Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

December 23, 2003

GSBCA 16273-RELO

In the Matter of MARKO BOURNE

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DeGRAFF, Board Judge.

Claimant asks us to review the agency's decision to deny his claims for payment of several relocation benefits. As discussed below, we agree with claimant, in part.

Background

In August 2001, Marko Bourne became an employee of the Federal Emergency Management Agency (FEMA). His duty station was in Emmitsburg, Maryland, and he commuted there from his home in Etters, Pennsylvania, a trip that took approximately one hour. Beginning in December 2001, Mr. Bourne's supervisor needed him to spend some of his time in FEMA's Washington, D.C. office. Mr. Bourne performed temporary duty in Washington and spent five nights there in January 2002. Emmitsburg is approximately seventy miles from Washington. Etters is approximately 113 miles from Washington, and the drive between the two cities took approximately two and one-half hours each way.

Mr. Bourne's supervisor says in January 2002, he and Mr. Bourne discussed the possibility of Mr. Bourne changing his duty station to Washington, although his supervisor says he did not ask Mr. Bourne to make such a change at that time. Mr. Bourne's supervisor began working for the Federal Government in October 2001, and for many months thereafter, he did not know what a permanent change of station was. He authorized Mr. Bourne to perform temporary duty in Washington before he met with an employee in FEMA's National Emergency Training Center (NETC) and learned it might be possible to reimburse Mr. Bourne for some of his expenses if he made a permanent change of station (PCS) to Washington. The NETC employee says this meeting occurred in late June or early July 2002.

He remembers he was concerned because the end of the fiscal year was approaching and funds might not be available to pay for a PCS. Although Mr. Bourne's supervisor does not remember precisely when he told Mr. Bourne a PCS to Washington would be approved, he is sure he first secured funding for a PCS and also secured the approval of the Director of FEMA.[1] In a letter dated July 22, 2002, Mr. Bourne's supervisor told him he would be needed in Washington "for a period of another 60 days."

According to Mr. Bourne, in January 2002, his supervisor asked him to work in Washington permanently. Mr. Bourne did not want to move to Washington. His wife had been employed in York, Pennsylvania, for sixteen years and he did not want her to have to give up her job in order to move. In addition, housing prices in the Washington area were significantly more than in Pennsylvania. He says as time passed, he had additional discussions with his supervisor and with the NETC employee about working in Washington. Mr. Bourne continued to perform temporary duty in Washington, spending eight nights there in February and four nights in March. On March 9, 2002, he entered into a contract to purchase a piece of property where he could construct a house. Mr. Bourne performed additional temporary duty in Washington, spending four nights there in April and eleven nights in May. On May 3, 2002, Mr. Bourne went to settlement on the purchase of the property where he planned to construct his house. Mr. Bourne says in May 2002 "it was decided that in advance of an official PCS move . . . I would be placed on [temporary duty] status" to Washington.[2] On August 17, 2002, Mr. Bourne signed a listing agreement with a real estate agent to sell his house in Etters.

On September 19, 2002, FEMA issued a travel authorization transferring Mr. Bourne from Emmitsburg, Maryland, to Washington, D.C. In a letter that accompanied the travel authorization, FEMA explained to Mr. Bourne why his expertise and knowledge were needed in Washington, and said his transfer was in the best interest of FEMA. The next day, the Director of FEMA signed a statement saying payment of Mr. Bourne's relocation costs was in the best interest of the Government. The effective date of Mr. Bourne's PCS would have been sixty days from September 19, except he waived the sixty-day period and reported for duty in Washington on September 22, 2002. In connection with his PCS, FEMA agreed to reimburse Mr. Bourne for sixty days of temporary quarters subsistence expenses (TQSE) for him, his wife, and his son. FEMA also agreed to reimburse Mr. Bourne for the expenses he incurred in connection with selling his old residence in Etters, Pennsylvania. In addition, FEMA agreed to reimburse Mr. Bourne for the expenses he incurred in connection with purchasing a new residence. Finally, FEMA agreed to pay to ship up to 18,000 pounds of Mr. Bourne's household goods to his new residence.

On September 22, 2002, Mr. Bourne began occupying temporary quarters at a hotel near FEMA's offices in Washington. Although Mr. Bourne expected construction of his new house would be finished near the end of October, work did not progress as quickly as

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[1] The statements of Mr. Bourne's supervisor and the NETC employee are contained in their signed declarations.

[2] Mr. Bourne's statements are contained in a June 9, 2003 letter he sent to FEMA's Office of Financial Management and in his November 25, 2003 submission to us.

anticipated and FEMA granted Mr. Bourne's requests for two thirty-day extensions of the TQSE period. Mr. Bourne was in temporary quarters from September 23-25, September 30-October 5, October 8-9, October 15-22, October 24-November 13, November 15-December 18, 2002, and January 2-22, 2003. The intervening days he spent at his old residence in Etters, with his wife and son.

