UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 25, 2016

CBCA 5027-RELO

In the Matter of VICTOR M. RIVERS

Victor M. Rivers, Bristow, VA, Claimant.

Stephanie A. Polk, Deputy Counsel, Naval Surface Warfare Center, Carderock Division, Department of the Navy, Bethesda, MD, appearing for Department of the Navy.

Ilona M. Keller, Human Resources Specialist, Civilian Personnel Directorate, Department of the Army, APO Area Europe, appearing for Department of Defense.

LESTER, Board Judge.

Claimant, Victor M. Rivers, seeks reimbursement of real estate expenses associated with the purchase of a residence in Bristow, Virginia, following his transfer from Stuttgart, Germany, as well as reimbursement for expenses associated with selling his old home in Tampa, Florida, where he resided before moving to Stuttgart.

The Department of the Navy (Navy), Mr. Rivers' current employer, was originally identified as the appropriate entity to respond to the claim. Nevertheless, based upon comments that the Navy made during briefing on Mr. Rivers' claim, we requested information from Mr. Rivers' prior employer in Stuttgart, the United States European Command (European Command) of the Department of Defense. After thoroughly reviewing Mr. Rivers' submissions and those of both the Navy and the European Command, we must deny Mr. Rivers' claim.

Background

From September 2001 through December 2004, Mr. Rivers was employed by a private contractor in Tampa, Florida, where he owned a residence. Effective December 2004, Mr. Rivers moved to Stuttgart, Germany, after accepting a job with another private contractor, Booz Allen & Hamilton, Inc. (Booz Allen). He remained employed by Booz Allen until April 2007. Throughout his employment with Booz Allen, he retained ownership of his house in Tampa.

Effective April 30, 2007, while in Germany, Mr. Rivers was appointed to a federal civilian position in Stuttgart with the European Command under a term appointment that, effective December 7, 2008, was converted to a permanent appointment.

In 2014, because of a five-year service limitation that the Department of Defense (DoD) imposes upon continuous overseas civilian employment, *see* DoD Instruction 1400.25-v1230 ¶ 4(h) (July 26, 2012) ("Civilian employment in the competitive service in foreign areas shall be limited to a period of 5 continuous years unless interrupted by at least 2 years of physical presence in the United States or nonforeign area"), Mr. Rivers' eligible period of employment in Stuttgart was coming to an end. As required by his overseas service agreement, Mr. Rivers enrolled in the DoD Priority Placement Program (PPP). The primary purpose of the PPP is to "plac[e] DoD employees who have been adversely affected through no fault of their own" by "reductions-in-force (RIF), base closures, realignments, consolidations, contracting out, position classification decisions, rotation from overseas, and transfers of function (TOF)" into new positions within the continental United States (CONUS). DoD Priority Placement Program (PPP) Handbook, ch. 1, §§ C.1, C.2, at 1-1 (July 2011). "Failure or refusal to exercise return rights, to register in PPP, or to accept a valid offer, is a basis for separation" from federal service. DoD Instruction 1400.25-v1230, Enclosure 2 ¶ 5.a(3)(c). The employee is required to "accept the assignment resulting from PPP registration." *Id.* Enclosure 2 ¶ 5.a(3)(a).

On or about December 22, 2014, Mr. Rivers was matched through the PPP to an information technology (IT) specialist position with the Naval Surface Warfare Center (NSWC), Carderock Division, in Bethesda, Maryland. In a document titled "Request for Priority Placement Program Job Offer," dated January 21, 2015, the PPP unit of a Navy Office of Civilian Human Resources (OCHR) indicated that, if Mr. Rivers accepted the IT specialist position, the gaining activity (NSWC) would be required to pay temporary quarters subsistence expenses (TQSE) and miscellaneous expenses, while the losing activity (the European Command) would provide other permanent change of station (PCS) reimbursements. Sometime on or before February 12, 2015, Mr. Rivers was offered and accepted the position. His official travel orders were issued on February 20, 2015, but the

box indicating that Mr. Rivers was entitled to reimbursement for real estate expenses was not checked. On March 20, 2015, Mr. Rivers asked the European Command's financial office for clarification as to why his travel orders did not authorize real estate expense reimbursement, but he was told to contact the Civilian Personnel Advisory Center (CPAC) in Stuttgart regarding his entitlements.

