UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 9, 2007

CBCA 647-RELO

In the Matter of ANDRES ARREDONDO

Andres Arredondo, Vancouver, WA, Claimant.

Chris Barned, Supervisor, Travel and Relocation, National Business Center, Bureau of Land Management, Denver, CO, appearing for Department of the Interior.

POLLACK, Board Judge.

Background

On August 15, 2006, the Bureau of Land Management's (BLM's) Branch of Procurement Management informed claimant, Andres Arredondo (Arredondo or claimant), that he was to be relocated from his duty station in Coos Bay, Oregon, to a new duty station in Portland, Oregon. Mr. Arredondo reported to Portland, on or about October 13, 2006. This claim involves costs associated with the sale of his house in Coos Bay.

Instead of selling his Coos Bay home on his own, Mr. Arredondo chose to enroll in a contracted-for relocation service. Re/Max Allegiance Relocation Services (REMAX) had the contract with BLM to provide those services to a transferring government employee, such as Mr. Arredondo. REMAX's contract with BLM called for REMAX to be reimbursed by BLM for 21.5 % of the appraised price of the seller's property for its services. No appraised price was specified in the contract, as the amount was dependent on the actual appraised value. The BLM contract with REMAX did not define the specific services which were being reimbursed within the 21.5%.

As part of the process, Mr. Arredondo signed a contract with REMAX which set out various responsibilities for each of the parties. Under the contract, REMAX agreed to buy the Coos Bay home from Mr. Arredondo for its appraised value of $167,000, subject to a series of potential adjustments to that price.

On November 10, 2006, Mr. Arredondo and REMAX closed on the property. According to the settlement sheet, the amount received by Mr. Arredondo reflected reductions from the sales price for the principal balance owed at the time, some accumulated interest, taxes, a pre-payment penalty of $3885.85, and a termination fee of $350. The reductions for the principal balance, accumulated interest, and taxes are typical costs associated with a settlement. Those are not reimbursable under the Federal Travel Regulation (FTR) and not claimed by Mr. Arredondo.

On November 29, 2006, Mr. Arredondo submitted a claim to BLM for $4235.85, which was composed of a $3885.85 pre-payment penalty for his first loan and a $350 termination fee for his second loan. He had paid both of those sums at settlement. BLM agrees and the regulations confirm that had Mr. Arredondo sold the house on his own, he would have been entitled to reimbursement for the pre-payment penalty and termination fee. However, because he sold it using a relocation service contractor, BLM concludes he cannot be reimbursed for the expenses.

On January 5, 2007, REMAX invoiced the Government for its services at $35,905, a fee of 21.5% of the appraised value. There was no breakdown as to what costs or expenses had been included in that 21.5%. REMAX states that the 21.5% did not include costs for paying a mortgage pre-payment penalty or include a figure for a termination fee. BLM has provided us no information to contest the REMAX statement.

BLM has nevertheless denied reimbursement to Mr. Arredondo. According to BLM, it denied reimbursement because it concluded that 41 CFR 302-12.5 (2006) (FTR 302-12.5) precluded reimbursement. That regulation, which was set out in question and answer format, provides as follows:

> If I use a contracted-for relocation service that is a substitute for reimbursable relocation allowance, will I be reimbursed for the relocation allowance as well?
>
> No, if you use a contracted-for relocation service that is a substitute for reimbursable relocation allowance, you will not be reimbursed for the relocation as well.

BLM acknowledges that its permanent change of station (PCS) employee guide, at section X, "Allowances for Expenses Incurred in Connection with Real Estate Transactions and Unexpired Leases," Part G, Relocation Services, does not address direct reimbursement to the transferee in a situation such as that here. BLM also does not dispute that the guide does generally allow reimbursement to a transferred employee for mortgage penalty and early termination fees. BLM concludes that reimbursement is not permitted here because, as it reads the FTR, the FTR requires that once an employee chooses to use a relocation services contractor, he forfeits the right to any relocation reimbursement, no matter whether the item was covered by the relocation services contractor or not.

Discussion

Pursuant to 5 U.S.C. § 5724c (2000) federal agencies are authorized to enter into contracts to provide relocation services to transferring employees, including but not limited to making arrangements for purchase of an employee's residence at his old duty station. The implementing policies set out in regulation as to relocation allowances are contained in the FTR, 41 CFR part 302-12.

Up until March 1997, the FTR dealing with use of a relocation contractor contained a provision which specified as follows:

> *Dual benefit prohibited*. Once an employee is offered, and decides to use, the services of a relocation company, reimbursement to the employee shall not be allowed for expenses authorized under parts 302-1 through 302-10 of this chapter, that are analogous or similar to expenses or the cost for services that the agency will pay under the relocation service contract.

41 CFR 302-12.5(b) (1996).

The above is clearly worded. Under that regulation, the agency would not reimburse for an expense which it would be paying to the relocation contractor. Applying that to the instant claim, since REMAX was neither reimbursed nor was the service included in its contract, there would be no bar to paying Mr. Arredondo.

On March 21, 1997, however, the regulation was amended. 62 Fed. Reg. 13,766 (Mar. 21, 1997). Through that amendment the above language was removed and the new language was inserted. The new language was in a new format, a question and answer form, which was described as "plain English style." The stated purpose of the stylistic change was "to make the FTR easier to understand and to use." The amended section dealing with the interplay between use of a relocation services contractor and reimbursement for non-

duplicate payments did not expressly address dual payment, however. Apparently the dual payment prohibition was either subsumed in the new wording or eliminated, but that cannot be determined from the language standing alone. We do note, however, that nothing in the new regulation or in the supplemental information section of the Federal Register publication of the amended regulation suggested or indicated that the prior dual payment criteria were now abandoned in favor of no reimbursement. Generally, this would mean that the previous rule should remain intact. *Cf. John C. Bland*, GSBCA 16094-RELO, 04-1 BCA ¶ 32,431 (2003) (regarding calculations of cost of excess weight of household goods shipped by Government).

