



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 24, 2021

CBCA 7161-RELO

In the Matter of RUBEN M.

Ruben M., Claimant.

Connie J. Rabel, Director, Travel Mission Area, Enterprise Solutions and Standards, Defense Finance and Accounting Service, Indianapolis, IN, appearing for Department of Defense.

LESTER, Board Judge.

Claimant challenges a decision by the Defense Finance and Accounting Service (DFAS) denying temporary quarters subsistence expense (TQSE) for his family after he and his family had to return home early from a tour of duty outside the continental United States (OCONUS) when claimant was called to active military duty. The travel orders under which the family returned to the United States authorized TQSE on an actual expense basis, but, after the family incurred and claimed the hotel expenses that form the basis of their TQSE claim, DFAS determined that they were ineligible. We grant the claim.

Background

In late 2017, claimant transferred from his position as a civilian employee of the Defense Contract Audit Agency (DCAA), which had stationed him at the United States Southern Command (USSOUTHCOM) in Doral, Florida, to a position as a civilian executive officer within USSOUTHCOM working with the Department of Defense's Office of Security Cooperation at the United States Embassy in Santo Domingo, Dominican Republic. As part of that transfer, claimant signed a transportation agreement agreeing to serve in the Dominican Republic position for at least three years, with a possible extension of up to five

years. The agreement also entitled claimant to return to a position with DCAA in Florida, but in Fort Lauderdale rather than Doral, at the conclusion of his Dominican Republic tour.

In addition to his civilian employment, claimant is also a Naval Officer in the Naval Reserves. In February 2020, the United States Navy (Navy) notified claimant that he had been involuntarily “tagged” for a nine-month mobilization in the Middle East beginning July 31, 2020. Initially, USSOUTHCOM informed claimant that his family would be allowed to remain in government housing on post in the Dominican Republic during his nine-month deployment. On June 30, 2020, however, the Department of State notified claimant and USSOUTHCOM that the family could not remain on post and, even if the family members could find a way to stay in the country at some alternate location, they would lose all diplomatic privileges and immunities while claimant was deployed.

Claimant soon thereafter asked USSOUTHCOM about the possibility of allowing for a permanent change of station that would permit his family to return to the Doral/Miami area earlier than they had planned. Claimant’s supervisors at USSOUTHCOM agreed. On July 8, 2020, USSOUTHCOM issued a “Notification of Personnel Action” on Standard Form 50 (SF-50) changing claimant’s duty station to “Doral, Fl[orida] (Home of Record),” although without identifying any specific address for the new duty station; authorizing the “early” return of dependents from the Dominican Republic; and authorizing TQSE on an actual expense basis for up to thirty days pending the arrival of the family’s household goods (HHG) in the Doral/Miami area. The orders acknowledged that “early return of dependents [is] authorized [in accordance with the Joint Travel Regulations (JTR)] chapter 5, section 053805” and that “employee and his family are being returned to the U.S. while sponsor is on active duty military orders” because the “State Department will not allow the family to remain [in the Dominican Republic] during sponsor’s absence.” The travel orders indicated that claimant had signed a new transportation agreement on June 24, 2020, although that agreement is not a part of the record before the Board and its contents have not been described.

Claimant and his family departed the Dominican Republic for the Doral/Miami area on July 30, 2020. Although claimant and his family traveled together by air to Miami, claimant was traveling through Miami on his way to his military duty, and the Navy paid for his travel as part of his military orders. Travel for claimant’s family was paid as return travel from claimant’s OCONUS tour of duty, as authorized by USSOUTHCOM. The transportation costs for claimant and his family are not in dispute, as the appropriate agencies have already paid those costs.

Following arrival in Miami, claimant’s family had to stay at a hotel until August 16, 2020, pending delivery of the family’s HHG to their permanent living quarters. For a large

portion of that time (July 30 to August 12, 2020), claimant's family was ordered to quarantine and self-isolate in the hotel because of COVID pandemic protocols.

In early September 2020, claimant submitted a travel voucher seeking payment of \$3434.65 in TQSE actual expenses for his family's stay at the hotel. After claimant submitted his voucher, USSOUTHCOM, apparently at DFAS's direction, issued amended travel orders eliminating its prior authorization for TQSE, although still identifying "Doral, FL[orida] (Home of Record)" as the new duty station without an address. Subsequently, over the course of several months, USSOUTHCOM made several additional amendments to claimant's SF-50 personnel action notices, either at DFAS's request or to implement mandatory pay adjustments, and claimant made several amendments to his voucher, based upon suggestions from USSOUTHCOM, including an amendment identifying the COVID quarantine as a justification for reimbursement. All of the SF-50 notices identified either Doral or Miami as claimant's permanent duty station (PDS). Finally, effective July 4, 2021, USSOUTHCOM issued a new notice of personnel action that formally transferred claimant from his position with USSOUTHCOM to a position with DCAA in Fort Lauderdale, Florida.

That last transfer notice correlated with claimant's return from his nine-month deployment. Claimant returned to the Miami area from his military duty on June 30, 2021, and did not subsequently return to USSOUTHCOM or the Dominican Republic. Instead, he began civilian employment at DCAA in its Fort Lauderdale office on or about July 4, 2021.