Mr. Rivers reported to his new duty station in Bethesda, Maryland, on April 5, 2015. He almost immediately began asking the Carderock Division human resources office, as well as both the Naval OCHR and the European Command's CPAC, about his entitlement to real estate expenses reimbursement both for the purchase of a home in the Bethesda area and for a future anticipated sale of his old home in Tampa. In a series of email messages between April 14 and 17, 2015, he was told by the Stuttgart CPAC that any PCS entitlements were the responsibility of the Navy, while the NSWC human resources officer told him that they were the responsibility of the European Command and that, in any event, reimbursement of real estate expenses "is not an entitlement."

On May 19, 2015, Mr. Rivers participated in a telephone conference with representatives of the Carderock Division human resources and finance offices. At the conclusion of the discussion, the Carderock Division operations department head requested an opinion from its legal department about Mr. Rivers' entitlement to reimbursements.

On June 19, 2015, while awaiting that opinion, Mr. Rivers purchased a new residence in Bristow, Virginia, which is within commuting distance of his new duty station.

On July 17, 2015, Mr. Rivers' supervisor at the Carderock Division informed him that his request for expenses was denied and that, if he wanted to pursue his claim, he should file it with the Board. Mr. Rivers did so on October 14, 2015. The Navy responded to his claim on November 25, 2015. Subsequently, because the Navy had argued that, if the Board found Mr. Rivers entitled to real estate expenses, his prior employer, the European Command, would be the appropriate entity to pay them, we requested that agency's views, which were submitted on January 22, 2016. The last of the parties' various responses to the European Command's submission was filed on April 7, 2016.

Discussion

Pursuant to 5 U.S.C. § 5724a (2012), if a federal employee is transferred from a duty station within CONUS to a duty station outside the continental United States (OCONUS), and later is transferred "in the interest of the Government" from that OCONUS duty station to a different CONUS duty station, the Government is required to pay the real estate expenses that the employee incurs in the subsequent sale of his residence at the first CONUS duty

station and the purchase of a residence at the new CONUS duty station. 5 U.S.C. § 5724a(d)(2). The only exception to this requirement relates to a "sale . . . or purchase transaction that occurs prior to official notification that the employee's return to the United States would be to an official station other than the official station from which the employee was transferred when assigned to the post of duty outside the United States," in which case no reimbursement of real estate expenses is permitted. *Id.* § 5724a(d)(3). Mr. Rivers asserts that, under this statute, he is entitled to reimbursement of his real estate transactions – both for the sale of his home in Tampa and for the purchase of a home in Bristow, Virginia.

Originally, the Navy's only argument in response to Mr. Rivers' claim was that Mr. Rivers' transfer was primarily for Mr. Rivers' benefit, and not in the interest of the Government, meaning that he was not entitled to any reimbursement for real estate transaction expenses under 5 U.S.C. § 5724a. Federal employees "who transfer primarily for their own convenience or benefit," rather than primarily in the interest of the Government, are not entitled to payment of relocation expenses (including real estate expenses). *Derek T. Lamirault*, GSBCA 13933-RELO, 97-2 BCA ¶ 29,028, at 144,576; *see Riyoji Funai*, GSBCA 15452-RELO, 01-1 BCA ¶ 31,342, at 154,778 (if it is determined that the primary beneficiary of a transfer is the employee, no relocation benefits "may be paid from Government funds"). The Navy argued that, because Mr. Rivers was in the PPP and would eventually have become unemployed had he not found this new CONUS position, acceptance of the position was in his interest, not the Government's. Yet, the Joint Travel Regulations (JTR) make clear that, if an employee's transfer will result in a geographic move from one permanent duty station (PDS) to another, "[t]he gaining activity must formally advise the employee, *at the time an offer is extended*, that the transfer is in the employee's interest, not in the Gov't's interest, and that the Gov't does not pay the PCS expenses." JTR 5502-B.2.b(2) (emphasis added). There is nothing in this record indicating that the Navy complied with that requirement or that it ever notified, much less "formally advise[d]," Mr. Rivers of its position until after Mr. Rivers had already moved back to the United States.[1] In fact, it seems that the Navy developed its argument that Mr. Rivers' move was in his own rather than the Government's interest only *after* Mr. Rivers submitted his claim. In such circumstances, the Navy cannot rely upon a "transfer primarily in the employee's interest" argument as a basis for denying real estate expenses.

