



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 22, 2016

CBCA 5469-RELO

In the Matter of FERNANDO VAZQUEZ

Fernando Vazquez, Florence, SC, Claimant.

Robin L. Kelley, Branch Chief, Natural Resources Conservation Service, Department of Agriculture, Tolland, CT, appearing for Department of Agriculture.

SULLIVAN, Board Judge.

Claimant, Fernando Vazquez, requests reimbursement of unexpired lease expenses incurred when the Government transferred him within South Carolina. Because we find that Mr. Vazquez could have and should have avoided the expenses for which he seeks reimbursement, we deny the claim.

Background

Mr. Vazquez is a soil conservationist with the Natural Resources Conservation Service of the United States Department of Agriculture (the agency) in South Carolina. On March 29, 2016, Mr. Vazquez attended an agency meeting where he was informed of—and agreed to—a reassignment to the Florence Field Office, effective June 26, 2016. On April 12, 2016, Mr. Vazquez received by electronic mail a memorandum, dated April 8, 2016, informing him again of his reassignment and that he would be contacted by the relocation team “[i]n the coming weeks.”

At that time, Mr. Vazquez and his family were renting an apartment in Orangeburg, South Carolina. On April 26, 2016, Mr. Vazquez delivered to the leasing agent a notice of intent to move out, listing June 26, 2016, as the date on which Mr. Vazquez would vacate the premises. However, Mr. Vazquez’s lease expired on May 28, 2016, prior to this move-out

date, and Mr. Vazquez entered into a month-to-month holdover lease, with an increase in monthly rent from \$969 to \$1265.

Mr. Vazquez attests that, because of the financial hardship that this increase in rent placed upon his family, he contacted the agency several times to check the status of his relocation and was told that the agency was “working on it.” Mr. Vazquez further attests that, in his prior dealings with human resources organizations, those organizations were extremely sluggish, and that, because of this experience, he predicted he would not hear back from the agency until September 2016. On June 14, 2016, due to the expected a delay in his relocation and the financial burden of the increased rent expense, Mr. Vazquez entered into a new, seven-month lease. Under the new lease, Mr. Vazquez’s monthly rent was reduced from \$1265 to \$999—a monthly savings of \$266. The new lease also contained a provision that permitted Mr. Vazquez to end the lease contract early with sixty days’ notice and the payment of \$2138 to the leasing agent. The new lease also allowed for subletting of the apartment with written consent of the leasing office.

On June 26, 2016—the effective date of Mr. Vazquez’s reassignment—the agency notified Mr. Vazquez by e-mail of a new effective date of July 26, 2016. The agency apologized “for all of the confusion” and reassured Mr. Vazquez that they were “on the right track” and the relocation office would be contacting Mr. Vazquez soon. On July 11, 2016, the agency informed Mr. Vazquez by e-mail of his eligibility for transfer of station benefits. The next day, the agency sent Mr. Vazquez by e-mail a transfer of station welcome package, which Mr. Vazquez completed immediately. On July 15, 2016, the agency sent Mr. Vazquez by e-mail his travel authorization.

According to the travel voucher that Mr. Vazquez submitted to the Board, he reported for duty at his new duty station on August 15, 2016. With the travel voucher, Mr. Vazquez sought reimbursement of lease termination costs in the amount of \$1193.42, which Mr. Vazquez described as the “partial payment ” for the lease termination in Orangeburg. Mr. Vazquez also submitted an invoice from the leasing company, dated August 3, 2016, which showed that Mr. Vazquez owed a total of \$3757.42, for rent for August 2016 (\$999), rent for September 2016 (\$566), a buy-out fee (\$1998), and utility expenses for June (\$194.42). The invoice from the leasing agent also states that Mr. Vazquez would vacate on September 17, 2016. The agency denied Mr. Vazquez’s claim for lease termination expenses, and Mr. Vazquez appealed the denial to the Board. Mr. Vazquez neither alleges nor provides evidence of any effort to mitigate his costs through sublease or other arrangement.

Discussion

Statutory authority mandates that an “an agency shall pay to or on behalf of an employee who transfers in the interest of the Government, expenses of the sale of the residence (or the settlement of an unexpired lease) of the employee at the old official station . . . that are required to be paid by the employee.” 5 U.S.C. § 5724a(d)(1) (2012). The statute limits qualifying expenses to those that are incident to a transfer so that “employees will not have to incur financial losses when transferred at the request of the Government.” *John Nobles*, CBCA 1131-RELO, 08-2 BCA ¶ 33,872, at 167,667 (quoting S. Rep. No. 89-1357, 2–4 (1966), as reprinted in 1966 U.S.C.C.A.N. 2565–67); see also *Jorge L. Gonzalez*, CBCA 984-RELO, 08-2 BCA ¶ 34,004, at 168,162 (citing *Marko Bourne*, GSBCA 16273-RELO, 04-1-BCA ¶ 32,544 (2003)).

The purpose of this allowance is to reimburse an employee for costs incurred in connection with residence transactions, including “[t]he settlement expenses for a lease which has not expired on your residence . . . at your old official station.” 41 CFR 302-11.1 (2015). To receive reimbursement of expenses associated with the settlement of a transferred employee’s unexpired lease (or month-to-month holdover), an employee must demonstrate that:

- (a) Applicable laws or the terms of the lease provide for payment of settlement expenses; or
- (b) Such expenses cannot be avoided by sublease or other arrangement; or
- (c) You have not contributed to the expenses by failing to give appropriate lease termination notice promptly after you have definite knowledge of your transfer; or
- (d) The broker’s fees or advertising charges are not in excess of those customarily charged for comparable services in that locality.

