



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 15, 2016

CBCA 5100-RELO

In the Matter of ROGER C. CASTRO

Roger C. Castro, APO Area Pacific, Claimant.

Debra L. Martin-Robillard, Civilian Personnel Officer, Pacific Air Forces, Department of the Air Force, APO Area Pacific, appearing for Department of the Air Force.

LESTER, Board Judge.

Claimant, Roger C. Castro, requests that we review the decision of the Department of the Air Force (Air Force) denying him temporary quarters subsistence allowance (TQSA). We remand this claim to the agency for further evaluation and consideration.

Background

On July 1, 2014, the claimant retired as an officer in the United States Army and returned to his home state, Hawaii, to pursue a degree at the University of Hawaii at Hilo. Through the school's "Study Abroad" program, Mr. Castro was selected as part of his degree program to study in New Zealand from July through November 2015, after which he was expected to return to Hawaii. Mr. Castro arrived in New Zealand on a student visa on July 8, 2015. Under the terms of that visa, he was required to "leave [New Zealand] before visa expiry or face deportation."

In late July 2015, the Air Force posted a job announcement on USAJOBS for a contingency plans specialist position at Kadena Air Base (Kadena AB) in Okinawa, Japan. While in New Zealand on his student visa, Mr. Castro applied for that position. On August 24, 2015, he received a tentative job offer (subject to successful completion of drug testing), which he accepted. Because of what the Air Force describes as an administrative

error, the Air Force did not at that time send Mr. Castro a Questionnaire for Overseas Benefits Determination, which would have provided the agency with the information that it needed to determine whether Mr. Castro was entitled to a living quarters allowance (LQA) and/or TQSA following his arrival in Okinawa.¹ On November 5, 2015, the Air Force made Mr. Castro a firm job offer, with an entrance duty date of November 16, 2015. Mr. Castro arrived in Okinawa on November 15, 2015, to begin work the next day. On November 16, 2015, Mr. Castro completed the benefits determination questionnaire that the Air Force provided him following his arrival.

On November 24, 2015, the Kadena AB Civilian Personnel Office informed Mr. Castro that he was not eligible to receive LQA or TQSA based upon the answers that he had provided on his response to the questionnaire.² Mr. Castro has asserted that, had the agency informed him before he moved to Okinawa that he was not eligible for such allowances, he would not have accepted the job.

On December 11, 2015, Mr. Castro filed his claim with the Board, asking that we review his request for TQSA. He has not challenged the LQA denial here.

The Air Force submitted a written response to Mr. Castro's claim and supplied us with several exhibits, one of which was a Standard Form (SF) 50, "Notification of Personnel Action," for Mr. Castro. That SF-50 indicates that, after filing his claim here, Mr. Castro resigned from his position as a contingency plans specialist, effective December 31, 2015, because the denial of overseas allowances, coupled with the cost of off-post housing, had created too much of a financial burden for him. The Air Force does not address the effect (if any) of that resignation on his claim.

Discussion

I. The Overseas Differentials and Allowances Act

Pursuant to the Overseas Differentials and Allowances Act, 5 U.S.C. § 5923 (2012), "when the Government does not provide free quarters for a civilian employee in a foreign area, the Government may grant the employee several types of quarters allowances," *Albert*

¹ The agency acknowledges that it should have provided this questionnaire to Mr. Castro after it made him a tentative offer so that it could have made determinations about his eligibility for a transportation agreement, LQA, and TQSA before he traveled to Okinawa.

² The record indicates that, although the agency denied LQA and TQSA, it found Mr. Castro eligible for a transportation agreement.

Carter, Jr., GSBCA 15435-RELO, 01-1 BCA ¶ 31,404, at 155,127, including TQSA “for a period not in excess of 90 days after first arrival at a new post of assignment” (with the possibility of an additional sixty-day extension). 5 U.S.C. § 5923(a)(1), (b). TQSA “is meant to cover the reasonable lodging, meals, and laundry expenses of an employee and/or family members while occupying temporary quarters after arriving at a new overseas post and immediately preceding final departure from an overseas post.” *Carter*, 01-1 BCA at 155,127; *see* DSSR 121. The President is empowered to prescribe regulations governing such allowances, *see* 5 U.S.C. § 5922(c), an authority that the President delegated to the Secretary of State. *See* Exec. Order No. 10903, 26 Fed. Reg. 217, 217-18 (Jan. 9, 1961).