On December 14, 2002, Mr Bourne signed a contract to sell his residence in Etters. In early February 2003, he went to settlement on the sale of his old residence, moved to his new residence, and began commuting daily between his new residence and Washington. Mr. Bourne's new residence is located in New Freedom, Pennsylvania, which is approximately thirty-five miles closer to Washington than was his old residence in Etters. His commute from New Freedom takes approximately one and one-half hours each way.

Mr. Bourne asked FEMA to reimburse him for some of his relocation expenses, which it did. In addition, FEMA paid to move Mr. Bourne's household goods from his old residence to his new residence.

On May 20, 2003, FEMA sent a letter to Mr. Bourne demanding he repay the $18,467.58 he received for TQSE, the $15,176.03 he received for the expenses of selling his old residence in Etters, and the $8894.07 FEMA paid to have Mr. Bourne's household goods shipped to his new residence. The letter said FEMA would not reimburse Mr. Bourne for the expenses he claimed ($7938.37) in connection with acquiring the property in New Freedom and constructing his new residence there. This is the agency decision Mr. Bourne asks us to review.

FEMA's May 20 letter gave Mr. Bourne two reasons for not reimbursing the expenses he incurred in connection with acquiring his new residence. First, FEMA said he was not eligible to be reimbursed because he purchased the property for his new residence and began construction before he was authorized to make a PCS to Washington. Second, FEMA said he was not eligible to be reimbursed because his new residence is not located at his new duty station.

FEMA demanded Mr. Bourne repay the amount he received for the expenses of selling his old residence because it said the sale was not incident to his transfer. FEMA's May 20 letter implied Mr. Bourne's sale of his old residence was due to the purchase of his new residence, and because the purchase of the new residence was not incident to his transfer, neither was the sale of the old residence incident to his transfer. FEMA also said reimbursing Mr. Bourne for the expenses of selling his old residence was not in the best interest of the Government.

FEMA's May 20 letter said Mr. Bourne was required to repay the amount the agency paid to ship his household goods from one residence to another because his move was not to the Washington area.

The May 20 letter told Mr. Bourne he should not be reimbursed for any of his TQSE because temporary quarters are supposed to be used only if necessary until an employee can move into permanent residence quarters. Because Mr. Bourne's new residence is near his old residence and because he stayed at his old residence for several days during the TQSE period, FEMA concluded Mr. Bourne did not intend to leave the area of his old residence and, therefore, did not need to utilize temporary quarters in Washington. In addition, FEMA told Mr. Bourne it should not have granted the two thirty-day extensions to his original sixty-day TQSE period. FEMA granted the extensions based upon Mr. Bourne's need to remain in temporary quarters until his new residence was ready for occupancy. FEMA subsequently concluded Mr. Bourne did not need the extensions because he did not intend to move into a new residence at his new duty station. Finally, FEMA told Mr. Bourne he should not have been reimbursed for TQSE for his wife and child, because they never occupied temporary quarters.

Discussion

In its October 27, 2003 submission to us, FEMA says the primary issue here is whether the expenses incurred by Mr. Bourne were incident to his transfer to Washington. In FEMA's view, Mr. Bourne's move to his new residence was not the result of his transfer because he purchased the property for his new residence several months before FEMA issued the travel authorization that transferred Mr. Bourne to Washington and because the property is not in the Washington area. Because his move to his new residence was not the result of the transfer, FEMA says his other claimed expenses were not incident to the transfer. In addition to maintaining Mr. Bourne is not entitled to be reimbursed for any of his expenses, FEMA says it should not have reimbursed Mr. Bourne for TQSE as if his wife and son were in temporary quarters, because they were not, and also says it should not have reimbursed Mr. Bourne for TQSE for days he spent in Etters. In addition, FEMA says it should not be responsible for the cost of shipping more than 18,000 pounds of Mr. Bourne's household goods, because 18,000 pounds is the maximum weight for which the Government can pay household goods shipping charges when it transfers an employee.

Mr. Bourne's November 25, 2003 submission to us characterizes the primary issue here as whether Mr. Bourne's transfer was in the interest of the Government. In his September 12, 2003 submission to us, Mr. Bourne says FEMA officials expressed their intent to transfer him long before they issued the travel authorization that transferred him to Washington. Further, he says his move from Etters to New Freedom was due to the transfer. He says the daily commute to Washington from New Freedom is feasible, although lengthy, and is one hour shorter than if he had stayed in Etters and commuted to Washington from there.