41 CFR 302-11.7.¹ In addition to these requirements specific to unexpired lease expenses, the Board has found that federal employees are “expected to exercise the same care as a

¹ Although the Federal Travel Regulation (FTR) states these conditions in the alternative, the Board has explained that each element must be satisfied. See *Mark J. Musaus*, CBCA 2184-RELO, 11-1 BCA ¶ 34,749, at 171,054 n.1; *Lorenzo Henderson*, CBCA 651-RELO, 07-1 BCA ¶ 33,539, at 166,144.

prudent person relocating at personal expense.” *Alphonso S. Hamilton*, CBCA 5109-RELO, 16-1 BCA ¶ 36,441, at 177,607 (quoting *Zaki M. Saad*, CBCA 1370-RELO, 09-1 BCA ¶ 34,065, at 168,436).

Looking at the facts at the time, rather than in hindsight, *Hamilton*, 16-1 BCA at 177,607, we find that Mr. Vazquez has not shown that he acted reasonably to avoid the expenses that he incurred. At the time Mr. Vazquez agreed to his transfer at the end of March 2016, he was told that he would begin his new position on June 26. Based upon this notice, Mr. Vazquez promptly gave notice to his leasing agent that he would vacate his apartment on June 26. Despite these facts and the agency’s assurances that his relocation paperwork was proceeding, Mr. Vazquez entered into a new seven-month lease on June 14, 2016, that required a payment of \$2165 if he were to terminate his lease early.

Mr. Vazquez explains that the additional \$266 per month was a financial hardship for his family and he did not know when the agency would actually complete his relocation. Even if Mr. Vazquez had been required to bear this additional \$266 per month for an additional seven months, this additional amount ($\$266 \times 7 = \1862) is less than the payment required to terminate the new, seven-month lease early. Mr. Vazquez’s decision to enter this new lease and become liable for these termination charges was not objectively reasonable and fails the standard of care a federal employee must exercise when incurring costs incident to a relocation. Mr. Vazquez acknowledges that he had the option to remain on a month-to-month lease, albeit at a higher monthly rent. The month-to-month lease was another arrangement that would have allowed Mr. Vazquez to avoid incurring the lease termination costs that he seeks. 41 CFR 302-11.7(b).

The fact that Mr. Vazquez had not received his travel authorization at the time he entered into the new lease does not alter the Board’s analysis. The general rule is that employees must receive a travel authorization prior to incurring any residence transaction expenses. 41 CFR 302-11.305. Nevertheless, there is a well-established exception to this proscription: “The controlling consideration is whether, prior to the issuance of travel orders, the agency may be deemed to have manifested a clear administrative intent to transfer the employee at the time the expenses were incurred.” *Gonzalez*, 08-2 BCA at 168,162 (citing *Larry A. Rives*, CBCA 805-RELO, 07-2 BCA ¶ 33,684). An agency is thought to have manifested a clear administrative intent to transfer an employee when, “despite the lack of formal written notification of the transfer, a definite selection for the position has been made and all parties concerned had good reason to expect the transfer would be approved and effectuated.” *Id.* When determining the existence of such manifestation, we will look to the facts and circumstances of the specific situation. *Timothy A. McCoy*, CBCA 5003-RELO, 16-1 BCA ¶ 36,325, at 177,088 (citing *Brandon J. Thorpe*, CBCA 2103-RELO, 11-1 BCA ¶ 34,687, at 170,847). “Expressions of intent must be particularized to specific employees,

times, and places, in order to be effective.” *Id.* at 177,089 (quoting *Gary J. Tennant*, CBCA 553-RELO, 07-1 BCA ¶ 33,558, at 166,224).

Here, we find a clear manifestation of the agency’s administrative intent to transfer Mr. Vazquez prior to his entering the seven-month lease. Based upon the agency’s communications with him regarding his transfer, Mr. Vazquez provided his notice of intent to move out. These “increasingly specific communications” demonstrate to us that, by April 12, 2016, the agency had manifested a clear administrative intent to transfer Mr. Vazquez. *Kristina R. Dronenburg*, CBCA 3847-RELO, 15-1 BCA ¶ 35,872, at 175,371. Moreover, it is evident that “all parties concerned had good reason to expect the transfer would be approved and effectuated.” *Gonzalez*, 08-2 BCA at 168,162.

The agency denied Mr. Vazquez’s claim, finding that Mr. Vazquez “contributed to the expenses by failing to give appropriate lease termination notice promptly after [he] had definite knowledge of [his] transfer.” 41 CFR 302-11.7(c). Mr. Vazquez disputes this contention, pointing to his prompt notice to the leasing agent in April 2016. Mr. Vazquez did give prompt notice of his intention to vacate, and his lease expired shortly thereafter. As explained, the expenses for which Mr. Vazquez seeks reimbursement do not arise from the lease in place at the time he gave this notice, but from the new lease that Mr. Vazquez entered into in June 2016. Because we have determined that Mr. Vazquez did not exercise the required level of prudence when he decided to enter into this lease, the Board does not need to reach the question of whether he provided prompt notice of his termination of the June 2016 lease.

Decision

The claim is denied.

MARIAN E. SULLIVAN
Board Judge