



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 31, 2017

CBCA 5600-RELO

In the Matter of ROBERT M. BAUM

Robert M. Baum, North Ridgeville, OH, Claimant.

Gary McWilson, Acting Director, PCS Travel Section, Department of Veterans Affairs, Austin, TX, appearing for Department of Veterans Affairs.

LESTER, Board Judge.

Claimant, Robert M. Baum, seeks review of the agency's decision denying his request for reimbursement of real estate transaction expenses, which he asserts were incurred as part of his permanent change of station (PCS) from Washington, D.C., to Cleveland, Ohio. For the reasons set forth below, we must deny Mr. Baum's claim.

Background

On May 5, 2016, while stationed in Washington, D.C., as a Department of Veterans Affairs (VA) employee, Mr. Baum submitted an application for a program management officer position with the VA's Employee Education System (EES) in Cleveland. Mr. Baum submitted that application in response to a posted announcement, which indicated that relocation and recruitment incentives were authorized for the successful applicant. The posting closed on May 19, 2016.

On June 23, 2016, Mr. Baum received a congratulatory email message from an EES employee, informing him that "EES is moving forward with selecting you" for the advertised position. In the message, the EES employee indicated that "[t]here are requirements for the nomination package" and asked him to forward specific information needed for a security check, as well as his most recent performance appraisal and current salary information.

There is nothing in the record indicating that Mr. Baum had any conversations with the EES employee, or received other supplemental information in any other form, telling him that the “nomination” to which the EES employee referred was pro forma and/or that he was essentially guaranteed selection for the position.

In July 2016, Mr. Baum and his wife were in the Cleveland area and discovered a lot in a subdivision that they liked upon which the subdivision developer could build them a house “if/once [they] were to move to the area.” On July 16, 2016, after learning that the process of building a house on the property would take up to four months and that “parcels were selling daily,” they signed a purchase agreement for a property parcel (at discounted pricing) and provided the developer with an earnest money deposit. The purchase agreement provided that, if the Baums elected to finance the purchase (which they did), they had to apply for a loan within seven days of signing the purchase agreement, to work “diligently . . . with [the] lender in good faith to obtain loan approval,” and to respond to the lender’s requests for information “and meet all the conditions of [the] loan application.” If the Baums did not have loan approval within forty-five days after execution of the purchase agreement, the seller would “have the [unilateral] right to cancel” the purchase agreement or, instead, could elect to extend the loan approval period (with the right to terminate later if the seller determined that the Baums were not using good faith efforts to obtain a loan). If the seller elected to terminate the purchase agreement and did not believe that the Baums had acted in good faith to obtain loan approval, the seller would be entitled to retain their earnest money deposit. The purchase agreement provided that, if the Baums breached any provision in the agreement, the seller had the unilateral right to treat its retention of the earnest money deposit either as the payment of liquidated damages (relieving the Baums of any further liability) or as payment towards the seller’s damages (entitling the seller to pursue additional legal and/or equitable remedies against the Baums, including specific performance). On July 29, 2016, the seller executed the purchase agreement that the Baums had previously signed.

On August 1, 2016, Mr. Baum received a congratulatory email message from a human resources consultant with the Veterans Health Administration (VHA), informing him that he had been tentatively selected for the EES position and asking him, if he intended to accept the offer, to complete Optional Form 306 (Declaration for Federal Employment) and forward it to her. The VHA representative indicated in the message that the “offer was tentative based on receipt of your suitability review.” The VHA issued a final selection letter on August 8, 2016. Mr. Baum informed the agency that he would accept the new position that same day, and he signed a VA Form 3918 Intra-Agency Transfer Request on August 16, 2016. He apparently began his EES duties on or about August 21, 2016, while still in Washington, D.C., but then transferred to Cleveland at some later date in 2016.

The Baums subsequently locked into a mortgage rate for the Cleveland property on October 11, 2016, and closed on the property (including the house that the developer had built for them on it) on November 22, 2016.

Mr. Baum then submitted a request for reimbursement of the closing costs on the purchase of his house. The agency denied his request, indicating that, although his PCS orders authorized reimbursement of residence transaction expenses, he was not entitled under section 302-11.305 of the Federal Travel Regulation (FTR), 41 CFR 302-11.305 (2015), to reimbursement of costs that he had obligated himself to pay before official notification of his transfer. Mr. Baum has requested that the Board review the agency's denial of his claim.