As set forth in the Department of State Standardized Regulations (DSSR), which implement the statute, quarters allowances, including TQSA, “may be granted to employees who were recruited by the employing government agency in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the possessions of the United States.” DSSR 031.11. If a new employee was “recruited outside the United States,” however, he “may receive TQSA only if certain specified requirements are met.” *Carter*, 01-1 BCA at 155,127. Those requirements are set forth in DSSR 031.12, as follows:

Quarters allowances prescribed in Chapter 100 may be granted to employees recruited outside the United States, provided that:

- 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, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the former Canal Zone, or a possession of 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, the Commonwealth of Puerto Rico, the Commonwealth of the Northern

Mariana Islands, the former Canal Zone, or a possession of 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.

II. Whether Mr. Castro Was “Recruited Outside the United States”

It is clear that Mr. Castro was “recruited outside the United States.” Although Mr. Castro indicates that he was still a resident of Hawaii the entire time that he was on a student visa in New Zealand and suggests that the Board should consider his actual place of residence in evaluating his right to TQSA, the relevant portions of the DSSR do not focus upon residency. As our predecessor board for relocation and travel matters, the General Services Board of Contract Appeals, previously recognized in *James E. Pierce, Jr.*, GSBCA 15201-RELO, 00-1 BCA ¶ 30,816, the DSSR focuses upon where the person was physically located when he was “recruited” for employment:

Mr. Pierce points out that he is a United States citizen, that his home of record is Oregon, and that Oregon is his permanent residence within the United States. However, the applicability of DSSR 031.11 does not depend upon Mr. Pierce’s citizenship, the location of his home of record, or the location of his permanent residence. Instead, the applicability of the regulation depends upon whether he was recruited in the United States for the position at Camp Zama. Because Mr. Pierce was in Japan, and not in the United States, when he was recruited for his position at Camp Zama, he is not eligible to receive quarters allowances as an employee who was recruited in the United States.

Id. at 152,113; see *Thomas v. United States*, 122 Fed. Cl. 53, 66 (2015) (“DSSR § 031.11,” which addresses quarters allowances for employees recruited in the United States, “applies only to those employees who were physically located in the United States at the time of their hire”).

Mr. Castro suggests that different considerations should apply because his stay in New Zealand was only a “temporary condition (akin to a long vacation)” and that, because of the temporary nature of his student visa, he should be considered a “Stateside Hire.” The history of DSSR 031.12 indicates the contrary. Many years ago, DSSR 031.12 identified students temporarily engaged in formal study overseas as individuals who were considered to be “recruited outside the United States,” but who would be entitled to benefits under 5 U.S.C. § 5923: the DSSR section expressly authorized quarters allowances if “the employee was

temporarily in the foreign area for travel or formal study and immediately prior to such travel or study had resided in the United States.” DSSR 031.12d (effective Apr. 2, 1961), *quoted in Barbara E. Meyer-Wendt*, B-160107 (Oct. 7, 1966); *see Ronald H. Davis*, 54 Comp. Gen. 149, 151-52 (1974) (discussing DSSR provision). Under that provision, Mr. Castro’s four-month stay in New Zealand would plainly have qualified him for quarters allowances. *See Trifunovich v. United States*, 196 Ct. Cl. 301, 311 (1971) (granting entitlement to quarters allowances where new employee was hired during an eighteen-month overseas travel period). The Department of State (DOS) removed that subsection from DSSR 031.12 long ago, meaning that Mr. Castro cannot rely on it now as a basis for TQSA entitlement. Nevertheless, its original inclusion in section 031.12 shows that DOS considers students who are on temporary overseas formal study as falling within the definition of individuals “recruited outside the United States.”

III. Whether Mr. Castro Meets the Specific Requirements of DSSR 031.12

Because Mr. Castro was recruited outside the United States, the agency can grant him TQSA only if he meets the specific requirements of DSSR 031.12. Mr. Castro satisfies the first part of those requirements – subsection (a) of DSSR 031.12 – given that his “actual place of residence” in the Okinawa area was “attributable to his/her [new] employment by the United States Government.” That is, he moved to Okinawa because of his new job.

