UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 6, 2016

CBCA 4943-RELO

In the Matter of THADDEUS L. KONTEK

Thaddeus L. Kontek, Washington, DC, Claimant.

Robert T. Macdonald, Managing Director, Financial Reporting and Analysis, Department of State, Washington, DC, appearing for Department of State.

LESTER, Board Judge.

Claimant, Thaddeus L. Kontek, challenges the Department of State's decision to reimburse his temporary quarters subsistence expenses (TQSE) based upon the standard continental United States (CONUS) per diem rate, rather than upon the locality per diem rate for the Washington, D.C., area applicable to temporary duty (TDY) travel. For the reasons discussed below, we have no choice but to deny his claim.

Background

Mr. Kontek is a Foreign Service officer with the Department of State (DOS). In early 2015, he was notified of his impending transfer from a post at the United States Embassy in Antananarivo, Madagascar, to a post in Washington, D.C. A proposed travel itinerary, dated February 20, 2015, indicated that, as part of his transfer, he would receive a home service transfer allowance (HSTA), which would include reimbursement of TQSE and miscellaneous expenses. His subsequent travel orders, which were issued on March 16, 2015, authorized the HSTA, including reimbursement of TQSE on an actual expense basis for the first sixty days of Mr. Kontek's residency in Washington, D.C. DOS estimated that the total TQSE over the course of those sixty days would be $11,610, although the final amount would be based upon actual expenses not in excess of the permissible per diem. The travel orders

further indicated that the reimbursable TQSE would be calculated "based on the Standard CONUS per diem rate, which may be substantially less than the locality per diem rate" and that "the second 30 days are at a lower rate for all travelers."

On April 2, 2015, Mr. Kontek sent an email message to another DOS employee – apparently, the general services officer (GSO) at his embassy – stating that he was "confused on the TQSE allowance for housing" and asking whether he would receive "the DC rate at 100% for [himself] and 75% for [his] wife." In a responsive email message, the GSO indicated as follows: "For the TQSE – you are right – 100% for you, 75% for your wife. The lodging portion can only be reimbursed with receipts but the [meals and incidental expenses (M&IE)] portion can be reimbursed just by documenting your expenses on the form – no receipts needed." After this representation, the GSO copied and included in her email message a block quote from section 252.3(a)(1) of the Department of State Standardized Regulations (DSSR), which indicated that reimbursement of the TQSE portion of the HSTA would be calculated based upon, and could not exceed, "the standard CONUS (per diem) rate."

Mr. Kontek and his wife subsequently traveled to Washington, D.C., and, for the sixty-day period beginning April 18, 2015, incurred lodging and M&IE costs in that metropolitan area. At the conclusion of the sixty-day period, Mr. Kontek requested TQSE reimbursement of approximately $22,000, but DOS paid him less than half the requested amount. On June 23, 2015, Mr. Kontek questioned the reduction, complaining that the standard CONUS per diem rate of $129 per day that DOS had used to calculate his reimbursement was far below the locality per diem rates (with lodging and M&IE of up to $300 per day) that employees traveling to Washington, D.C., on TDY would have received. He asserted that his GSO told him "that [he] would get DC per-diem rates and booked temporary lodging accordingly." After a DOS claims representative informed him that TQSE reimbursement is limited to the standard CONUS per diem rate, he complained that "[i]t is impossible to find lodging in DC" at such a rate and that, in light of the hotel accommodation prices in Washington, D.C., the amount paid was "grossly unfair" to employees, who should not have to bear "[t]he costs of transfer back to DC."

After DOS denied his claim, Mr. Kontek sought the Board's review.

