



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 17, 2010

CBCA 1785-RELO

In the Matter of FRANK LACKS, JR.

Frank Lacks, Jr., Aurora, CO, Claimant.

Peter Marchesani, Chief, Stuttgart Civilian Personnel Advisory Center, Office of the Deputy Chief of Staff, East Region, Department of the Army, APO, Area Europe, appearing for Department of the Army.

WALTERS, Board Judge.

Claimant, Frank Lacks, Jr., seeks relief from the Army's demand that he reimburse amounts previously paid him for temporary quarters subsistence allowance (TQSA) in connection with his permanent change of station (PCS) from Germany to Colorado. According to Mr. Lacks, his orders specifically authorized TQSA, and he was directed by his command's Human Resource Center "to move out of [his] home into a hotel of choice" while his household goods were being packed for overseas shipment, with the understanding that the Army "would pay the hotel expense" through TQSA payment. The Army concedes that TQSA was, in fact, specified by Mr. Lacks' orders, but asserts that the allowance was provided and paid by mistake, because Mr. Lacks did not qualify to receive TQSA under applicable regulations. Mr. Lacks urges that the Board rectify the situation, which he considers unreasonable and one that creates a hardship for him and his family.

Unfortunately, we must sustain the Army's position in this matter. As the agency indicates, the Department of Defense Joint Travel Regulations at C1003 specify that employees are not eligible for TQSA unless they were "eligible for a Living Quarters Allowance (LQA) under the provisions in DOD Personnel Management System Direction 1400.25-M, Subchapter 1250-E and DSSR [Department of State Standardized Regulations]

Section 031.1.” The record reflects that Mr. Lacks had moved to Germany on his own, to search for work there and to be with his family. Mr. Lacks had been recruited for his Army position in Germany when he was already outside the United States. DSSR section 031.12 allows for the possibility of providing an employee with LQA when he has been recruited outside the United States, but only under very limited circumstances, which were not present here:

a. the employee’s actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his/her employment by the United States Government; and

b. prior to appointment, the employee was recruited in the United States . . . by:

(1) the United States Government, including its Armed Forces;

(2) a United States firm, organization, or interest;

(3) an international organization in which the United States Government participates; or

(4) a foreign government

and had been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States . . . ; or

c. as a condition of employment by a Government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency.

DSSR 031.12. Prior to his recruitment as a civilian employee by the Army in Germany, Mr. Lacks was not in Germany working and in “continuous employment” either for the United States Government, for a United States firm, for an international organization, or for a foreign government in a position for which he had been recruited while still in the United States. Rather, at the time of his recruitment by the Army he was not employed and was searching for work. Nothing in the record indicates that, as a condition of his employment by the Army, he was required to move to another area in Germany, let alone that such a move was “specifically authorized by the head of agency.”

Although the requirements of DSSR 031.12b may be waived by the head of the agency “upon determination that unusual circumstances . . . justify such action,” it is clear not only that a waiver had not been granted, but that the criteria specified by the Department of Defense for such waiver¹ would not have been satisfied.

Although it is regrettable that Mr. Lacks reasonably relied upon his mistaken travel orders to incur the hotel costs in question, and will sustain a significant loss by reason of the Army’s mistake, there was no authority for the Army to pay TQSA in the present instance, notwithstanding its erroneous orders. As the General Services Administration Board of Contract Appeals (GSBCA), our predecessor board responsible for reviewing travel and relocation benefit claims, observed in *Joseph E. Copple*, GSBCA 16849-RELO, 06-2 BCA ¶ 33,332:

The agency’s travel authorization that granted claimant reimbursement of TQSA was erroneous and cannot create an entitlement that does not exist in statute and regulation. Put another way, an agency may not pay monies in

¹ In this regard, DOD Personnel Management System Direction 1400.25-M, subchapter 1250, provides, in part:

SC1250 5.1.3. For a waiver of section 031.12b of Reference (b) [DSSR] to be approved, one of the following situations must have occurred:

SC1250.5.1.3.1. The sponsoring spouse dies.

SC1250.5.1.3.2. Sponsoring spouse becomes physically or mentally incapable of continued employment with the Government.

SC1250.5.1.3.3. The couple is divorced or legally separated. . . .

SC1250.5.1.3.4. Sponsoring spouse left the post or area permanently.

SC1250.5.1.3.5. Spouses could not maintain a common dwelling due to the relocation of either spouse’s work place.

SC1250.5.1.3.6. The employee is an incumbent of a position designated as emergency-essential according to DoD Directive 1404.10

. . . .

violation of statute and regulation, even though the travel authorization purported to create the entitlement and an employee relied upon the authorization to his detriment. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *Opher Heymann*, GSBCA 16687-RELO, 05-2 BCA ¶ 33,104; *Kevin R. Kimiak*, GSBCA 16641-RELO, 05-2 BCA ¶ 33,007; *John J. Churchill*, GSBCA 16419-RELO, 04-2 BCA ¶ 32,698.

Id. at 165,290. When an employee has been issued erroneous travel orders that purport to grant an entitlement that does not exist, in contravention of statutory and regulatory strictures, neither this Board nor the agency may “right the wrong.” *Andrew J. Marks*, CBCA 672-RELO, 07-2 BCA ¶ 33,602.

Decision

Accordingly, Mr. Lacks’ claim is denied.

RICHARD C. WALTERS
Board Judge