



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 29, 2008

CBCA 1206-RELO

In the Matter of BYRON L. WELLS

Byron L. Wells, Dallas, TX, Claimant.

James E. Hicks, Office of Chief Counsel, Drug Enforcement Administration, Alexandria, VA, appearing for Department of Justice.

WALTERS, Board Judge.

Claimant, Byron L. Wells, a Special Agent (SA) with the Department of Justice, Drug Enforcement Administration (the agency or DEA), seeks reimbursement of costs incurred in the sale and purchase of homes in conjunction with his medical hardship transfer from the DEA's Houston, Texas Division Office to its Dallas, Texas, Division Office. We deny Mr. Wells' claim for the reasons set forth below.

Background

In early January 2008, Agent Wells met with a DEA Associate Special Agent in Charge (SAC) to advise him of a serious family medical hardship and to discuss the possibility of a transfer from the Houston Division to the Dallas Division, something that would help him cope with his family situation because of the proximity of extended family members in the Dallas area. In this regard, the Associate SAC encouraged him to apply for a medical hardship transfer.

On January 20, 2008, even before submitting his medical hardship petition, Agent Wells engaged a realtor and listed for sale his residence in Spring, Texas (located near Houston). Agent Wells ultimately completed his medical hardship petition and submitted

that petition on February 15, 2008, for consideration by the DEA Career Board in Washington, D.C. Although only the Career Board had the authority to approve and order a permanent transfer, the respective SACs of the Houston and Dallas Divisions discussed Agent Wells' predicament and agreed, during the week of February 18, 2008, to place Agent Wells in a temporary duty (TDY) assignment status that would permit him to live in Dallas and work in the Dallas Division Office. On February 23, 2008, Agent Wells moved his family into temporary housing (an apartment) in the Dallas area. He placed his household goods in rented storage. He reported to the Dallas Division Office on March 3, 2008, for his TDY assignment. On or about March 20, 2008, Agent Wells closed on the sale of his Spring, Texas, residence. On March 18, 2008, he also executed an agreement to purchase a residence in Allen, Texas (located near Dallas). His request for a permanent medical hardship transfer had yet to be approved as of either date.

The DEA Career Board, which appears to meet at irregular intervals, finally considered Agent Wells' petition and approved it on April 24, 2008. The Career Board, by memorandum dated April 25, 2008, and e-mail message transmitted on that date., notified the SACs of the Houston and Dallas Divisions of this approval. The message requested that the recipients "inform SA Wells of this decision" and stated that written notification would be "forthcoming." Agent Wells states that, on April 25, 2008, a DEA Group 1 Supervisor advised him of this approval. He also states that a "copy of the email was provided."

Agent Wells indicates that he closed on the purchase of the residence in Allen, Texas, several days later, on April 30, 2008, and that he hired a local Dallas area mover to move his family from their temporary Dallas area apartment into that residence. The move was accomplished on May 1, 2008.

DEA states that, on April 24, 2008, the Career Board sent out its official written notification of approval, in the form of a cable that reassigned Agent Wells to the DEA Dallas Division. This cable was forwarded to Agent Wells on or about May 1, 2008, and Agent Wells states that he received the cable on May 2, 2008. The cable message, which also appears to have been transmitted via e-mail message to both DEA divisions on April 30, 2008, warned specifically: "[E]mployees are reminded that no expenses may be incurred until receipt of official travel orders (DEA Form 132A)." Prior to his receipt of the cable, Agent Wells states, he was not given such a warning and indeed was "not cautioned about anything." To the contrary, he asserts, he was told by the SAC of the Dallas Division that his "relocation entitlements would be taken care of."

It appears that, in early May 2008, Agent Wells submitted to the DEA his claim for expenses associated with the sale and purchase of the two residences, in the total amount of \$22,053.54. It also appears that the claim was initially denied by the DEA and that, by

memorandum dated May 12, 2008, Agent Wells appealed the denial to the Unit Chief of the DEA Transportation Management Unit and that the appeal was denied, because the sale and purchase were both initiated prior to Agent Wells' receipt of his official travel orders. Agent Wells sought this Board's review of that denial on May 15, 2008. Although Agent Wells declined to furnish any additional input with regard to the agency's response, on September 15, 2008, he did provide answers to certain Board inquiries that were needed to complete the record, whereupon the record in this matter was closed.

Discussion

The Government is authorized by statute to reimburse its employees for real estate transaction expenses they incur that are incident to a transfer of station that is in the Government's interest. 5 U.S.C. § 5724a(d) (2000). In this regard, the general rule is that a transferred employee may not be reimbursed for expenses incurred in advance of his receipt of formal notification of the pending transfer. *Connie F. Green*, GSBCA 15301-RELO, 01-1 BCA ¶ 31,175 (2000). The reason given for this rule is that, if the transfer does not materialize, either the employee or the Government may "lose money for no purpose." *Id.* at 153,998 (citing *Rosemary H. Sellers*, GSBCA 13654-RELO, 97-1 BCA ¶ 28,714). Nevertheless, both one of our predecessors in settling federal employee relocation expense claims, the General Services Administration Board of Contract Appeals (GSBCA), and what was previously the General Accounting Office (GAO) (currently the Government Accountability Office), carved out an exception to that rule that allows for reimbursement where an agency had previously manifested a clear "administrative intent" to transfer the employee. *Rudolph Gomez, Jr.*, GSBCA 15735-RELO, 02-2 BCA ¶ 31,984 (citing *Green*; *Dennis A. Edwards*, GSBCA 14943-RELO, 00-1 BCA ¶ 30,741); *Kenneth E. James -- Reconsideration*, B-256002, et al. (July 2, 1996). Determining whether a clear "administrative intent" to transfer an employee had been manifested depends on the facts and circumstances of the specific situation, *Gomez*, and agencies are said to have "broad discretion" in making such a determination. *Green*.

