



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 2, 2011

CBCA 2174-TRAV

In the Matter of ANTONIO L. GORDON

Antonio L. Gordon, APO Area Pacific, Claimant.

Ponhara Po, Chief, Labor/Employee Relations & Services Division, Department of the Navy, FPO Area Pacific, appearing for Department of the Navy.

DRUMMOND, Board Judge.

In July 2010, Antonio L. Gordon, then living in Okinawa, Japan, accepted a position with the Department of the Navy (Navy) in Misawa, Japan. In connection with the job offer, on July 23, 2010, the Navy issued travel orders which authorized temporary quarters subsistence allowance (TQSA) and pay advance. The Navy subsequently determined that Mr. Gordon was not entitled to these benefits and removed both benefits in amended travel orders dated August 9, 2010. Mr. Gordon proffers that he did not receive the amended orders until after he had moved to his new duty station and incurred expenses for lodging and meals. Mr. Gordon arrived at his new duty station on August 13, 2010. Mr. Gordon says that he relied on the original travel orders, which authorized TQSA and two months' advanced salary. The Navy refused Mr. Gordon's requests for these benefits.

The Navy, while conceding that the initial orders were issued by mistake, rejected Mr. Gordon's claim, concluding that he did not qualify to receive TQSA and pay advance under the applicable regulations. Mr. Gordon, while acknowledging that he is not eligible to receive these entitlements, urges the Board to rectify the situation, which he considers unreasonable and one that creates a hardship on him and his family.

Mr. Gordon was released from active duty military service with the United States on March 31, 2008, while stationed in Japan. Rather than returning to the United States, Mr. Gordon accepted a job with a United States non-appropriated fund instrumentality (NAFI) located in Okinawa, Japan. In 2010, Mr. Gordon was recruited for the Navy position in Japan when he was already living there.

As the Navy correctly notes, an employee is eligible for TQSA only if he meets the requirements established in Department of Defense (DOD) Personnel Management System Direction 1400.25-M, subchapter 1250, and Department of State Standardized Regulations (DSSR) 031.1. These rules provide that quarters allowances (including TQSA) for personnel stationed abroad are available to employees who were recruited in the United States.

DSSR 031.12 allows for the possibility of providing an employee with quarters allowances 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.

Prior to his recruitment as a civilian employee by the Navy in Japan, Mr. Gordon was not in Japan working in “continuous employment” either for the United States Government, a United States firm, an international organization, or a foreign government in a position for which he was recruited while still in the United States or employed under conditions providing for his return transportation to the United States. Nothing in the record indicates that, as a condition of his employment by the Navy, he was required to move to another area in Japan, let alone that such a move was “specifically authorized by the head of the 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 a waiver¹ would not have been satisfied.

As the agency also correctly notes, an employee is eligible to receive advanced salary only if he meets the requirements established in DOD Financial Management Regulations 7000.14R, chapter 3, and DSSR 851.2. These rules provide that advanced salary for personnel stationed abroad is available to employees who were recruited in the United States. DSSR 851.2 allows for the possibility of providing an employee with advanced pay when he is recruited outside the United States, but only if the employee is “eligible for allowances or differential under subchapter 030, including the provisions pertaining to local hires (Section 031.12) and temporary employees (Section 031.4), as determined by relevant agency authority.” Mr. Gordon is not entitled to advanced pay because he did not meet the requirements outlined in DSSR 031.12b.

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

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

- The sponsoring spouse dies.
- Sponsoring spouse becomes physically or mentally incapable of continued employment with the Government.
- The couple is divorced or legally separated
- Sponsoring spouse left the post or area permanently.
- Spouses could not maintain a common dwelling due to the relocation of either spouse’s work place. [or]
- The employee is an incumbent of a position designated as emergency-essential according to DOD Directive 1404.10

Although it is regrettable that Mr. Gordon relied upon the initial travel orders to incur hotel costs and other expenses in question, and will sustain a significant loss by reason of the Navy's initial mistake, there is no authority for the Navy to make these payments and advance two months' salary. *Frank Lacks, Jr.*, CBCA 1785-RELO, 10-1 BCA ¶ 34,374. The agency's initial, erroneous travel authorization cannot create an entitlement that does not exist in statute and regulation. Put another way, an agency may not pay monies in violation of statute and regulations, even though the travel authorization purported to create the entitlement and an employee relied upon the authorization to his detriment. *Id.* at 169,733; *Andrew J. Marks*, CBCA 672-RELO, 07-2 BCA ¶ 33,602.

Decision

Accordingly, this claim is denied.

JEROME M. DRUMMOND
Board Judge