An employee who transfers "in the interest of the Government" may be eligible to receive relocation benefits, provided certain statutory and regulatory requirements are met. Some of these benefits are the expenses of transporting not more than 18,000 pounds of household goods; the subsistence expenses of the employee and the employee's immediate family while the employee or the family is occupying temporary quarters; and the expenses of the sale of the employee's residence at the old duty station and the purchase of a residence at the new duty station. 5 U.S.C. §§ 5724 (a)(2), (h); 5724a(c), (d) (2000). The letter that accompanied Mr. Bourne's September 19, 2002 travel authorization explained why his transfer was in the interest of the Government and we accept that explanation as accurate.

Real estate transaction expenses

FEMA contends Mr. Bourne should not be reimbursed for the real estate transaction expenses he incurred in connection with his residence in New Freedom, because the residence is not in the Washington area. The Federal Travel Regulation requires an agency to reimburse an employee for real estate transaction expenses incurred due to the purchase of a residence "at" the new official duty station. 41 CFR 302-11.1 (2002). The only test contained in the regulation for determining whether a residence is "at" a new duty station is found in 41 CFR 302-11.100, which provides an employee will be reimbursed for the expenses of purchasing a new residence if the employee commutes from the residence on a daily basis. An employee is not required to purchase a residence within a specified minimum distance from the new official duty station in order to be reimbursed for real estate transaction expenses. All that is required is that the new residence be nearer, or at least substantially reduce the commute, to the new duty station. John C. Burton, GSBCA 15991-RELO, 03-2 BCA ¶ 32,328; see Vincent P. Mokrzycki, GSBCA 16142-RELO (Oct. 28, 2003). Mr. Bourne's new home is closer to Washington and his commute is substantially reduced. Because he also commutes from New Freedom to Washington each day, the location of his new residence does not prohibit him from being reimbursed for the transaction expenses he incurred in connection with the purchase of his residence there.

FEMA also contends Mr. Bourne should not be reimbursed for the real estate transaction expenses he incurred in connection with his residence in New Freedom because he purchased the property there before he received official notice of his transfer to Washington. The statutory authority to reimburse employees for real estate transaction expenses is designed to authorize payment of expenses "incident to transfer from the old to the new station." S. Rep. No. 1357, 89th Cong., 2d Sess 2-4 (1966), reprinted in 1966 U.S.C.C.A.N. 2565-67. In order to ensure the purpose of the statute is fulfilled, the regulation prohibits reimbursement of residence transaction expenses incurred before the employee is "officially notified (generally in the form of a change of station travel authorization)" of a transfer. 41 CFR 302-11.305. In addition to issuing a travel authorization, there are other ways for an agency to communicate its clear administrative intent to effect a transfer. Rudolph Gomez, Jr., GSBCA 15735-RELO, 02-2 BCA ¶ 31,984; Shirley Rae Vanderburg, GSBCA 15626-RELO, 02-1 BCA ¶ 31,782; Connie F. Green, GSBCA 15301-RELO, 01-1 BCA ¶ 31,175; Dennis A. Edwards, GSBCA 14943-RELO, 00-1 BCA ¶ 30,741; Michael J. Halpin, GSBCA 14509-RELO, 98-1 BCA ¶ 29,730.

Although Mr. Bourne argues he purchased the New Freedom property only after FEMA communicated its clear intent to transfer him, we are not convinced the facts support his argument. Mr. Bourne's supervisor wanted him to work in Washington, and he accomplished this by placing Mr. Bourne on temporary duty there. Mr. Bourne contracted to purchase the New Freedom property in early March and settled on the purchase in early May 2002. After Mr. Bourne's supervisor met with the NETC employee in late June or early July, he made sure funding was available and he obtained the approval of the Director of FEMA before he told Mr. Bourne a transfer would be approved. In mid-September, FEMA issued the travel authorization that transferred Mr. Bourne to Washington. Before FEMA issued the travel authorization, it seems likely Mr. Bourne's supervisor hoped Mr. Bourne would come to work in Washington and Mr. Bourne strongly suspected he might be transferred to Washington. His supervisor's hopes and his own suspicions, however, did not amount to a clear communication from FEMA to Mr. Bourne in early May that it intended to transfer him to Washington. Because Mr. Bourne purchased the property in New Freedom before he received official notice of his transfer, his real estate purchase transaction expenses were not incident to his transfer and are not reimbursable. Paul W. Gard, Jr., GSBCA 15311-RELO, 00-2 BCA ¶ 31,053.