After months of exchanges about the claim at issue, DFAS ultimately denied claimant's TQSE request, asserting that TQSE cannot be authorized for early return of dependents travel, but reimbursing \$58.03 as an after-tax travel per diem for claimant's dependents. After claimant sought review of his claim before the Board, DFAS indicated that, upon review, it appeared that claimant's return to Miami in July 2020 along with his family was for "return separation travel," even though the Navy was paying for his travel (though not his family's travel) through military orders, and that he was at that time exercising his return rights. An employee returning for separation, DFAS said, is not eligible for TQSE.

Discussion

The only issue before us is whether claimant's family is entitled to TQSE for the period from July 30 through August 16, 2020, when they were in the Miami area awaiting HHG delivery after having been essentially forced out of the Dominican Republic following claimant's military deployment. The family's air travel expenses from the Dominican Republic to Miami and the return of HHG are paid and not at issue.

“TQSE reflect subsistence expenses incurred by an employee or immediate family member while occupying temporary quarters (lodging obtained for the purpose of temporary occupancy from a private or commercial source).” *Yiannis A. Lolos*, CBCA 6576-RELO, 20-1 BCA ¶ 37,535 (2019); *see* 41 CFR 302-6.2 (2020). “The purpose of TQSE is ‘to reimburse an employee reasonably and equitably for subsistence expenses incurred when it is necessary to occupy temporary quarters.’” *Michael D. Sloan*, CBCA 6159-RELO, 18-1 BCA ¶ 37,094 (quoting 41 CFR 302-6.3). “An agency is not obligated to authorize payment of a TQSE allowance” but has the discretion to do so if it “determines [that] it is in the Government’s interest to pay TQSE.” *Yiannis A. Lolos*.

The circumstances here are somewhat unique, and it is clear that officials at USSOUTHCOM, upon learning that claimant’s unexpected military deployment was going to preclude continued residence of claimant’s family in the Dominican Republic, attempted to act creatively to minimize the negative effects of the deployment. USSOUTHCOM issued a SF-50 notification of personnel action transferring claimant from the Dominican Republic and naming Doral as his new PDS, effective July 30, 2020, while retaining him as an employee of USSOUTHCOM. In that SF-50, USSOUTHCOM authorized TQSE for claimant and his family, although, apparently at DFAS’s suggestion, wrote “Early Return of Dependents” on the form. Despite that language, it seems clear that the intent of the SF-50 was to transfer claimant back to Doral effective July 30, 2020, and to relocate his family, who had no choice but to leave the Dominican Republic, at the same time. USSOUTHCOM’s later issuance of an amended SF-50, at DFAS’s request, removing the TQSE authorization came too late, given that claimant’s family had already traveled and incurred TQSE in reliance on the validly-issued SF-50. *See Douglas W. Morris*, CBCA 5574-TRAV, 17-1 BCA ¶ 36,664 (“As a general rule, once travel is authorized, the employee’s right to reimbursement of travel costs vests as the travel is performed, and ‘valid travel orders cannot be revoked or modified retroactively, after the travel is completed, to decrease rights that have already become fixed.’” (quoting *Renee Cobb*, CBCA 5020-TRAV, 16-1 BCA ¶ 36,240)).¹

¹ Only if “there was [a material] error on the face of the orders or the orders were clearly in conflict with a law, regulation, or agency instruction” would the employee’s rights not vest when the traveler incurred costs in reliance upon the orders. *Shamika S. Rice*, CBCA 6028-TRAV, 18-1 BCA ¶ 37,150. The record here does not suggest that the authorization was erroneous, that it conflicted with law or regulation, or that any error in typing “Early Return of Dependents” on the SF-50 was sufficiently material to void the SF-50.

DFAS notes that, when claimant and his family returned to Doral in July 2020, claimant had not completed the three-year obligation to remain at the Dominican Republic PDS established in his service agreement. Yet, JTR 054912 (July 2020), titled “Acceptable Reasons for Release from a Tour of Duty,” indicates that a civilian employee may be released from a tour of duty requirement specified in a service agreement “for reasons beyond the employee’s control that are acceptable to the DoD component.” Acceptable reasons include “call to duty in the Armed Forces” and “extreme personal hardship” that would result from completion of the tour of duty requirement such as the unexpected separation of the employee’s family. *Id.* 054912.A.2, .B.2. USSOUTHCOM officials acted reasonably in releasing claimant from his three-year duty obligation after he was tagged for military deployment, and his early departure has no effect on his TQSE rights. *See Regina V. Taylor*, GSBKA 13650-RELO, 97-2 BCA ¶ 29,089 (finding claimant eligible for TQSE where she “was given a waiver of her two-year [OCONUS] commitment”).