Here, Agent Wells asserts that, in addition to the two Division SACs agreeing to the TDY assignment that allowed him to work out of Dallas, "prior to issuing any travel orders, the agency had manifested a clear administrative intent to transfer my family and me." The DEA challenged the notion that there was a manifestation of such an "administrative intent," and Agent Wells has failed to provide the Board with any further detail on who manifested that "administrative intent" for the agency, how he or they manifested that intent, and specifically when the manifestation of intent occurred vis-a-vis the dates of the sale and purchase presently at issue. *See, e.g., Michael L. Scott*, GSBCA 16310-RELO, 04-1 BCA ¶ 32,526 (2003) (letter from an agency human resource specialist sent to an employee prior to his incurrence of relocation expenses, confirming the agency's offer and employee's

acceptance of a position and stating that the employee was “eligible for transfer of station” with that acceptance, was held to be a “manifestation of a clear intention to transfer,” notwithstanding the letter’s reference to the need for approval of transfer authorization by the agency’s regional relocation coordinator prior to incurring such expenses, since the named individual’s approval was found to have been delayed only due to agency “administrative errors”).

Based on the evidence currently before the Board, case precedent militates against providing Agent Wells with reimbursement for either real estate transaction at issue. In this regard, our Board, in *Joseph Bush*, CBCA 660-RELO, 07-1 BCA ¶ 33,560, followed the principles previously enunciated by the GSBCA:

Real estate transaction expenses are reimbursable only if the purchase or sale of a residence is incident to the employee’s transfer. For that reason, we have established that when a contract for purchase or sale is entered into before an agency manifests an intent to transfer the employee, the transaction will be considered to have been entered into for some reason other than the transfer. That reason may have been anticipation of a transfer, but unless the transfer has been announced, anticipation is insufficient to make the sale incident to the transfer.

Peter J. Grace, GSBCA 16790-RELO, 06-1 BCA ¶ 33,219 at 164,635; *Bernard J. Silbert*, B-202386 (Sept. 8, 1981) (although mindful that a reliable verbal notification of tentative selection to a position may be adequate for reliance, the Comptroller General concluded that there was no reliable notification at the time the employee became obligated to purchase the residence at the new duty station.)

07-1 BCA at 166,226. In *Bush*, the claimant had entered into a contract to purchase a residence in Texas several months prior to receiving official notification of the location of his new permanent duty station, and our Board held that reimbursement of the related expenses of that purchase should be denied as not “incident to the transfer.” *Bush, supra*.

Our Board, like the GSBCA and GAO before it, does recognize that physical receipt of official transfer orders might not be required in every case, such as where statements by authorized officials are “capable of construction as expressions of intent to transfer” the employee. See *Gary J. Tennant*, CBCA 553-RELO, 07-1 BCA ¶ 33,558. Nevertheless, to

demonstrate clear “administrative intent,” it must be shown not only that the statements were made prior to incurrence of the real estate transaction costs, but also that they were made by an individual with appropriate authority. *Id.* In the present case, even if Agent Wells were to show that the Dallas Division SAC’s statement (that Agent Wells’ “relocation entitlements would be taken care of”) had been made in advance of either the sale or purchase, the DEA has asserted that the alleged statement presumed that the expenses would be incurred pursuant to formal transfer orders and that, in any event, the SAC had no authority to effect a permanent transfer (only the Career Board had such authority). Agent Wells provided no rebuttal to these arguments, and we do not find the alleged statement by the Dallas Division SAC to have been sufficiently clear in and of itself as a manifestation of intent to transfer Agent Wells, even if the SAC had the requisite authority to effect the transfer. Had the Dallas Division SAC extended a “definite offer, even though contingent upon higher level approvals,” that might well have qualified as “sufficient to evidence administrative intent to transfer.” *See Green* (citing *Deborah A. Osipchak*, B-270196 (Mar. 22, 1996); *Travis D. Skinner*, B-198880 (Oct. 21, 1980)). The Board has not been advised that such an offer had been extended, however.

As to the oral notification of Career Board approval that was given Agent Wells on April 25, 2008, while that might have constituted “reliable notification,” *see Bernard J. Silbert*, B-202386 (Sept. 8, 1981), such notification came more than a month after Agent Wells had already entered into both the purchase and sale contracts, i.e., after he had already incurred the expenses at issue. *Tenant*. Thus, from the facts as stated, the expenses do not appear to have been “incident to the transfer.” *Bush*. If, on the other hand, the agency has or is presented with additional information not submitted to the Board that would show that an administrative intent to transfer Agent Wells had existed prior to either of the real estate transactions in question, it would have authority and discretion to reimburse Agent Wells for the associated costs. *Green*.

Decision

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

RICHARD C. WALTERS
Board Judge