



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 18, 2017

CBCA 5625-RELO

In the Matter of JENNIFER A. MILLER

Jennifer A. Miller, Alexandria, VA, Claimant.

Laura A. Merritt, Civilian PCS Program Administrative Specialist, Headquarters Air Force Personnel Center, Joint Base San Antonio-Randolph, TX, appearing for Department of the Air Force.

O'ROURKE, Board Judge.

Claimant, Jennifer A. Miller, an Air Force employee who transferred from Eglin Air Force Base, Florida, to Arlington, Virginia, in November 2015, requested a one-year extension of time in which to complete all residential transactions in connection with her permanent change of station (PCS). The agency denied her request. We grant the claim because the agency based its decision on erroneous facts and a misinterpretation of the regulation.

Background

Pursuant to PCS orders, claimant moved from Florida to Virginia, and reported to her new permanent duty station (PDS) on November 19, 2015. At the time of her PCS, claimant planned to sell her condominium in Florida and purchase a new home in Virginia. Her orders authorized payment of real estate transaction expenses which were incurred within one year of her arrival at her new PDS in Virginia. However, claimant was unsuccessful in accomplishing either task during that time frame.

Prior to the deadline, claimant requested a one-year extension of time in which to complete her real estate transactions and be reimbursed for authorized expenses. In support of her request, claimant provided the agency with documentation of her efforts to sell the condominium in Florida and purchase a home in Virginia. These efforts are described below.

The Condominium in Florida

Claimant is the owner of a condominium property in Florida that she occupied from December 2014 until she vacated it on November 15, 2015, due to her PCS. Prior to her PCS, claimant listed the property for sale with a realtor.

From April 1 through November 15, 2015, while the unit was owner-occupied, claimant's real estate agent showed the property to prospective buyers but no offers were received. For financial reasons, claimant decided to lease the property shortly after she vacated it. The period of the first lease was from December 2015 until November 2016, but the lease was cut short by the tenants in August 2016 due to their receipt of military PCS orders. The property remained on the market during the entire period that the first set of tenants occupied it, which was approximately nine months. The property was shown to prospective buyers during the first lease period, but no offers were received.

Claimant briefly returned to Florida in August 2016 to perform a move-out inspection with the tenants and complete minor repairs to the unit. On September 1, 2016, claimant learned that the multiple listing service (MLS) advertising her condominium had expired on August 1, 2016.¹ When she inquired about it, her agent confirmed the expiration and stated she no longer wished to represent claimant. The agent asserted she had shown the property but had difficulty gaining access to the unit due to scheduling conflicts with the tenants. Claimant leased the property a second time and secured a new agent to sell the property.² This second realtor lasted less than three months due to a disagreement with the new tenant.

Negotiations with the third realtor began in November 2016. This realtor recommended waiting until after the holidays to advertise the property in order to reduce the "days on the market" statistic and make it more attractive to buyers. During that time, however, the unit was represented by the agent and was "pocket-listed" from December 2015 until it was relisted with the MLS on February 2, 2017.³ After forty-four days on the market with this realtor, claimant received an offer on the property on March 23, 2017. The offer

¹ The record shows that claimant learned of this fact when she received several postcards from a different agent inviting claimant to relist her unsold condominium with her.

² The second lease began on September 9, 2016, and was for a twelve-month period.

³ According to claimant, the third realtor was able to advertise the property during this time by word of mouth to investor-buyers who were looking for properties that were already occupied to use as an investment.

was from an investor-buyer. The lease and tenants remained in place during the negotiation process.⁴

By the time claimant received that first offer, she had been trying to sell the unit for 487 days. With the exception of a one-month period in August 2016 (when the listing expired under the first agent's representation without claimant's knowledge), the unit was represented by a real estate agent during the one-year period for which claimant was authorized reimbursement of real estate transaction expenses. Although claimant reduced the price of her condominium three times, each reduction occurred prior to her departure to Virginia. Her real estate agents confirmed that the final price was reasonable.

Home Purchase in Virginia

Claimant went on a house-hunting trip to Virginia in early November 2015, and viewed several properties during that trip. She reported to her new PDS in Arlington, Virginia on November 19, 2015, and stayed in temporary quarters at Fort Belvoir, Virginia, for fourteen days (from November 18 to December 2, 2016). While continuing her house search, she leased an apartment in Alexandria, Virginia, for twelve months. During that time, claimant applied for (and received) a mortgage pre-approval; saved enough money to make a down payment on a property; researched crime statistics in various neighborhoods; toured properties; and inquired about building materials used for noise/sound attenuation in certain multi-family dwellings.⁵ Claimant engaged the services of three different real estate agents to assist her in finding a home in the national capital region, an area of the country where the housing market is particularly competitive. Claimant submitted an offer on a residence in October 2016, which was accepted. After the housing inspection revealed significant code violations, the deal failed.