Discussion

Pursuant to the statutory authority of 5 U.S.C. § 5724a(d)(1) (2012), "if an agency transfers an employee from one duty station [in the United States] to another in the interest of the Government, the agency must authorize the reimbursement of expenses that the transferred employee incurs . . . in purchasing a residence at the new official duty station." *Milton Brown*, CBCA 4998-RELO, 16-1 BCA ¶ 36,205, at 176,660 (2015); *see* 41 CFR 302-11.6(a) ("If you qualify for a residence transaction expense allowance, you may be reimbursed for the . . . [e]xpenses of . . . purchasing a new residence in the United States"). The closing costs that Mr. Baum is seeking here fall within the types of expenses that the FTR, which implements the statutory requirement, identifies as reimbursable. *See* 41 CFR 302-11.200. The FTR makes clear, however, that an employee may obtain reimbursement of such costs only if he incurred them after being "officially notified" of his transfer:

Will I receive reimbursement for any residence transaction expenses incurred prior to being officially notified of my transfer?

No, reimbursement of any residence transaction expenses (or settlement of an unexpired lease) that occurs prior to being officially notified (generally in the form [of] a change of station travel authorization) is prohibited.

Id. 302-11.305.

Here, Mr. Baum did not receive his formal written offer for the EES position until August 8, 2016, and the agency believes that Mr. Baum is barred from seeking reimbursement of any residence transaction expenses relating to that property that he obligated himself to pay prior to that official notification date. Neither the Board, its predecessor in travel and relocation matters (the General Services Board of Contract Appeals (GSBCA)), nor the Comptroller General, which decided travel and relocation matters before

that role was assumed by the GSBCA, has taken such a restrictive view of the official notification requirement in the FTR. “An employee is not necessarily precluded from being reimbursed for expenses incurred in the . . . purchase of a residence before a definite notice of transfer.” *Bernard J. Silbert*, B-202386 (Sept. 8, 1981). Nevertheless, he “may be reimbursed for real estate expenses incurred prior to, and in anticipation of, a transfer only if an administrative intent to transfer the employee exists at the time the expenses are incurred.” *Warren A. White*, B-235046 (Sept. 18, 1989); *see Tyler D. Warner*, CBCA 5215-RELO, 16-1 BCA ¶ 36,364, at 177,258 (proper inquiry is whether, “prior to the incurrence of the expense, the agency has manifested a clear ‘administrative intent’ to transfer the employee”).

In *Connie F. Green*, GSBCA 15301-RELO, 01-1 BCA ¶ 31,175 (2000), the GSBCA, whose decisions we have adopted as precedent, held that what constitutes clear administrative intent to transfer an employee is dependent on the specific circumstances of each case, but it identified the following examples of what would, and would not, be sufficient to show such an intent:

[U]nofficial 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. 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. 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. Where a house is listed, and a contract for sale entered into, before an offer is made, the necessary administrative intent is not present to justify payment of real estate expenses associated with the sale of the residence.

Id. at 153,998-99 (citations omitted). Summarizing these various circumstances into a general rule, it is clear that residence transaction expenses can be reimbursed only if, “despite the lack of formal written notification of the transfer, a *definite* selection for the position has been made” before the purchase agreement is executed “and all parties concerned had good reason to expect the transfer would be approved and effectuated.” *Jorge L. Gonzalez*, CBCA 984-RELO, 08-2 BCA ¶ 34,004, at 168,162 (emphasis added).

That is not what the record here shows. Although Mr. Baum suggests that, through its email message of June 23, 2016, the agency provided him with sufficient information to

justify his immediate purchase of a residential property in Cleveland, the only information that the EES employee communicated to Mr. Baum that day was that EES was “moving forward with selecting” him and that it needed more information from him for a “nomination package” that EES would present elsewhere for decision. There is nothing in the record indicating that anyone at EES told Mr. Baum at that time that the job was essentially his or that the “nomination package” was a mere formality.