Discussion

"Section 901 of the Foreign Service Act of 1980, which is codified at 22 U.S.C. § 4081 (2012), 'grants the Secretary of State the authority to pay the travel-related expenses of members of the Foreign Service and their families.'" *Brian D. Crawford*, CBCA 4880-RELO, 15-1 BCA ¶ 36,162, at 176,472 (quoting *Raymond Daniel Toma, Jr.*, CBCA

1499-RELO, 09-2 BCA ¶ 34,152, at 168,822). Implementing that statutory authority, volume 3 of the Foreign Affairs Manual (FAM) authorizes HSTA for Foreign Service employees transferring from a foreign post to a post within the United States, an allowance which is designed to cover "extraordinary necessary and reasonable expenses, not otherwise compensated for, incurred by an employee incident to establishing him/herself at a post of assignment in the U.S." 3 FAM Exhibit 3210; *see Andrew G. Chritton*, CBCA 3080-TRAV, 13 BCA ¶ 35,229, at 172,839 (FAM implements 22 U.S.C. § 4081).

The FAM directs that HSTA is to be granted "as specified by Department of State Standardized Regulations (DSSR) 250." 3 FAM 3231.2(b)(1).[1] Under DSSR 250, HSTA is divided into four elements, one of which is an "actual subsistence expense" allowance. DSSR 251.2(c). That allowance is "designed to help offset costs of meals, laundry and dry cleaning of clothes and lodging in a hotel, pension, or other transient-type quarters, including obligatory service charges." *Id.* As DOS indicated in Mr. Kontek's travel orders, the "actual subsistence expense" allowance is the same as TQSE, which "is intended to reimburse [a transferred] employee reasonably and equitably for subsistence expenses incurred when it is necessary to occupy temporary quarters." *Melinda Slaughter*, CBCA 754-RELO, 07-2 BCA ¶ 33,633, at 166,579 (quoting the Federal Travel Regulation, 41 CFR 302-6.3 (2006)).

DOS can authorize payment of the employee's actual subsistence expenses (for up to sixty days, with the possibility of an extension of up to an additional sixty days) or, in the alterative, a fixed amount to cover subsistence expenses (not to exceed thirty days). DSSR 251.2(c). The DSSR provides that, if the agency chooses to authorize reimbursement of actual expenses, the amount authorized to be paid is defined in DSSR 252.3:

> The amount paid under the actual subsistence expense portion is either the employee's daily expenses for allowable items or the maximum prescribed rate (Section 252.3), whichever is less.

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[1] The definitions of HSTA in DSSR 250 and in volume 3 of the FAM are virtually identical. However, the DSSR, in defining HSTA, adds a reference to 5 U.S.C. § 5924(2) (section 5924(2)) and identifies it as the statutory basis of DOS's authority to grant HSTA. DSSR 251.1(a). Because section 5924(2) defines "transfer allowance" in a manner consistent with the DSSR and the FAM, we need not consider whether it is section 5924(2) or, instead, 22 U.S.C. § 4081 that provides the primary source of DOS's authority to grant HSTA. *See* 5 U.S.C. § 5924(2) (agencies may grant employees transferred from a foreign post to a domestic post a "transfer allowance for extraordinary, necessary, and reasonable subsistence and other relocation expenses (including unavoidable lease penalties), not otherwise compensated for," that they incur in establishing themselves at the domestic post).

DSSR 251.2(c). Pursuant to DSSR 252.3(a), the employee is entitled to incur reimbursable expenses for the first thirty days at "a daily rate not in excess of the standard CONUS (per diem) rate," DSSR 252.3(a)(1)a, and for the second thirty days at "75% of the applicable per diem rate established in 252.3a(1)a." DSSR 252.3(a)(2)d. In addition, if a family member above the age of twelve is traveling with the employee, the agency will add an additional payment of "75% of the daily rate established in 252.3a(1)a" to cover the first thirty days of the family member's expenses and "50% of the applicable rate established in 252.3a(1)a" for the second thirty-day period. DSSR 252.3(a)(1)b, (a)(2)b.