The Agency's Denial of Claimant's One-Year Extension Request

Claimant was unsuccessful in meeting the one-year deadline for both transactions. Consequently, she timely requested a one-year extension for completing them. Claimant provided the following information to the agency in support of her request: correspondence between her and her real estate agents (in both Florida and Virginia); documentation showing price changes related to her Florida property; information related to her obtaining

⁴ This offer ultimately fell through when the buyer backed out. The record is not clear about what happened, but references the approaching tax deadline.

⁵ Claimant stated that after she moved to Virginia, she had to show proof of income at the higher Virginia salary for several months to qualify for a competitive mortgage.

pre-approval for a mortgage; evidence of overtime hours worked while house-hunting in Virginia; temporary duty assignments; information related to weather delays in the national capital region; short-term apartment leases; an offer on a property; and information describing the robust housing market in the national capital region.

The agency denied claimant's request for a one-year extension. With regard to her Florida property, the agency found that she did not have her condominium listed for sale for most of the year, and that her tenants were a primary factor in hindering the sale of the property. The agency also noted that she never reduced the price of the property following her transfer and did not occupy the residence prior to her PCS, which is a requirement to be eligible for relocation benefits. With regard to her house search in Virginia, the agency found that claimant's efforts were inadequate and commented that "there is no evidence that she ever made an offer or seriously sought to buy a house." The agency also considered the reasons offered by claimant to be matters of personal convenience rather than the "exigent" circumstances required by the Joint Travel Regulations (JTR) to grant an extension.

Discussion

When an employee transfers in the interests of the Government, statute provides that agencies shall pay real estate transaction expenses when the old and new duty stations are within the United States. 5 U.S.C. § 5724a(d)(1) (2012). The Federal Travel Regulation (FTR) implements this statutory directive by establishing requirements that agencies follow when processing real estate transaction expense claims. The FTR prescribes a one-year time limit for completing real estate transactions. The period begins the day after an employee reports for duty at his or her new official station. 41 CFR 302-11.21 (2016). The agency may extend this period for up to one additional year for reasons beyond [the employee's] control and acceptable to [the] agency." *Id.* 302-11.22.

The JTR, which governs official transfers of Department of Defense employees, is consistent with the FTR, which is the prevailing regulation of the two. Chapter five, paragraph 5908-C.4 states, "The 1-year period may be extended for up to an additional year by the funding activity's commanding officer/designee." Paragraph 5908-C.7 advises that "[a]n extension may be granted only if extenuating circumstances prevented the employee from completing the sale, purchase and/or lease termination transactions within the initial 1-year period and that the delayed transactions are reasonably related to the PCS."

We have previously found that agency officials must make three determinations when considering a request for an extension: "(1) Did extenuating circumstances prevent the employee from completing the sale within the [time allowed]? (2) Were those circumstances acceptable to the official? (3) Were the residence transactions reasonably related to the

[PCS]?” *Judith A. Sukol*, CBCA 2092-RELO, 10-2 BCA ¶ 34,574, at 170,459 (citing *David B. Yorkowitz*, GSBCA 15337-RELO, 02-2 BCA ¶ 31,052). In evaluating requests for extension, “[a]gencies should interpret federal travel regulations in a common-sense way, taking into consideration the normal, human needs of the employees whom those agencies direct to conduct the Government’s business.” *Hector M. Gallardo*, CBCA 1937-TRAV, et al., 10-1 BCA ¶ 34,414, at 169,885 (quoting *Raymond X. Blauvelt*, GSBCA 16033-TRAV, 03-1 BCA ¶ 32,182).

In reviewing agency decisions related to extension requests, the Board considers such requests to be matters of agency discretion and will not disturb them unless it finds that the agency’s decision was arbitrary, capricious, or clearly erroneous. *Eugene Andruchowicz*, CBCA 3022-RELO, 13 BCA ¶ 35,200, at 172,700 (2012) (citing *Nhat D. Nguyen*, GSBCA 15859-RELO, 02-2 BCA ¶ 31,986); see also *David R. Ferguson*, CBCA 2193-TRAV, 11-1 BCA ¶ 34,691, at 170,852 (“When a regulation calls for the exercise of discretion by an agency, the agency’s determination will not be overturned in the absence of abuse of that discretion.”). In deciding these matters, this Board and our predecessor, the General Services Board of Contract Appeals (GSBCA), have consistently decided not to question the agency’s exercise of its discretion so long as there is a reasonable basis for that determination. *Arthur Hubbard*, CBCA 1932-RELO, 10-2 BCA ¶ 34,540, at 170,348 (citing *Jeanne Hehr*, GSBCA 16936-RELO, 06-2 BCA ¶ 33,431, at 165,741). In reviewing the agency’s decision under an arbitrary and capricious standard, we do not substitute our judgment for the agency’s. Rather, the Board’s more narrow charge is to consider whether the agency reviewed the relevant information and articulated a rational connection between the facts presented and the resulting decision. *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

