UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 9, 2013

CBCA 3297-RELO

In the Matter of KIRBY S. OLSON

Kirby S. Olson, Texarkana, TX, Claimant.

Nicole M. Decker, Assistant Counsel, DLA Distribution, Defense Logistics Agency, New Cumberland, PA, appearing for Department of Defense.

KULLBERG, Board Judge.

Claimant, Kirby S. Olson, an employee of Defense Logistics Agency (DLA), seeks reimbursement for the full amount of temporary quarters subsistence expenses (TQSE) that was authorized by his permanent change of station (PCS) orders. DLA contends that the amount authorized on Mr. Olson's PCS orders was calculated in error, and that he was properly reimbursed the amount allowed when an employee elects to receive a TQSE in a lump sum (TQSE(LS)). For the reasons stated below the claim is denied.

Background

Mr. Olson was transferred to his current duty station in Texarkana, Texas, under PCS orders dated June 18, 2012. His PCS orders showed that he had elected to receive TQSE(LS), and he was authorized payment of TQSE(LS) in the amount of $11,070. The per diem rate for the purpose of computing TQSE(LS) at his new duty station was $123. Mr. Olson's PCS orders also showed that he had three dependents, his spouse and two children.

On August 20, 2012, Mr. Olson submitted his travel voucher for payment of TQSE(LS) in the amount of $11,070. The total amount of reimbursement for Mr. Olson's TQSE(LS) claim, however, was $5535 before withholdings were deducted. Mr. Olson was advised that the amount of TQSE(LS) shown on his PCS orders, $11,070, was in error, and the amount paid was properly calculated under the Joint Travel Regulations (JTR). Mr. Olson then submitted his claim to the Board seeking payment for the balance of the full amount of TQSE(LS) that was shown on his PCS orders.

Discussion

The issue in this matter is whether Mr. Olson can be reimbursed the full amount of TQSE(LS) that was authorized by his PCS orders. Statute provides that transferred employees may receive subsistence expenses while occupying temporary quarters. 5 U.S.C. § 5724a(c) (2006). Under the JTR, which apply to Mr. Olson, an employee may receive either TQSE(LS) or TQSE based upon actual expenses incurred (TQSE(AE)). JTR C5350-A. The Federal Travel Regulation (FTR), which also applies to Mr. Olson, provides that when an agency makes both TQSE(LS) and TQSE(AE) available, the employee has the option to elect one of the two methods for determining TQSE. 41 CFR 302-6.11 (2011) (FTR 302-6.11).

Mr. Olson's PCS orders show that he elected to receive TQSE(LS). Under both the FTR and JTR, TQSE(LS) is computed for the employee at 75% of the per diem rate for temporary duty travel for each day up to thirty days and at 25% of the per diem rate for each of the employee's dependents for each day up to thirty days. FTR 302-6.201; JTR C5392-C. The per diem rate for Mr. Olson's new duty station was $123. Mr. Olson is entitled to collect 75% of $123 for thirty days for himself and 25% of $123 for each of his three dependents for thirty days, and the total amount of TQSE(LS) that he is entitled to receive is $5335.[1] Consequently, the amount of reimbursement that Mr. Olson received for TQSE(LS) was properly calculated.

Mr. Olson contends that he accepted his current position based upon the terms offered in his PCS orders and that he has "upheld [his] portion of the contract and the agency should be made to hold their portion." The following is well established:

> The courts have consistently held that there is a "well-established principle that, absent specific legislation, federal employees derive the benefits and

[1] The calculation of Mr. Olson's TQSE(LS) is: ($123 x .75 x 30) + ($123 x .75 x 30) = $5335

> emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government." *Chu v. United States*, 773 F.2d 1226, 1229 (Fed. Cir. 1985). In other words, "public employment does not . . . give rise to a contractual relationship in the conventional sense." *Shaw v. United States*, 640 F.2d 1254, 1260 (Ct. Cl. 1981) (quoting *Urbina v. United States*, 428 F.2d 1280, 1284 (Ct. Cl. 1970)); *see also* [many other court decisions].