Taking as a given that the amended language does not make clear the fate of the dual payment provisions, we note that sections 302-12.3 and 12.4 of the same regulation may provide some help. In summary, these sections note that the agency may pay for contracted-for relocation services that are a substitute for reimbursable relocation allowances authorized throughout the chapter. Moreover, the regulations state the goal for the use of relocation contracts is, "to improve the treatment of employees who are directed to relocate to facilitate the retention of a well-qualified workforce." FTR 302-12.104. For us to read the new regulation to take away what had before been reimbursable, and for us to make that conclusion based solely upon the unclear language in the amended regulation, seems to fly in the face of the purpose of the FTR's reimbursement provisions.

In addition, while we recognize that the Joint Travel Regulations (JTR) issued by the Department of Defense (DOD) do not apply to non-DOD civilian agency workers, it is noteworthy to point out that the JTR are essentially implementations of the FTR, and supplement the FTR by covering specifics relating to DOD actions and procedures. JTR C15003-B specifically addresses dual payment and contains parallel language to the language in the FTR prior to the 1997 change. Thus, if we read the FTR as put to us by BLM, employees at civilian agencies who use relocation services would be eligible for a lesser range of reimbursement than counterparts at DOD.

The BLM response to Mr. Arredondo's claim did not contain a copy of the solicitation or the contract BLM had with REMAX, nor did it contain Mr. Arredondo's contract with REMAX. After docketing, the Board requested that BLM provide a copy of the solicitation and contract associated with the award to REMAX of the relocation services contract. There was nothing in the documents which explained what the 21.5% covered and nothing that specified that REMAX was responsible for paying pre-payment penalties as part of its agreement with BLM.

There is no dispute that the sums being sought here by Mr. Arredondo were not included in REMAX's services and as such there would be no double payment if Mr Arredondo received reimbursement.

BLM's reading of the word "substitute" in the key FTR provision is too narrow in that BLM fails to understand that the bar for substitution requires that the reimbursement being sought by the employee is a cost or expense that is being covered or should have been covered by the relocation services contractor. It clearly makes sense that the Government is not going to reimburse a party for items that the Government is paying the relocation services contractor to cover. However, it does not logically or legally follow that by simply choosing to use a relocation contractor, an employee loses the opportunity to be reimbursed for costs and expenses not otherwise covered and not paid or reimbursed to any other entity by the agency. Here, there is no evidence of substitution. The relocation services contractor did not pay either the mortgage penalty or termination fees. Additionally, there is no evidence that REMAX included payment of the items in its charges to BLM.

Moreover, BLM's reading runs counter to both the letter and spirit of the regulations and law and would create an unjustified and unexplainable inconsistency as to how and for what non-DOD civilian employees and DOD civilian employees are reimbursed (in essentially identical circumstances). It would also mean that DOD has been incorrectly applying the regulations and would call into question a decision of this Board as to the parallel JTR.

Gary C. Duell, GSBCA 15812-RELO, 02-2 BCA ¶ 32,034, dealt with the relationship of a reimbursable allowance and use of a relocation services contractor in the context of a claim involving the Air Force. The case arose under the JTR, but nevertheless is pertinent. In *Duell*, the claimant challenged the disallowance of expenses for Federal Express charges in connection with selling his old home, as well as disallowance of several other expenses incurred in connection with purchasing his new home. The Air Force stated it disallowed the Federal Express costs because the claimant used a relocation services contractor to sell his old home, which the Air Force said precluded the reimbursement of any additional expenses. The board found:

> [W]hile use of the relocation services contractor prohibits an employee from recovering any expenses similar to those the agency may have been required 2to pay the contractor, it does not necessarily preclude reimbursement of an expense that would be allowed in connection with the sale of a residence, but

> was not reimbursed to the relocation services contractor. The regulation, thus, does not entirely support the position taken by the Air Force--it prohibits only reimbursement of duplicate or similar expenses that the agency has incurred in paying for the contractor's services.

Id. at 158,304.

In *Duell*, the board found against the claimant. It did so, however, on the basis that the claimant failed to meet his burden of proving that the charges were necessary for the sale of the residence and were not charges incurred simply for the claimant's convenience. The *Duell* decision, however, remains clear in limiting the bar to reimbursement to situations involving duplicate payment and rejecting the Air Force's broader reading.

Duell involved interpretation of a regulation with different language from that in issue here. The JTR are essentially an implementation of the statute providing for the FTR and set out additional policies and procedures applicable to DOD elements. The JTR have retained language which clarifies the use of reimbursement with a relocation contractor and which the Board in *Duell* read to not prohibit reimbursement, as long as no duplicate payment had been made. Although, the JTR are not applicable to employees of civilian agencies, the JTR cannot contradict or provide options to military employees that are barred by the FTR, any more than can the FTR provide relief that is prohibited by the implementing statute. Thus, the fact that the JTR allow for reimbursement in instances such as that in dispute is a further confirmation that our interpretation of the language and not that of BLM is correct.

Decision

Accordingly, Mr. Arredondo is entitled to reimbursement for $4235.85.

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HOWARD A. POLLACK
Board Judge