The Agency Based Its Decision on Incorrect Facts

Several key facts reflected in the agency’s original decision and reply to claimant’s appeal are inconsistent with the record. These include the time period for which the condominium in Florida was on the market; claimant’s physical residence in Florida immediately prior to her PCS; and whether claimant submitted an offer on a home in Virginia. Contrary to the agency’s findings,⁶ the condominium was listed for sale for the entire first year of her PCS, with the exception of a one-month period when the agent quit

⁶ The first agency decision found that the condominium was on the market during the lease. The second one, offered in response to this appeal, reached the opposite conclusion and cites *Dustin L. Sauer*, CBCA 5155-RELO, 16-1 BCA ¶ 36,334, in support of its erroneous finding that the house was off the market most of the year.

representing claimant without her knowledge. The record does not support the agency's conclusion that "there is no evidence that she ever reduced the sales price." Claimant reduced the price of the condominium three times. Furthermore, there is ample evidence that claimant occupied the residence immediately prior to her PCS, including witnessed affidavits from residents of neighboring units attesting to the fact that she lived there before moving to Virginia, as well as a copy of her driver's license and other official documents verifying her place of residence prior to her PCS.

Although there was evidence that agents had "some difficulty" showing the unit due to the fact that claimant leased the property, showings did occur and the property was listed on the MLS for eleven of the twelve months of claimant's one-year eligibility period. The record shows that claimant had zero offers for the nine months it was on the market prior to her PCS—when the unit was owner-occupied—and the *only* offer received on the property was received while the property was leased for the second time. While having tenants may have made the sale more difficult, the relevant data shows that the condominium market favored buyers, not sellers. In such cases, time extensions should be liberally allowed to carry out Congress' intent to reimburse employees for real estate transaction costs incurred incident to official transfer. *Sukol*, 10-2 BCA at 170,460 (citing *Sara B. Harris*, B-212171 (Sept. 27, 1983)).

Regarding the home search in Virginia, claimant did, in fact, make an offer on a property during the initial one-year period, and there is substantial information in the record demonstrating claimant's serious, continuous, and earnest efforts to purchase a residence at her new duty station. She worked with three real estate agents; reviewed copious property listings; made inquiries about construction materials used in particular properties; applied for, and received, pre-approval for a mortgage; and saved money for a down payment on a home. These activities demonstrate claimant's clear intention to purchase a residence in Virginia.

Claimant also provided the agency with information showing that the national capital region is an extremely competitive housing market. As such, it is not unusual for a house search there to take longer than a year to complete. Given the substantial cost of homes in the area, combined with the high level of competition for properties, the fact that a federal employee enters into a short-term lease during a property search does not necessarily indicate a lack of seriousness about buying a home.

The Agency Applied an Incorrect Standard of Review in Exercising Its Discretion

Both the JTR and the FTR require that *extenuating* circumstances exist which prevent the employee from completing the transactions during the one-year period. While the agency's decision correctly quotes this provision of the JTR, the agency official concluded,

“I do not find that she has established that *exigent* circumstances reasonably related to her PCS prevented her from purchasing a new home.” (Emphasis added) The agency’s reply to claimant’s appeal used both words—*extenuating* and *exigent*—in its review. These words are not synonymous. *Exigent* means calling for immediate action or attention; urgent; critical. *Extenuating* means diminishing or lessening the seriousness of an offense, guilt, etc., by giving excuses or serving as an excuse; mitigating; excusing. *Webster’s New World College Dictionary* (5th ed. 2016). In the context of relocation benefits related to a PCS, the Board has found that “[e]xtenuating circumstances include ‘[a]ny action which has contributed to the predicament in which the employee finds herself.’” *Susan G. Hashemi*, CBCA 5186-RELO, 17-1 BCA ¶ 36,614 (2016) (quoting *Stephanie P. Riddle*, GSBCA 15027-RELO, 99-2 BCA ¶ 30,533).

In this case, the agency official did not find claimant’s circumstances acceptable. While agencies have broad discretion in this area, it is not unfettered; an agency must have a reasonable basis for its decisions. *Sukol*. When an agency bases its decision on facts clearly contradicted by the record, fails to consider relevant and available information, and employs an incorrect standard in evaluating an extension request, there can be no reasonable basis for that decision.

Decision

The claim is granted. The agency must reimburse claimant for all residence transaction expenses permitted by regulation which were incurred during the two years after she reported to her PDS in Virginia.

KATHLEEN J. O’ROURKE
Board Judge