[1] Although the Navy asserts that it "notified Agency Human Resources officials" at the outset of the recruitment process for this position "that [it] did not intend to authorize PCS," Navy Response at 2, that document did not indicate that the transfer was viewed as in the interest of the employee, and, more importantly, there is no indication in the record that the basis for the denial was ever communicated to Mr. Rivers before his transfer.

Nevertheless, the European Command, after we requested its views, identified another basis for the denial of Mr. Rivers' real estate expenses (a basis that the Navy has since adopted): Mr. Rivers does not meet the statutory requirements of 5 U.S.C. § 5724a because he was not employed by the Federal Government in the United States before being transferred overseas. Instead, he traveled to Stuttgart as an employee of Booz Allen, after which he was later locally hired by the Government.

JTR 5908-D, applying the requirements of 5 U.S.C. § 5724a, recognizes that "[a]n employee who has completed an agreed upon tour of duty at a foreign PDS and is reassigned/transferred to a different CONUS/non-foreign OCONUS PDS (other than the one from which transferred when assigned to the foreign PDS) is authorized reimbursement" of real estate transaction expenses for the sale of a residence at the CONUS PDS from which the employee was originally transferred and for a residence purchase at the new CONUS PDS. JTR 5908-D.2, -D.4. But JTR 5908-D.3.b expressly provides that "[a] locally hired employee," as that term is defined at JTR 5836-E.2.a(2), "is not eligible for [those] real estate allowances." JTR 5836-E.2.a(2) includes the following in its definition of a locally hired employee: an employee of a Government contractor who that contractor recruited in the United States "under employment conditions that provided for return travel and transportation allowances," who "[c]ommitted to a specific vacant position" with the Government "before separation from prior employment" with the contractor, and who was "appointed not later than 1 month after termination of such [contractor] employment." That describes Mr. Rivers' employment situation in Stuttgart. He was not a federal employee when he transferred from Tampa to Stuttgart, and, because his hiring while in Stuttgart renders him a "locally hired employee," the provisions of 5 U.S.C. § 5724a do not entitle him to reimbursement of real estate transaction expenses. *See Dennis Fijalkowski*, GSBCA 15683-RELO, 02-1 BCA ¶ 31,754, at 156,842 (employee stationed in a foreign area is not eligible for real estate expenses arising from a subsequent transfer to a station in the United States unless he was originally transferred overseas as a federal employee from a station in the United States); JTR 5004-C (same).

Mr. Rivers asserts that, when the European Command hired him in 2007, it clearly considered him as having been hired from Tampa, rather than as a local hire in Germany, because it found him eligible at that time for living quarters allowance (LQA) and transportation entitlements. He argues that local hires "are not entitled to LQA and transportation entitlements" under Department of State Standardized Regulations (DSSR) 031.11, which provides for quarters allowances (including LQA) for "employees who were recruited by the employing government agency in the United States." Because he received LQA, he argues, he must have been considered an employee recruited in the United States. Mr. Rivers has overlooked DSSR 031.12, which contemplates quarters allowances for employees "recruited outside the United States" in certain circumstances. Those

circumstances include situations in which, "prior to appointment, the employee was recruited in the United States . . . by . . . a United States firm . . . and had been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States." DSSR 031.12(b)(1). That is the provision under which Mr. Rivers was granted LQA: he was hired by Booz Allen in Tampa, transferred to Germany as an employee of Booz Allen (with an agreement providing for repatriation rights), and was then hired by the Government while in Germany. Similarly, the version of JTR 4002-B.1 in effect when the European Command hired Mr. Rivers permitted (but did not require) agencies to provide transportation agreements to locally-hired OCONUS employees if they had been Government contractor employees under employment conditions that provided for return travel and transportation allowances. Accordingly, Mr. Rivers' receipt in 2007 of LQA and a transportation agreement did not somehow make him a federal employee "recruited in the United States."

