UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 27, 2016

CBCA 4544-RELO

In the Matter of LINDA C. BROWN

Linda C. Brown, Elizabethtown, KY, Claimant.

Thomas Spahr, Director, Travel Functional Area, Enterprise Solutions and Standards, Defense Finance and Accounting Service, Indianapolis, IN, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

Linda C. Brown was transferred from a Department of the Army facility in Kentucky to a Defense Logistics Agency (DLA) facility in Germany in 2008, and then back to an Army facility in Kentucky in 2011. The extent of her claim is not entirely clear, but we perceive it to be for expenses of her husband's travel from Kentucky to Germany, expenses of his travel from Germany to Kentucky, and a family separation allowance pursuant to 37 U.S.C. § 427 (2006) for the period of time when she was in Germany but he remained in Kentucky. The Board on two occasions asked her to clarify her claim; she did not respond.

Background

On April 3, 2008, Ms. Brown was issued permanent change of station (PCS) orders transferring her to Germany. These orders authorized delayed travel for her husband, who, she has explained, remained in Kentucky to provide assistance on various family matters. At that time, she asked travel officials whether, if her husband was in Germany at the time she returned to a post in the United States, the Government would pay the cost of his travel back to the United States. She was assured that the Government would pay for that cost. Ms. Brown reported for duty in Germany on May 12, 2008. Her husband did not accompany her at that time.

By memorandum dated April 27, 2010, Ms. Brown requested an extension of time, until May 2011, in which the Government would pay the costs of her husband's travel to Germany. She informed the commanding officer of her DLA unit, "My husband is favorably considering a move to Germany in early 2011 to assist me as I return to CONUS [the continental United States] on or around 11 May 2011." The commanding officer approved this request. Mr. Brown traveled to Germany on March 26-27, 2011, and the Government paid his travel costs.

Subsequently, the Defense Finance and Accounting Service (DFAS) determined that the payment of Mr. Brown's 2011 travel costs was improper, and it demanded that Ms. Brown repay the money. The Defense Office of Hearings and Appeals (DOHA), acting under authority of 5 U.S.C. § 5584, waived repayment of the debt. DOHA said, "It is our belief that you relied upon your agency's subject matter expert's counsel and had no reason to question their judgments or decision. In addition, you provided ample documentation to prove that the funds were used as intended in reliance on erroneous authorization."[1]

On April 4, 2011, Ms. Brown was issued orders returning her to the Army facility in Kentucky. These orders list Mr. Brown as a dependent. The Browns left Germany on June 4, 2011.

In November 2011, DFAS told Ms. Brown that the Government should not have paid for Mr. Brown's travel from Germany to Kentucky.

Discussion

Ms. Brown was ill-advised twice by agency officials – first in 2008, when she was told that if her husband was in Germany when she was reassigned to a United States duty station, the Government would pay his travel costs back to the United States, and then in 2010, when the commanding officer of her unit approved an extension of time, until May

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[1] For unexplained reasons, Ms. Brown was previously paid for expenses of a trip to Germany by Mr. Brown in 2008. Prior to DFAS's insistence on repayment of the costs of Mr. Brown's 2011 trip to Germany, DFAS demanded that Ms. Brown return the money for the 2008 trip, on the ground that Mr. Brown did not actually travel to Germany in 2008. DOHA, acting under authority of 5 U.S.C. § 5584, waived recovery of that debt as well. The DOHA decision on the 2008 travel expenses suggests that Mr. Brown did actually travel to Germany in 2008, and Ms. Brown maintains that the couple paid with their own funds for all of Mr. Brown's trips to Germany prior to 2011. Whether Mr. Brown went to Germany in 2008 is immaterial to our decision.

2011, for Mr. Brown to travel to Germany at the Government's expense. As DFAS understands, neither of these agency determinations was authorized by law.

The Federal Travel Regulation (FTR) said, when Ms. Brown was transferred to Germany, that "[the employee] and [the employee's] immediate family member(s) must complete all aspects of [the employee's] relocation within two years from the effective date of [the employee's] transfer or appointment." 41 CFR 302-2.8 (2007).[2] The FTR provided that "the 2-year limitation for completing all aspects of a relocation may be extended by [the employee's] Agency for up to 2 additional years, but only if [the employee has] received an extension under § 302-11.22." *Id.* 302-2.11.[3] The latter section governs residence transactions. Ms. Brown did not request an extension for residence transactions, so this provision allowing an extension is not applicable here. The Department of Defense's Joint Travel Regulations (JTR), which implement and supplement the FTR, similarly stated, "Dependent travel must begin within 2 years after the effective date of the employee's PCS/initial OCONUS [outside the continental United States] appointment." JTR C5110-G.1.a. Because Ms. Brown reported for duty in Germany on May 12, 2008, the Government could pay the expenses of Mr. Brown's travel to Germany only if his travel began by May 12, 2010. It did not begin by that date; instead, it began nearly a year later – on March 26, 2011.[4]

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[2] There were two exceptions to this limitation: if an employee was furloughed to perform active military duty, and if travel and/or transportation of household effects was precluded due to shipping restrictions, the running of time was tolled. 41 CFR 302-2.8. Neither of these exceptions applies here.

