agreement was reasonably based).

In this case the FTR and JTR provide that the determination must be made on the basis of whether "the employee has extenuating circumstances."¹ Here, the agency candidly admits it did not make its determination based on the employee's individual efforts in selling her house in the presence of an allegedly depressed real estate market, but on a broad policy determination that granting time extensions for claiming real estate transaction expenses to any employee in a depressed real estate market would be too expensive for the agency. In short, the agency made its decision based on its budget considerations, not based on the employee's individual circumstances, as required by the FTR.

¹ In contrast, the regulatory standard for extension of the time period for occupancy of temporary quarters and reimbursement of temporary quarters subsistence expense (TQSE) is the more stringent "compelling reason" standard. See 41 CFR 302-6.104. This may be because the statutory authorization of TQSE is discretionary, not mandatory, as it is with real estate transaction expenses. Compare 5 U.S.C. § 5724a(c)(1) with 5 U.S.C. § 5724a(d)(1).

This approach is particularly troubling in light of the mandatory nature of 5 U.S.C. § 5724a(d)(1)--when an employee's transfer is in the interest of the Government--and in light of a General Accounting Office decision holding that a time extension to sell a house should be "liberally allowed" during a depressed housing market to carry out the congressional intent to reimburse employees for the expenses of selling and buying residences incident to transfer. *Sara B. Harris*, B-212171 (Sept. 27, 1983).²

The agency's reliance on the decision of *Nhat D. Nguyen* in support of its position is misplaced. In that case the request for a time extension resulted from the employee's choice of neighborhoods and preferred housing far from his permanent duty station. The agency considered the employee's individual circumstances and concluded that the employee's request resulted from his personal choices for the location of his new residence, when there was ample suitable housing closer to the employee's duty station. Under those circumstances, the board found the agency's analysis was not an abuse of discretion.

Indeed, in *Peter J. Grace*, GSBCA 16790-RELO, 06-1 BCA ¶ 33,219, the board suggested that a weak housing market may indeed be one of the considerations in the agency's exercise of discretion. In that case, the agency summarily denied an employee's request for a time extension because of the employee's untimely request. The agency denied the request because the employee, unaware of the ending date for the two-year window, made the request more than thirty days after that date. The Board remanded the claim to the agency and required it to exercise its discretion in considering the extenuating circumstances the employee had presented, including the weak housing market.

We grant the claim in part and remand to the matter to the agency for the exercise of discretion considering claimant's individual circumstances. Upon remand, the agency may consider whether the decline in the housing market was as severe as claimant suggested, considering the percentage of decline in the real estate market in the area of claimant's old residence. The agency may consider what efforts claimant made in selling her house during the initial two-year period. The agency may consider whether claimant priced her house to sell given the selling or listing prices of comparable houses during the initial two-year period.

² The agency also argues that claimant's transfer was voluntary in that it was not the result of an existing mobility agreement. That fact is irrelevant. The agency issued a travel authorization granting claimant relocation benefits. The agency thus determined that the transfer was in the interest of the Government. The duly authorized and valid travel authorization creates a vested right to those relocation benefits authorized by statute and regulation. *Jack J. Pagano*, CBCA 1838-TRAV, 10-1 BCA ¶ 34,408; *Andre E. Long*, GSBCA 14498-TRAV, 98-1 BCA ¶ 29,731.

The agency may also consider whether the claimant had received any offers to purchase her residence during that period and whether she explicitly rejected or refused to consider such offers.

ANTHONY S. BORWICK
Board Judge