



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 26, 2013

CBCA 3207-RELO

In the Matter of RICHARD P. FENNER

Richard P. Fenner, Colorado Springs, CO, Claimant.

William D. Hennessy, Office of the Staff Judge Advocate, 4th Infantry Division and Fort Carson, Fort Carson, CO, appearing for Department of the Army.

SHERIDAN, Board Judge.

Claimant, a Department of the Army employee, asks this Board for an opinion as to the correct travel status and payment for his twelve-month deployment from Fort Carson, Colorado, to Kandahar, Afghanistan. Claimant asserts that he is entitled to payment for temporary duty (TDY) instead of the temporary change of station (TCS) payment he received. Claimant has not filed a claim with the agency, so this matter is not ripe for Board review.

Background

Claimant was deployed to Kandahar Airfield, Afghanistan, with the 43rd Sustainment Brigade, Fort Carson, Colorado, as a safety and occupational health manager from March 9, 2010, to March 7, 2011. Prior to his deployment he was issued TCS orders from the Fort Carson Directorate of Resource Management (DRM) Travel Team. Claimant performed under the TCS orders and was reimbursed for his expenses.

While in Afghanistan, claimant learned that after he had been deployed, a decision had been made by the 4th Infantry Division Chief of Staff to deploy all Fort Carson civilian safety

personnel in a TDY status.¹ According to the agency, this was a verbal decision, in which it was also decided that the status of anyone previously or currently deployed would not be retroactively changed.

As a result of the Army issuing TCS orders, claimant states that he “lost [his] locality pay and over \$10,000 in pay and entitlements.” Claimant asks the Board to answer a variety of questions centering around the fact that he was deployed in a TCS status as opposed to a TDY status. Claimant posits that when he “asked to see the Fort Carson travel policy . . . in regards to the change in TCS to TDY policy, nothing could be produced.” Claimant believes he has been unfairly treated and that he should be reimbursed his locality pay because other Fort Carson personnel deployed in “similar situations” were issued orders for TDY that did not result in the loss of their locality pay. However, claimant has not yet filed a claim with the agency.

Discussion

In this case, the agency argues that because claimant has not yet filed a claim, the matter is not ripe for Board review. Citing the Board’s rules governing travel and relocation claims, specifically Board Rule 401 (48 CFR 6104.401 (2012)), the agency posits that any claim for entitlement or travel relocation expenses must first be filed with the claimant’s own department or agency and the agency must initially adjudicate the claim. Board Rule 401 states in relevant part:

(c) Review of claims. Any claim for entitlement to travel or relocation expenses must first be filed with the claimant’s own department or agency (the agency). The agency shall initially adjudicate the claim. A claimant disagreeing with the agency’s determination may request review of the claim by the Board.

48 CFR 6104.401(c). As claimant has not yet filed a claim with his agency, Rule 401 dictates that this matter is not yet ripe for Board review. *Id.*

The Board further observes that while claimant has posed several questions to it, the Board lacks the jurisdiction to issue advisory decisions to prospective claimants. The

¹ Placing deployed employees in TDY status allowed employees to, among other things, retain their locality pay allotments. Employees lose locality pay while in TCS status.

questions claimant asks are for the agency.² Ultimately, if claimant is not satisfied with the answers he may file a claim with the agency. It is only after the agency has adjudicated the claim that the claimant may ask the Board to consider the agency's decision. 48 CFR 6104.402(a).

Before asking the Board to consider the agency's decision, claimant should be aware that this Board has noted previously that "an agency has discretion to determine how to treat an assignment." *Susan M. Spillman*, CBCA 1619-TRAV, 10-1 BCA ¶ 34,371, at 169,725 (instead of putting the employee on TDY for a one-year assignment, the agency elected to issue PCS orders). We concluded, "This Board cannot reverse the agency's determination unless it finds that the agency has abused its discretion." *Id.* "It is not [the Board's] charge to substitute our judgment for discretionary decisions of an agency as to an employee's duty status, unless the decision is arbitrary or capricious, or contrary to statute or regulation." *Donald D. Reese*, CBCA 1394-TRAV, 09-1 BCA ¶ 34,075, at 168,481 (the Board concluded it was neither illegal nor improper for the agency to use TCS for the employee's status instead of TDY).

We also recently noted in *Jeffrey E. Koontz*, CBCA 3251-TRAV (May 17, 2013):

Legal rights and liabilities with regard to travel expenses vest when the travel is performed, and valid travel orders may not be revoked or modified retroactively so as to increase or decrease the rights that have become fixed after the travel has been performed. *Dana Riser*, GSBICA 14017-RELO, 98-1 BCA ¶ 29,417 (1997). Travel orders may be amended or revoked to correct an error on the face of the orders or if the orders clearly are in conflict with a law, regulation, or agency instruction.

PATRICIA J. SHERIDAN
Board Judge

² During the process of compiling the record in this matter, it appears that the agency has provided the facts as to what occurred and has submitted documentation pertinent to the matter. Claimant can find answers to many of the questions he posed to the Board through the documentation and the agency's response. Remaining questions may be posed to agency counsel and the DRM Travel Team.