Mr. Rivers further asserts that, when he accepted the federal job in Stuttgart, he was assured that his hiring was considered as having been from his "Home of Record" (Tampa), which led him to believe that, if he eventually was transferred back to a federal position in the United States other than in Tampa, he would be able to rely upon the real estate expense reimbursement provisions of 5 U.S.C. § 5724a. To the extent that someone at the European Command made such representations, they could not bind the agency. This Board has "consistently held that even if an agency made a commitment to reimburse an ineligible employee for real estate expenses, the commitment cannot overcome the fact that Congress has not authorized such reimbursement." *Defense Intelligence Agency Employee*, CBCA 976-RELO, 08-2 BCA ¶ 33,900, at 167,773. No agency has the authority to provide relocation benefits based upon a legal fiction – here, that the agency hired Mr. Rivers in Tampa rather than in Stuttgart – that it knows to be false. *See James H. Place*, CBCA 3751-TRAV, 15-1 BCA ¶ 35,903, at 175,511 (Board must base relocation entitlement decisions on "actual circumstances"). For the same reason, Mr. Rivers' representation that the Government annotated his PCS orders to Carderock to reflect Tampa as his home of record and an alternate CONUS return location cannot change the reality that he was hired by the Government locally in Stuttgart, rather than Tampa. *See Randy Prewitt*, CBCA 1548-RELO, 09-2 BCA ¶ 34,253, at 169,257 (erroneous travel order authorization is invalid).

To the extent that Mr. Rivers is arguing that, outside the context of 5 U.S.C. § 5724a, his transfer from Stuttgart to Bethesda should entitle him, at a minimum, to real estate expenses incurred in purchasing a new home at the new duty station, there is no statutory or regulatory basis for such a recovery. JTR 5910 expressly identifies "[e]mployees hired locally at a location in a foreign area upon transfer to a PDS in CONUS or non-foreign OCONUS area" as individuals who are *not* eligible for reimbursement under the provisions of JTR chapter 5 (the chapter in which real estate allowances are discussed). Accordingly,

if an employee is hired locally at the foreign area post and is later transferred to a position in the United States, he "is not entitled to reimbursement of real estate transaction expenses" incurred at the new United States post. *Fijalkowski*, 02-1 BCA at 156,842; *see Prewitt*, 09-2 BCA at 169,256 (employee hired locally at foreign post is not eligible for real estate expenses following transfer to United States post); *Henry H. Arnold IV*, GSBCA 16275-RELO, 04-1 BCA ¶ 32,586, at 161,207 (same); *Marcia A. Devine*, GSBCA 14878-RELO, 99-2 BCA ¶ 30,498, at 150,617 ("As an employee who was first hired overseas, claimant . . . is not eligible to be reimbursed for the expenses of purchasing a home upon being transferred by the Army to the United States.").

The fact that the Navy did not initially identify to us, or to Mr. Rivers, the appropriate basis for denial of his real estate expenses does not affect the result here. "Only expenses authorized by statute or regulation may be reimbursed, because allowing an agency to make a payment in the absence of such authority would violate the Appropriations Clause of the Constitution." *Bradley P. Bugger*, CBCA 555-TRAV, 07-1 BCA ¶ 33,579, at 166,342. The agency's initial failure to recognize an appropriate basis for its denial of benefits does not somehow waive the lack of statutory or regulatory authorization for the benefits or create entitlement.

Finally, Mr. Rivers complains that denial of real estate expenses is inequitable because neither the European Command nor the Navy told him before he transferred to the Carderock Division that he would not receive real estate transaction reimbursements and because the denial has detrimentally affected him and his family. Unfortunately, equities cannot overcome an agency's lack of authority. *Gretchen Lizza*, CBCA 2153-RELO, 11-1 BCA ¶ 34,618, at 170,614 (2010).

Decision

For the foregoing reasons, we must deny Mr. Rivers' claim for real estate expenses.

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HAROLD D. LESTER, JR.
Board Judge