Mr. Kontek was paid according to that formula for the first sixty days in which he was staying in the Washington, D.C., area. He was paid 100 percent of the standard CONUS rate of $83 a day for lodging and $46 a day for meals and incidental expenses (M&IE) for his first thirty days in Washington, D.C., and he received a payment for his wife's expenses at 75 percent of that amount. He also received payment of his and his wife's subsistence expenses for the second thirty days in Washington, D.C., in an amount equivalent to 75 percent of the standard CONUS rate (for his expenses) and 50 percent of the standard CONUS rate (for his wife's expenses). DOS's payment was consistent with the requirements of the DSSR. *See Ira A.C. Peets*, GSBCA 15294-RELO, 00-2 BCA ¶ 31,058, at 153,353 (approving of reimbursement of HSTA hotel expenses at standard CONUS rates).

Mr. Kontek asserts that he was misled by his GSO's April 2, 2015, email message into believing that his TQSE would be reimbursed at the locality per diem rate that TDY employees receive. Although the GSO's representation in an email message to Mr. Kontek about his right to recover "100%" of the per diem rate might have been somewhat confusing, the message also contains a block quote from DSSR 252.3(a)(1), which plainly states that Mr. Kontek would receive the "standard CONUS (per diem) rate." In addition, Mr. Kontek's travel authorization clearly indicates TQSE reimbursement would be at the standard CONUS rate, which, the authorization stated, "may be substantially less than the locality per diem rate." To the extent that the GSO's initial statement about the permissible reimbursable per diem was misleading or incorrect, any misstatements cannot bind the agency or change the outcome here because "[t]he Government is not bound by the erroneous advice of its officials, even when the employee has relied on this advice to his detriment." *Debra K. Armstrong*, CBCA 3712-RELO, 14-1 BCA ¶ 35,676, at 174,610-11 (quoting *Flordeliza Velasco-Walden*, CBCA 740-RELO, 07-2 BCA ¶ 33,634, at 166,580).

Mr. Kontek correctly asserts that it would be virtually impossible for him or any other federal employee to find acceptable temporary commercial lodging in the Washington, D.C., area at a rate of only $83 per night. The record in this case shows that Mr. Kontek and his wife stayed in reasonable, but by no means luxurious, accommodations while awaiting the arrival of their household goods, but the daily rates that they were charged were more than

twice the permissible standard CONUS per diem (and were closer to the $229 locality per diem for lodging that was in place at that time for TDY travelers in the Washington, D.C., area). We addressed this precise dilemma in *Benjamin A. Knott*, CBCA 4579-RELO, 15-1 BCA ¶ 35,961, in which we acknowledged the difficulty that employees having to stay in the Washington, D.C., area at the standard CONUS per diem rate face while recognizing our lack of authority to overcome it:

> Although it is difficult to fathom how [the claimant] could have found acceptable temporary lodging within the standard CONUS rate in the Washington, D.C., area, we have previously noted that "[w]hether the differences between the amount of allowable reimbursement of expenses for TDY and PCS are unfair is a policy question which is for the Congress and the regulation-writers to decide. As a quasi-judicial tribunal, we are limited to interpreting and applying the law as it exists." *Donald L. Schaffer*, CBCA 695-RELO, 07-2 BCA ¶ 33,607, at 166,436. We have no authority to grant [the claimant] any recovery beyond the standard CONUS rate.

Knott, 15-1 BCA at 175,714.

Although Mr. Kontek asserts that it is "grossly unfair" to limit reimbursement of temporary housing in the Washington, D.C., area to the standard CONUS rate, we have no power to change the regulations that DOS has adopted. "The Department of State Standardized Regulations are promulgated by the Secretary of State and have the force and effect of law. As such, the Board does not have the authority to waive or carve an exception to the application of these regulations." *Gordon D. Giffin*, GSBCA 14425-RELO, 98-2 BCA ¶ 30,100, at 148,955 (citing *Robert D. Chelburg*, B-158033 (Nov. 8, 1994)). To the extent that DOS's rules for relocation expense reimbursement are unfair to its employees, that is a matter that only DOS can address.

Decision

For the foregoing reasons, we must deny Mr. Kontek's claim.

HAROLD D. LESTER, JR.
Board Judge