FEMA contends Mr. Bourne should not be reimbursed for the real estate transaction expenses he incurred in connection with the sale of his residence in Etters, because the sale of the Etters house was not incident to his transfer. Although Mr. Bourne listed the Etters house for sale before he received official notice of his transfer to Washington, he did not enter into a contract to sell the house and did not complete the sale until after he received the September 19, 2002 travel authorization. He sold the house in Etters because the commute between Etters and Washington would have been two and one-half hours each way. These facts establish the sale of the house in Etters was incident to his transfer. FEMA also says Mr. Bourne should not be reimbursed because reimbursement is not in the best interest of the Government. The test for whether an employee is eligible to receive relocation benefits is not whether payment of the costs is in the Government's best interest. Rather, the test is whether the employee's transfer is in the Government's interest. If an employee's transfer is in the interest of the Government and the employee meets the eligibility requirements, the agency is required by law to pay some relocation costs (including real estate transaction expenses) regardless of whether the payment of such expenses is in the agency's best interest. Mr. Bourne's transfer was in FEMA's interest and the real estate transaction expenses he incurred in connection with the sale of his house in Etters were due to his transfer. FEMA must reimburse Mr. Bourne for the expenses of selling his residence in Etters, to the extent allowed by applicable regulations.

Household goods moving expenses

FEMA says it is not required to pay for moving any of Mr. Bourne's household goods because he did not move to the Washington area and because he did not move his household goods incident to his transfer. The regulation requires an agency to reimburse an employee for moving household goods "[b]etween the old and new official station." 41 CFR 302-7.6. Read reasonably, the regulation allows household goods to be moved to an employee's residence at the new official duty station and, as explained in the preceding section, the residence does not have to be any particular minimum distance from the new official duty station so long as the employee commutes to and from the residence on a daily basis. Mr. Bourne's household goods were moved to the residence from which he commutes daily to and from Washington, which is all the regulation requires. Mr. Bourne moved his household goods incident to his transfer, because he moved them after he received the official notice of his transfer to Washington, and he moved them to a house that is an hour closer to Washington than his old residence. FEMA cannot, however, pay to move more than 18,000 pounds of an employee's household goods and Mr. Bourne is required to reimburse FEMA for any costs attributable to weight in excess of 18,000 pounds. 41 CFR 302-7.2, -7.200.

TQSE

TQSE consist of expenses incurred by an employee who is transferred to a new duty station more than fifty miles away from the employee's old duty station and who, of necessity and in connection with the transfer, occupies lodging obtained for the purpose of temporary occupancy within reasonable proximity of either the old or the new duty station. 41 CFR 302-6.1 to -6.4, -6.9, -6.302. Mr. Bourne's old duty station in Emmitsburg is more than fifty miles from his new duty station in Washington. The lodging he obtained and occupied was temporary and within reasonable proximity of his new duty station. FEMA contends, however, Mr. Bourne did not occupy temporary quarters either out of necessity or in connection with the transfer. FEMA says because Mr. Bourne's new residence is near his old residence and because he stayed at his old residence for several days during the TQSE period, he did not intend to leave the area of his old residence and, therefore, did not need to utilize temporary quarters in Washington. Mr. Bourne's new residence is thirty-five miles from his old residence and is one hour closer to Washington than his old residence. Although he spent some days at his old residence during the TQSE period, this does not establish he intended to remain in the area of his old residence. He intended to move to a new residence located one hour closer to Washington than his old residence and instead of spending five hours each day commuting between his old residence and Washington, he stayed in temporary quarters near his new duty station until his new residence was ready for occupancy. These facts convince us Mr. Bourne's stay in temporary quarters was necessary and connected to his transfer.

FEMA says it should not have granted the two thirty-day extensions to Mr. Bourne's original sixty-day TQSE period because he did not intend to move into a new residence at his new duty station and, therefore, did not need to remain in temporary quarters until his new residence was ready for occupancy. As discussed previously, Mr. Bourne did intend to move into a new residence at his new duty station. The regulation allowed FEMA to extend Mr. Bourne's time in temporary quarters if he could not occupy his new residence due to an unanticipated problem, such as a delay in construction. 41 CFR 302-6.105. FEMA's extensions of the original TQSE period were permitted by the regulations.

FEMA also says Mr. Bourne should not have been reimbursed for TQSE for his wife and child, because they never occupied temporary quarters, and he should not have been reimbursed for days he did not occupy temporary quarters. FEMA is correct. 41 CFR 302-6.100. Mr. Bourne is eligible to be reimbursed for TQSE to the extent allowed by applicable regulations.

Decision

The expenses Mr. Bourne incurred in connection with the purchase of his new residence are not reimbursable. The expenses he incurred in connection with the sale of his old residence and temporary quarters are reimbursable to the extent allowed by the regulations. The expenses the agency incurred in connection with the shipment of his household goods were properly paid by the agency, although the agency is not responsible for costs associated with shipping in excess of 18,000 pounds.

MARTHA H. DeGRAFF
Board Judge