



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 29, 2016

CBCA 5136-RELO

In the Matter of LAUREN R. POTEPA

Lauren R. Potempa, Wahiawa, HI, Claimant.

Mona Kinder, Branch Chief, Travel Entitlements, National Security Agency, Fort Meade, MD, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

In transferring Lauren R. Potempa from Maryland to Hawaii in October 2015, the Department of Defense authorized reimbursement of temporary quarters subsistence expenses (TQSE) under the actual expense method. Ms. Potempa stayed in temporary quarters for forty-five days while making this move – twenty-four days in Maryland before departing her old duty station, one day in Virginia near the airport from which she flew to Hawaii, and twenty days in Hawaii near her new duty station. The agency paid her TQSE at the standard CONUS (continental United States) rate for the days she stayed in Maryland and Virginia, and at the rate established for Hawaii for the days she stayed there.

Ms. Potempa believes that she should have been reimbursed at the Hawaii rate for all forty-five days she was in temporary quarters. Her belief is based on two factors: first, the information she reviewed on an agency website and written agency materials imply that employees transferring to Hawaii will be paid at the Hawaii rate for all days they reside in temporary quarters, and second, an agency human resources employee informed other transferring employees that such employees will be paid at that rate.

Ms. Potempa's understanding is not correct.

The Federal Travel Regulation (FTR) prescribes an “applicable per diem rate” for reimbursement of TQSE which is reimbursed under the actual expense method. For temporary quarters located in CONUS, that rate is the standard CONUS rate. For temporary quarters located outside the continental United States (OCONUS), the rate is “[t]he locality rate established by the Secretary of Defense or the Secretary of State under § 301-11.16 of [the FTR].” 41 CFR 302-6.102 (2015). The Department of Defense’s Joint Travel Regulations (JTR), which implement and supplement the FTR, similarly provide that for CONUS locations, the actual expense TQSE allowance is based on the standard CONUS per diem rate, and for OCONUS locations, it is based on the rate for the permanent duty station locality. JTR 5798-A.

The agency asserts, and Ms. Potempa does not deny, that before she moved, she was given a Hawaii Newcomer’s Guide which included a sentence which is faithful to these regulations: “TQSE will be paid at the Standard CONUS rate (\$129.00)¹ if used in the Baltimore/Washington, DC area prior to PCS [permanent change of station] and at the Hawaii rate if used in Hawaii after you arrive.” While it is true that, as Ms. Potempa notes, the agency also provided her with a table showing TQSE per diem rates for Hawaii, but not for CONUS locations, this does not mean, or even imply, that Hawaii rates would be paid for time spent in temporary quarters in CONUS.

Furthermore, even if an agency human resources employee provided information which is inconsistent with the requirements of the FTR and the JTR, that cannot create an obligation for the Government to make the payments at issue. As we have previously explained:

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.

¹ As the agency acknowledges, this rate was increased to \$140, effective October 1, 2015. See JTR 5798-A.1.

Michael C. Kostelnik, CBCA 3483-RELO, 13 BCA ¶ 35,430 (quoting *Julie N. Lindke*, CBCA 1500-RELO, 09-2 BCA ¶ 34,141 (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), and *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947))).

The claim is denied.

STEPHEN M. DANIELS
Board Judge