



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 14, 2011

CBCA 2103-RELO

In the Matter of BRANDON J. THORPE

Brandon J. Thorpe, Alexandria, VA, Claimant.

Jason J. Guiliano, Chief, Claims and Legal Services, Department of the Army, Fort Monmouth, NJ, appearing for Department of the Army.

DRUMMOND, Board Judge.

Mr. Brandon J. Thorpe is a civilian employee of the Department of the Army. He has asked this Board to review the agency's decision to deny his claim for payment of real estate expenses incurred during a permanent change of station (PCS) move from Fort Monmouth, New Jersey, to Aberdeen Proving Ground, Maryland. The agency determined that the sale of the old residence was not incident to the transfer.

Background

Prior to his relocation, Mr. Thorpe was a program analyst at Fort Monmouth. In 2005, Fort Monmouth was approved for base realignment and closure (BRAC). In September 2008, Mr. Thorpe and other employees at the base were informed about job opportunities that were available at Aberdeen Proving Ground, Maryland, before the scheduled base closure in 2011. In January 2009, Mr. Thorpe entered his name for a permanent position as a program analyst at Aberdeen. In anticipation that he would receive a position, Mr. Thorpe listed his residence in New Jersey with a real estate broker on February 17, 2009. Subsequently, sometime in March 2009, Mr. Thorpe claims that he spoke by telephone with his former supervisor, who informed him he had been selected for the position at Aberdeen. Mr. Thorpe accepted an offer to purchase his residence on April 7, 2009.

On April 16, 2009, Mr. Thorpe received a tentative offer for a permanent position at Aberdeen. He accepted the offer on April 17, 2009. On April 29, 2009, the Government issued written authorization for expenses (including real estate expenses) associated with his PCS move. According to Mr. Thorpe, he received the official orders relating to the PCS move on April 29, 2009.

Mr. Thorpe closed on the residence in New Jersey on June 29, 2009. He reported to his new duty station on July 8, 2009, and subsequently sought, *inter alia*, reimbursement of \$26,813 in real estate expenses associated with the sale of his residence in New Jersey. While his claim was initially granted in the amount of \$22,563 (\$26,813, minus \$250 for operating and maintenance costs for water/sewer, minus \$4000 for buyer's closing costs), the agency later denied the claim on the ground that he entered into a contract to sell his residence prior to being officially offered the job in Maryland. Accordingly, the agency determined that the sale was not incident to the transfer.

Mr. Thorpe disagrees. Mr. Thorpe argues the conversation with his former supervisor in March 2009 is evidence of clear administrative intent to transfer him. The agency disputes the existence of the alleged conversation. The record includes no evidence that documents the alleged conversation between Mr. Thorpe and his former supervisor. Nor does the record include any evidence that his former supervisor possessed authority to effect the transfer. Mr. Thorpe also argues that since closing occurred after he received notice of the transfer, he is entitled to reimbursement of the expenses.

Discussion

A government agent may not authorize the reimbursement of expenses in contravention of the law. *Flordeliza Velasco-Walden*, CBCA 740-RELO, 07-2 BCA ¶ 33,634. Therefore, the initial approval of payment of Mr. Thorpe's housing expense does not entitle Mr. Thorpe to reimbursement if reimbursement is prohibited by law.

Although Mr. Thorpe did not close on his residence until after receiving official notice, it has been held that real estate expenses are incurred when the employee signs the contract to sell the house. *See Bernard J. Silbert*, B-202386 (Sept. 8, 1981). Here Mr. Thorpe entered into the contract to sell his house on April 7, 2009, and, as such, that is the date that is used to evaluate eligibility for costs incurred at closing. As a general rule, when an employee incurs real estate expenses prior to receiving formal notification of a pending transfer, the employee will only be eligible for reimbursement if the agency had manifested a clear "administrative intent" to transfer the employee. *See Dennis A. Edwards*, GSBGA 14943-RELO, 00-1 BCA ¶ 30,741 (1999); *Warren A. White*, B-235046 (Sept. 18, 1989).

Agencies have broad discretion in determining whether there was administrative intent to transfer an employee. *Connie F. Green*, GSBCA 15301-RELO, 01-1 BCA ¶ 31,175, at 153,998 (2000) (citing *James K. Marron*, 63 Com. Gen. 298 (1984); *Joan E. Marci*, B-188301 (Aug. 16, 1977)). Whether an agency has manifested a “clear intention” to transfer an employee prior to issuance of formal notification of its intent depends on the facts and circumstances of the specific situation presented for decision. For example, unofficial telephone contacts notifying an employee of a potential reduction in force, a letter stating a position is surplusage and offering assistance in locating another position, and an official announcement that the essential functions of an installation would be relocated, have been held sufficient to evidence administrative intent to transfer. *See, e.g., Lawrence C. Jackson*, B-207564 (Nov. 22, 1982); *Glenn A. Schwartz*, B-202687 (Sept. 1, 1981); *Orville H. Myers*, 57 Comp. Gen. 447 (1978). Telephone contacts in which a definite offer is made, even though contingent upon higher level approvals or receipt of medical and security clearances, may also establish the requisite administrative intent. *E.g., Deborah A. Osipchak*, B-270196 (Mar. 22, 1996); *Travis D. Skinner*, B-198880 (Oct. 21, 1980). Conversations with agency officials in which an employee is told his or her prospects for a transfer were good have not sufficed to show clear administrative intent. *George S. McGowan*, B-206246 (Aug. 29, 1984).

Here, the evidence does not clearly point to the existence of an administrative intent to transfer this employee at the time he entered into a contract under which he became obligated to sell his residence at the old duty station. Although Mr. Thorpe no doubt anticipated the possibility of a transfer to Aberdeen, until the transfer has been announced, anticipation is insufficient to make the sale incident to the transfer. *Joseph Bush*, CBCA 660-RELO, 07-1 BCA ¶ 33,560, at 166,226 (citing *Peter J. Grace*, GSBCA 16790-RELO, 06-1 BCA ¶ 33,219, at 164,635; *Bernard J. Silbert*, B-202386 (Sept. 8, 1981)). The alleged telephone conversation with his former supervisor is inconclusive. Although Mr. Thorpe says that he was told in March 2009 that he had the job, there is no documentary evidence to corroborate that his former supervisor made the alleged statement. Moreover, there is no evidence in the record that his former supervisor had authority to effect the transfer. We do not find the alleged conversation between Mr. Thorpe and his former supervisor sufficient to establish the requisite prior administrative intent to transfer him.

Thus, from the facts as stated, the expenses do not appear to have been “incident to the transfer.” *Bush; White*. There is no evidence that the agency abused its discretion in this regard.

Decision

Based on the evidence before the Board, the agency correctly denied reimbursement of the claimed expenses.

JEROME M. DRUMMOND
Board Judge