[3] The time limitations discussed in this decision have been one year, rather than two, since August 1, 2011. 76 Fed. Reg. 18,326, 18,336, 18,343 (Apr. 1, 2011). Because an employee's "entitlements and allowances for relocation are determined by the regulatory provisions that are in effect at the time [the employee] report[s] for duty at [the employee's] new official station," 41 CFR 302-2.3, and Ms. Brown reported for duty in Germany in 2008, the two-year limits apply here.

[4] Another JTR section provides an additional reason for denying government payment for the costs of Mr. Brown's travel to Germany: Any dependent travel to an OCONUS duty station "must not be authorized unless at least 1 year of the minimum service period remains or the employee agrees to serve 1 year after dependent arrival in the OCONUS area." JTR C5110-G.2. Mr. Brown went to Germany when less than three months remained in Ms. Brown's tour of duty there, and she did not agree to serve in Germany for one year after he arrived.

Our conclusion that the Government was not authorized to pay for Mr. Brown's travel to Germany has no impact on the question of which party – the Government or Ms. Brown – should absorb the costs of that travel. This is because the Government has paid for the costs and DOHA has waived any recovery of indebtedness by Ms. Brown. Our conclusion does have an impact, however, on the question of which party should absorb the costs of Mr. Brown's travel back to the United States.

"Relocation expenses may be reimbursed only if they are 'incident to transfer from the old to the new station.'" *Gary J. Tennant*, CBCA 553-RELO, 07-1 BCA ¶ 33,558 (quoting *Marko Bourne*, GSBCA 16273-RELO, 04-1 BCA ¶ 32,544 (2003) (quoting S. Rep. No. 1357, 89th Cong. 2d Sess. 2-4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2565-67)). Whether expenses are incident to transfer has often arisen in situations involving real estate transactions. *E.g.*, *Jorge L. Gonzalez*, CBCA 984-RELO, 08-2 BCA ¶ 34,004; *Jagdish D. Patel*, CBCA 1130-RELO, 08-2 BCA ¶ 33,878; *Joseph Bush*, CBCA 660-RELO, 07-1 BCA ¶ 33,560. It has also arisen in situations involving temporary quarters subsistence expenses. *Robbie L. Swint, Jr.*, CBCA 4755-RELO, 15-1 BCA ¶ 36,090. We apply the principle here to a situation involving travel costs. Mr. Brown did not relocate to Germany incident to his wife's transfer, for he did not move within the two years after she began duty there. Instead, he went there in 2011 as a temporary visitor – as she acknowledged, "to assist [her] as [she] return[ed] to CONUS." It would be inappropriate for the Government to pay for the return travel expenses of a dependent who was assisting an employee to relocate, but was not relocating himself. DFAS properly determined that the Government should not pay for the costs of Mr. Brown's travel from Germany to Kentucky.

As we said at the outset of the Discussion portion of this decision, agency officials acted without authority when they told Ms. Brown that the Government would pay her **husband's travel expenses. Unfortunately for the claimant, these actions cannot create an obligation for the Government to make the payments. As we have previously explained:

> Allowing an agency to make a payment for a purpose not authorized by statute or regulation would violate the Appropriations Clause of the Constitution. U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.") The Supreme Court consequently has made clear that an executive branch employee's promise that the Government will make an "extrastatutory" payment is not binding. Where relevant statute and regulations do not provide for payment for a particular purpose, an agency may not make such payment.

Lauren R. Potempa, CBCA 5136-RELO, 16-1 BCA ¶ 36,275; *Michael C. Kostelnik*, CBCA 3483-RELO, 13 BCA ¶ 35,430; *Julie N. Lindke*, CBCA 1500-RELO, 09-2 BCA ¶ 34,141 (all

citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), and *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)).

The final portion of Ms. Brown's claim is for a family separation allowance. An allowance is a variety of compensation, not a relocation benefit. Claims involving federal civilian employees' compensation are settled by the Director of the Office of Personnel Management (OPM), not the Board. 31 U.S.C. § 3702(a)(2), (3). Consequently, we cannot settle this part of the claim and must dismiss it. Our usual practice, when confronted with a claim for compensation, is to transfer it to OPM for resolution. *E.g.*, *Shawn M. Rodman*, CBCA 5304-RELO, 16-1 BCA ¶ 36,380; *Willie J. Chandler*, CBCA 5286-RELO, 16-1 BCA ¶ 36,348. Here, however, transferring the case to OPM would serve no purpose, for the allowance which Ms. Brown seeks is authorized for "a member of the uniformed service," 37 U.S.C. § 427(a), and as a civilian employee, she was plainly ineligible for the allowance. Consequently, we do not transfer this portion of the case. *See Sheridan Transportation Systems, Inc. v. General Services Administration*, 2016 WL 3194759 (Fed. Cir. June 9, 2016).

STEPHEN M. DANIELS
Board Judge