In addition to satisfying subsection (a), Mr. Castro must also satisfy either subsection (b) or subsection (c) of DSSR 031.12 to qualify for TQSA. He does not satisfy subsection (b) because he did not travel to New Zealand after having been recruited for employment there by the United States Government, a foreign government, a United States organization, or an international organization “in which the United States Government participates”; he was not in “substantially continuous employment” with such an employer during his time in New Zealand; and such an employer had not guaranteed his return transportation to the United States. DSSR 031.12b.³ Accordingly, if Mr. Castro is entitled to TQSA, he must rely upon subsection (c) of DSSR 031.12.

The agency asserts that Mr. Castro does not satisfy subsection (c) because the subsection could apply only if, “as a condition of employment by the Government,” Mr.

³ The requirements of subsection 031.12b “may be waived by the head of agency upon determination that unusual circumstances in an individual case justify such action,” DSSR 031.12, but DoD Instruction 1400.25-v1250 (Feb. 23, 2012) (DoD Instruction) limits waiver approvals to circumstances generally associated with marital or domestic partner situational changes, *see* DoD Instruction Enclosure 2 ¶ 2.c(1), which are not applicable here.

Castro “was required to move to New Zealand” before he applied for the Kadena AB position. Agency Submission at 2. The agency misunderstands subsection (c). It applies if, “as a condition of employment by a Government agency, the employee was required by that agency to move to another area.” DSSR 031.12c. That does not mean that the Government originally had to hire Mr. Castro in the United States for a job in New Zealand, after which it then required him to move to Okinawa. The “move to another area” at issue here is the move from New Zealand to Okinawa. Mr. Castro was in New Zealand when he applied for the Kadena AB position, and he was required to move to Okinawa for the job. That meets the literal language of subsection (c). *See Frank Lacks, Jr.*, CBCA 1785-RELO, 10-1 BCA ¶ 34,374, at 169,732 (in considering DSSR 031.12c requirements, reviewing whether, “as a condition of his employment,” claimant “was required to move” from one area in Germany “to another area in Germany” as a new hire for a new job).⁴

Nevertheless, entitlement to TQSA under DSSR 031.12c is limited to “cases specifically authorized by the head of agency” or his delegate. The Air Force has not made that discretionary determination as it applies to Mr. Castro, but instead used a faulty rationale to find DSSR 031.12c inapplicable to his situation. We remand this matter to the Air Force for an appropriate review.

⁴ We note that, at one point in time, the applicable DoD Instruction stated that the provision now at DSSR 031.12c “will not be applied to new hires,” *Costas Mountanos*, B-189463 (Nov. 23, 1977) (quoting DoD Instruction 1418.1 ¶ III.B.1.d (Sept. 16, 1974) (now superseded)), which made it relevant only to an existing federal employee transferring from one foreign-area agency position to an agency position in a new foreign area. *Mrs. D. Russelle Hedley*, B-168161 (Nov. 16, 1973). That “new hire” language, however, does not exist in the current DoD Instruction, and it has been replaced by language about DSSR 031.12c suggesting a change from the old policy: “[s]electing a person to be relocated is based on regulatory guidance, leaving management little option *to recruit a new employee* or select an employee receiving LQA.” DoD Instruction Enclosure 2 ¶ 2.h (emphasis added). Further, paragraph 3.1.3.1.2 of the United States Air Forces in Europe Instruction 36-705 (Oct. 29, 2012) indicates that quarters allowances may be granted under DSSR 031.12c “if the assignment entails a move ‘within or between countries’ and management requires the employee to move to another area as a ‘condition of employment’ which ‘. . . if not fulfilled, results in failure *to gain* or retain employment.”” *Id.* (emphasis added) (quoting DSSR 031.12c & DoD Instruction Enclosure 2 ¶ 2.g). In the absence of any citation by the Air Force to language in the current DoD Instruction or elsewhere expressly precluding DSSR 031.12c’s application to new hires, we cannot reject Mr. Castro’s claim for TQSA on that basis.

Decision

For the foregoing reasons, we remand this matter to the Air Force for further consideration. To the extent that Mr. Castro's resignation from his position effective December 31, 2015, affects his entitlement to TQSA, the Air Force may consider that fact on remand.

HAROLD D. LESTER, JR.
Board Judge