Louise C. Mâsse, GSBCA 15684-RELO, 02-1 BCA ¶ 31,694, at 156,573 (2001) (quoting *Synita Revels*, GSBCA 14935-RELO, 00-1 BCA ¶ 30,716, at 151,712 n.2 (1999), *reconsideration denied*, 00-1 BCA ¶ 30,896. Reimbursement for relocation costs, consequently, is subject to statute and regulation, and Mr. Olson's PCS orders did not create a contractual relationship with the Government. The amount that Mr. Olson was paid for his TQSE(LS) was subject to the FTR and JTR, and his PCS orders did not obligate the Government to pay the amount authorized by his PCS orders, which would have been contrary to those regulations.

Additionally, Mr. Olson contends that he was advised that the amount of TQSE(LS) authorized by his PCS orders was correct and that he did not need to keep receipts of his expenses, but he cannot use his reliance on the statements or actions of agency employees to justify reimbursement contrary to statute and regulation. Precedent from the Supreme Court, which has been followed in previous relocation cases, has recognized the following:

> Allowing an agency to make a payment for a purpose not authorized by statute or regulation would violate the Appropriations Clause of the Constitution. U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.") The Supreme Court consequently has made clear that an executive branch employee's promise that the Government will make an "extrastatutory" payment is not binding. Where relevant statute and regulations do not provide for payment for a particular purpose, an agency may not make such payment. *Teresa M. Erickson*, GSBCA 15210-RELO, 00-1 BCA ¶ 30,900 (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)). Although the employee may have relied to his detriment on his agency's assurances, he may not be reimbursed because the law prevents the agency from honoring commitments made in its name by officials who do not have the power to make them. *Alexander S. Button*, GSBCA 16138-RELO, 04-1 BCA ¶ 32,452 (2003); *Louise C. Mâsse*, GSBCA 15684-RELO, 02-1 BCA ¶ 31,694 (2001); *Gary MacLeay*, GSBCA 15394-RELO, 01-1 BCA ¶ 31,210 (2000).

Bruce Hidaka-Gordon, GSBCA 16811-RELO, 06-1 BCA ¶ 33,255, at 164,834. While the Board recognizes that Mr. Olson may have relied to his detriment on the amount of TQSE(LS) shown on his PCS orders, the Board must necessarily "balance the harm the employee would suffer if the claim were denied against the damage which would result to our system of government if federal officials were free to spend money in ways which are contrary to the strictures of statute and regulation." *Terry L. Cline*, CBCA 861-RELO, 08-1 BCA ¶ 33,736, at 167,032 (2007) (quoting *Louise C. Mâsse*, 02-1 BCA at 156,573).

Finally, Mr. Olson contends that DLA acknowledges "an error on the face of [his] travel authorization," but such an error is only relevant to the type of TQSE he elected. As a general rule, an employee's election of either TQSE(LS) or TQSE(AE) cannot be changed after his or her PCS orders have been executed. JTR C5352-D.5.b. The exception to that rule is if "there is an error on the face of a travel order or if all the facts and circumstances surrounding the issuance of an order clearly demonstrate that some provision which was previously determined and definitely intended to be included was omitted through error or inadvertence in preparing the order." *Id*. C5352-D.5.c.

In its agency report, DLA acknowledged that the amount of TQSE authorized on Mr. Olson's PCS orders was calculated using the formula for computing TQSE(AE), which calculates reimbursement differently from the way it is determined when an employee elects TQSE(LS). As a result, Mr. Olson's PCS orders authorized an incorrect amount for TQSE(LS). Although there is an error on the face of Mr. Olson's PCS orders, it does not involve his election of TQSE(LS) instead of TQSE(AE). Such an error, consequently, does not allow any greater recovery in this case.

Decision

The claim is denied.

_____
H. CHUCK KULLBERG
Board Judge