Even Mr. Baum, in his submission to the Board, indicated that he and his wife bought the property at issue in July 2016 to serve as their residence only “if/once [they] were to move to the area.” When he signed the purchase agreement, Mr. Baum viewed it as containing a financing contingency, which he believed “allowed [him] to hold the parcel, while giving [him] additional time to wait for the official job offer before committing to a mortgage lender.” Because the purchase agreement required him to attempt in good faith to obtain a loan, he understood that he would likely lose his earnest money deposit if he essentially “pulled out of the agreement,” but that he would have done so “if he was not offered the position in a timely manner.” Mr. Baum’s own representations indicate that, when he executed the purchase agreement in July 2016, he did not believe that the agency had made it clear that it intended to transfer him to Cleveland. To the extent that Mr. Baum anticipated the *possibility* or even the *hope* of a transfer to Cleveland when he executed the purchase agreement, that is not the same as a clear administrative intent to transfer. *See Brandon J. Thorpe*, CBCA 2103-RELO, 11-1 BCA ¶ 34,687, at 170,847 (“anticipation is insufficient to make the [real estate purchase] incident to the transfer”).

Mr. Baum argues that the date upon which he executed the purchase agreement is irrelevant to his claim because he did not actually incur the closing costs until November 11, 2016, when he and his wife formally closed on the property. By that date, he asserts, the fact of his transfer was clear. Yet, the Baums obligated themselves to pay those costs when they executed the purchase agreement for the property in July 2016. Both the Board and the Comptroller General have focused upon the date of the real estate purchase agreement’s execution to determine when, for purposes of entitlement to residence transaction expense reimbursement, an employee obligated himself to incur costs. “[O]nly where it is found that there is a clear administrative intent to transfer an employee *before he contracts to purchase a residence* may real estate expenses incurred incident to that purchase be reimbursed.” *Kenneth E. James*, B-256002 (June 2, 1994) (emphasis added); *see Brandon J. Thorpe*, 11-1 BCA at 170,847 (real estate expenses are “incurred” when residential contract is signed); *Warren A. White*, B-235046 (Sept. 18, 1989) (same).

Mr. Baum also asserts that his purchase agreement contained a contingency that, had he not been offered the EES position, would have allowed him to walk away from the purchase, albeit with a likely loss of his earnest money deposit. Because he could have

walked away from the deal (subject to that monetary loss), he argues, the Board should not tie his November 2016 closing costs to the July 2016 purchase agreement execution date. We are aware of no precedent that would allow us to ignore the contract and create an alternate reality in which the contract was irrelevant to the employee's closing obligations. In fact, the rationale for permitting reimbursement for real estate purchases that occur only after a clear administrative intent to transfer is to deter employees from entering into transactions through which, "if the transfer does not materialize, either the employee or the Government may 'lose money for no purpose.'" *Jorge L. Gonzalez*, 08-2 BCA at 168,162 (quoting *Connie F. Green*, 01-1 BCA at 153,998). Under Mr. Baum's scenario, he would have incurred a financial loss had the transfer not materialized, which conflicts with the rule's rationale.

Further, Mr. Baum's argument that he could walk away from his agreement had there been no transfer does not fit the actual purchase agreement that he signed. That agreement obligated him to work diligently with a lender to obtain loan approval. Under Ohio law, which applies to Mr. Baum's property purchase, "there is no option that simply allows the buyer to walk away from the purchase agreement with impunity, nor could that option be inferred under the circumstances. Having offered to purchase the property, the buyers 'cannot defeat the contract by their own fault' and 'must make a bona fide effort' to obtain financing." *Shimrak v. Goodsir*, No. 100612, 2014 WL 4244313, at *4 (Ohio Ct. App. Aug. 28, 2014) (quoting *Graham-Chrysler Plymouth, Inc. v. Warren*, No. 9222, 1979 WL 207764, at *2 (Ohio Ct. App. Aug. 15, 1979)). Although Mr. Baum asserts that, had he not pursued a loan in good faith, the seller's damages would have been limited to the earnest money deposit, the purchase agreement at issue here was very seller-friendly and actually provided the seller with the unilateral option of seeking affirmative monetary damages and even specific performance if the Baums breached their contractual obligations. In such circumstances, we cannot find that Mr. Baum could simply have walked away from his property deal had he not been offered the EES position, and we cannot pretend that he did not, for all intents and purposes, obligate himself to pay closing costs when he executed the purchase agreement.

Decision

For the foregoing reasons, we must deny Mr. Baum's claim.

HAROLD D. LESTER, JR.
Board Judge