DFAS argues that, when claimant and his family returned to Doral in July 2020, claimant was exercising his “return rights” from his OCONUS position and that, as such, his entitlements are limited to the “Relocation Separation” and “Overseas to U.S. Return for Separation” benefits specified in 41 CFR 302-3.300: (1) one-way transportation expenses for claimant and his family and (2) the return of HHG. It is quite clear, however, that the July 2020 SF-50 changing claimant’s PDS from the Dominican Republic to Doral did *not* terminate claimant’s employment with USSOUTHCOM, much less his federal civilian service employment, but instead continued it. Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4335 (2018), a person who is absent from a civilian employment position to perform service in a uniformed service possesses certain rights of reemployment and benefit retention. In the federal civilian service, “[a]n employee absent because of service in the uniformed services is” not separated from the civil service for employment purposes, but instead is “to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency.” 5 CFR 353.106(a). Accordingly, when the Navy tagged claimant for military deployment, USSOUTHCOM could not simply terminate claimant’s employment or ignore its obligation to provide necessary benefits to claimant and his family. Claimant remained an employee of USSOUTHCOM after his July 2020 PDS transfer and during the period of his military deployment. USSOUTHCOM, working with claimant, reasonably attempted to meet its obligations relating to claimant’s right to retain employment and benefits as best it could by transferring claimant back to Doral earlier than originally anticipated and allowing his family to return there. DFAS has no basis for arguing that claimant’s transfer to Doral somehow constituted a separation from either USSOUTHCOM or federal civilian employment.

Further, an exercise of “return rights” would not preclude claimant’s right to TQSE in the circumstances here. If claimant had been returning from the Dominican Republic for retirement or separation from Government service, DFAS would be correct that his “return separation travel” entitlements, which are established by 5 U.S.C. § 5722, could not include subsistence expenses like TQSE. *William D. Dooley*, GSBICA 16107-RELO, 04-1 BCA ¶ 32,451 (2003); *Thomas D. Mulder*, 65 Comp. Gen. 900, 904 n.2 (1986). We have long recognized, however, that an employee who is exercising “return rights” but is also continuing employment with the Federal Government in his or her new location can have the same rights to subsistence expenses under 5 U.S.C. §§ 5724 and 5724a as other employees transferring in the interest of the Government from one duty station to another. *See, e.g., Rebecca J. Lott*, CBCA 6354-RELO, 19-1 BCA ¶ 37,476; *Dennis L. Brink*, CBCA 2871-RELO, 13 BCA ¶ 35,231; *Regina V. Taylor*; *see also Christopher B. Bordeaux*, B-232111 (Jan. 19, 1989). The mere fact that claimant returned to the continental United States (CONUS) from an OCONUS tour of duty does not bar an agency from providing TQSE so long as claimant was continuing federal civilian employment. *See Dennis L. Brink* (finding that, although “[p]ayment of TQSE is discretionary,” it “is allowable to an employee . . . returning from overseas” who is continuing federal employment).

DFAS also argues that, if TQSE is available to an employee exercising OCONUS “return rights,” it can only be where the employee has signed a new transportation or service agreement obligating the employee to continue federal civilian service for at least an additional twelve months after return. Yet, claimant’s July 2020 SF-50 notes that claimant signed a new service agreement on June 24, 2020, rendering DFAS’s argument seemingly irrelevant. Even if there were no new service agreement, “[i]t is well settled that the absence of a signed service agreement is not fatal to a claim for relocation allowances so long as the employee [remains] in Government service for the required length of time.” *Regina V. Taylor*. Claimant has satisfied that twelve-month obligation, as he has remained employed in the federal civil service from July 2020 to the present.

DFAS next argues that TQSE is never permissible for an early return of dependents from an OCONUS tour of duty that precedes the employee’s return. Despite the information that USSOUTHCOM was directed to write on claimant’s travel orders identifying the family’s return as “early,” the CONUS return of claimant’s family did not predate claimant’s CONUS return. Claimant’s July 2020 SF-50 modified claimant’s PDS — changing it from the Dominican Republic to Doral, Florida — effective July 30, 2020, and the claimed subsistence expenses that claimant’s family incurred relate to costs associated with that PDS change. Claimant’s family returned to Doral at the same time that claimant did. The fact that claimant may not have physically been with his family in the Doral hotel following the transfer is irrelevant, given that claimant had been called to active military duty.

To the extent that DFAS is arguing that the authorization for the family's return to the Doral/Miami area was for the convenience of claimant and not in the interests of the Government, rendering subsistence expense benefits unavailable, *see Janice J. Devilbiss*, GSBCA 15804-RELO, 03-1 BCA ¶ 32,065 (2002) (finding that, if the primary beneficiary of a transfer is the employee, subsistence expense reimbursement is not available), we disagree. In originally authorizing TQSE, USSOUTHCOM officials implicitly recognized that the transfer was in the Government's interest. That determination was reasonable. As noted above, claimant's military deployment affected benefits that claimant and his family were receiving during his tour of duty — on-post housing and diplomatic privileges and immunity — that, under USERRA, USSOUTHCOM had to find a way to address. Transferring claimant and his family back to Doral in July 2020 was a reasonable exercise of the agency's discretion to attempt to meet its obligations.

Decision

For the foregoing reasons, claimant is entitled to payment of TQSE for the period from July 30 through August 16, 2020.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge