UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 22, 2015

CBCA 4238-RELO

In the Matter of JAMES R. DIKEMAN

James R. Dikeman, FPO Area Europe, Claimant.

Stephanie A. Polk, Deputy Counsel, Naval Surface Warfare Center, Department of the Navy, Bethesda, MD, appearing for Department of the Navy.

KULLBERG, Board Judge.

Claimant, James R. Dikeman, seeks reimbursement of expenses that he incurred in connection with his transfer from the contiguous United States (CONUS) to his current position with the Department of the Navy (Navy) in Naples, Italy. Mr. Dikeman seeks to recover the following costs: (1) eleven days of rent that he paid after vacating his previous residence; (2) miscellaneous expense allowance (MEA) at the with-dependents rate; and (3) temporary quarters subsistence allowance (TQSA) for his spouse.[1] For the reasons stated below, the Board grants the claim.

[1] Mr. Dikeman also claimed two additional expenses, which included taxi fare, $60, and hotel tax, $113.88, that he incurred before his departure from CONUS. Although his claim for those expenses was previously denied, the agency later conceded in its September 11, 2015, submission to the Board that those expenses were reimbursable. Consequently, those portions of the claim are granted without further discussion.

Background

The Navy issued on November 2, 2012, a personnel notice that advertised for an assistant counsel position in Naples, Italy. Included in the notice was the statement that relocation expenses were authorized. On June 11, 2013, Mr. Dikeman received notice that he had been selected for that position. At the time of his selection, Mr. Dikeman was working at the Pentagon, and his spouse, also a Navy employee, was residing in Naples at her mother's residence.

The human resources office (HRO) in Naples issued orders for Mr. Dikeman's transfer on September 26, 2013, with a reporting date on or about October 21, 2013. By electronic mail message, Mr. Dikeman received a copy of his orders the next day. His orders provided for various costs of relocation including miscellaneous expenses but did not provide for TQSA. On October 18, his orders were amended to provide TQSA for ninety days and a foreign transfer allowance (FTA) predeparture subsistence expenses allowance for up to ten days. By letter dated October 18, 2013, the Deputy Assistant Chief of Staff for the gaining command in Naples stated the following:

> This is to certify that Mr. James Dikeman has accepted the position of Assistant General [Counsel] with Commander, U.S. Naval Forces, Europe, Commander, U.S. Naval Forces, Africa, and Commander, U.S. SIXTH Fleet, Naples, Italy. He reports for duty on 21 October 2013. He and his family members are entitled to full sponsorship, to include TQSA.

At the time of his appointment, Mr. Dikeman was renting an apartment in the Washington, D.C., area. The period of the lease was from November 15, 2012, to November 14, 2013, and the rent was $2515 per month. The lease provided that either the tenant or landlord could terminate the lease upon giving two months' prior written notice, and the lease also provided that the tenant could terminate the lease "upon one (1) month's written notice issued prior to the Rent Due Date, to run from the first day of the month through the last day of that same month, to Landlord/Agent due to involuntary change of employments [sic] from the Washington-Metropolitan Area." That section of the lease also stated the following:

> In the event of termination under this covenant, Tenant may be liable for a reasonable termination charge not to exceed the equivalent to one (1) month's rent at the rate in effect as of the termination date, or the actual damages sustained by the Landlord whichever is the lesser amount; the termination charge is to be in addition to rent due and owing through said termination date and rent due during the notice period.

Mr. Dikeman gave notice to his landlord on September 27, 2013, which was the day that he received his orders, that he soon would be vacating his apartment. Instead of requiring two months' notice, Mr. Dikeman states that his "landlord agreed to cut the notice period in half, treating the departure under the terms of the lease as an 'involuntary change of employment from the Washington-Metropolitan Area.'" Mr. Dikeman paid rent for the month of October because the actual date that he would turn his apartment over to his landlord was not certain.

On October 14, Mr. Dikeman prepared his apartment for the shipment of his household goods. His household goods were picked up the next day, and he turned the apartment over to his landlord on October 16. His landlord later refunded to Mr. Dikeman rent for the period from October 28 to 31. During the period from October 14 to 18, Mr. Dikeman resided in a hotel near the airport.

Mr. Dikeman arrived in Naples on October 19, and upon his arrival, he and his wife stayed at a hotel until December 18 – a total of sixty-one days. On November 20, Mr. Dikeman submitted his FTA claim for the expenses he incurred before his departure. For the lease penalty portion of his claim, he claimed $749.97 for nine days of rent after he vacated his apartment, which was based upon a monthly rent of $2515. Additionally, Mr. Dikeman sought reimbursement for MEA at the with-dependents rate, $1300, but he was only reimbursed at the without-dependents rate, $650. Subsequent to filing this matter, Mr. Dikeman revised the lease penalty portion of his FTA claim to $892.41, which was the cost of eleven days of rent.

On November 27, 2013, Mr. Dikeman filed his TQSA claim for the first thirty-day period, and on January 17, 2014, he submitted his TQSA claim for the thirty-first to sixtieth days and a separate claim for the sixty-first day. In support of his claim, he provided receipts from his hotel, which he paid by his personal credit card, and the credit card company converted the hotel charges from euros to dollars. The daily rate for his hotel included breakfast, and Mr. Dikeman has represented that he and his spouse usually ate breakfast at the hotel. Other expenses that he incurred, which included expenses in euros, were summarized in his claim submission.

Instead of reimbursing Mr. Dikeman for his and his spouse's actual TQSA expenses, the Navy reimbursed Mr. Dikeman for only his TQSA, in the amount of $l4,296.80, which was calculated using percentages of the per diem allowance for Naples, which was $336. The rate for the first thirty days was seventy-five percent of the per diem, the rate for the thirty-first to the sixtieth days was sixty-five percent of the per diem, and the rate for the sixty-first day was fifty-five percent of the per diem. The Navy informed Mr. Dikeman that he was not entitled to claim TQSA for his spouse because she was already residing in Naples.

After filing this matter with the Board, Mr. Dikeman submitted to the Board additional supporting documents for his TQSA claim, and he represented that his total TQSA claim was $22,331.12. He was able to compute a total dollar amount for the TQSA portion of his claim by converting those amounts he previously claimed in euros to dollars using the Naples HRO's currency exchange rates. Mr. Dikeman, consequently, seeks reimbursement for the remainder of his TQSA claim in the amount of $8034.32, which is $22,331.12 less $14,296.80.

Discussion

Lease Termination Penalty

Mr. Dikeman seeks reimbursement for the cost of eleven days of rent after he vacated his apartment, and the issue is whether such an expense is reimbursable as an unavoidable lease penalty. Statute, the Overseas Differentials and Allowances Act, provides that an employee transferring to a foreign area "may be granted . . . [a] transfer allowance for extraordinary, necessary, and reasonable subsistence and other relocation expenses (including unavoidable lease penalties), not otherwise compensated for, incurred by an employee incident to establishing himself at a post of assignment." 5 U.S.C. § 5924(2)(A) (2012). "The President has delegated to the Secretary of State authority to issue regulations which implement statutes providing for overseas pay differentials and allowances, including the FTA." *Stuart L. Sumner*, CBCA 1097-RELO, 08-2 BCA ¶ 33,897, at 167,769 (citing Exec. Order No. 10,903 (1961), *reprinted as amended in* 5 U.S.C. § 5921). "Pursuant to this authority, the Secretary has issued the Department of State Standardized Regulations (DSSR)." *Id*.

Reimbursement for a lease penalty expense is provided as part of an employee's FTA "to assist employees departing either the U.S. or foreign area to help offset the expense of unavoidable lease penalties in the U.S. or a foreign area for the early termination of a residence quarters lease due to a transfer required by a Federal agency." DSSR 241.2.d. The DSSR provides the following with regard to reimbursement for the lease penalty expense:

> This portion is to help offset the expense of a residence quarters lease penalty unavoidably incurred by an employee. The amount of reimbursement shall not exceed the amount required by the specific terms of a rental contract signed by the employee as a prior condition of obtaining the lease, or the equivalent of three months' rent, whichever is less.

Id. 242.4. Under the Joint Travel Regulations (JTR), a Department of Defense (DoD) employee who transfers from CONUS to a foreign area is reimbursed for a lease termination penalty as part of his or her FTA in accordance with the DSSR. JTR C1260-D.1, C5762.[2]

Mr. Dikeman seeks reimbursement for the eleven days of rent that he paid after he vacated his apartment. The General Services Administration Board of Contract Appeals (GSBCA), which decided relocation cases before the establishment of this Board, recognized that a claimant was entitled to reimbursement for rent paid after vacating her apartment because she did not receive her orders in a timely manner and had to arrive at her new duty station before the end of the lease period. *See Rosemary H. Sellers*, GSBCA 13654-RELO, 97-1 BCA ¶ 28,714, at 148,338-39 (1996). Although the *Sellers* case involved a transfer within CONUS and the GSBCA applied the Federal Travel Regulation (FTR) to the settlement of an unexpired lease, the same reasoning would apply in this case, which involves reimbursement of a lease penalty under the DSSR.[3] The Board has recognized the following:

> Like the comparable FTR and JTR provisions, the DSSR provision specifies in pertinent part that to be eligible for this payment, the employee must have promptly, after receipt of official notice of his transfer, informed the landlord of the need to vacate the premises prior to the expiration of the lease because of the pending transfer and, if possible, taken steps to avoid the penalty by sublease or assignment to others.

Carlos J. Delgado, CBCA 601-RELO, 07-2 BCA ¶ 33,681, at 166,752. The DSSR as it relates to reimbursement of an unavoidable lease penalty, consequently, applies essentially the same criteria as in the case of settlement of an unexpired lease under the FTR and JTR.

A similar situation as in *Sellers* applies in this case because Mr. Dikeman received his orders on September 27, 2013, and he was directed to report to Naples on October 21. Under such circumstances, he could not vacate his apartment before the negotiated end of his lease, which was thirty days after he gave notice. After receiving his orders, Mr. Dikeman acted reasonably and gave notice, but he could not avoid the total cost of terminating his lease.

---

[2] Citations are to the version of the JTR in effect at the time of Mr. Dikeman's transfer.

[3] The FTR and JTR provide for reimbursement of the expense of settlement of an unexpired lease when a transfer is within CONUS or a non-foreign area outside of CONUS. 41 CFR 302-11.1-2 (2012) (FTR 302-11.1-2); JTR C5762.

The Navy argues that Mr. Dikeman voluntarily applied for the counsel position in Naples, and the DSSR only allows for reimbursement of the lease penalty expense when an employee's transfer is due solely to the actions of the agency. It is well established that "[t]he purpose of agency regulations is to support the intent of the enabling legislation." 62 Comp. Gen. 641, 642 (1983) (citing *Dixon v. United States*, 381 U.S. 68, 74 (1965); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936)). Additionally, "[t]he purpose of the Overseas Differentials and Allowances Act as expressed in Senate Report No. 1647, 86th Congress, June 22, 1960, was to improve and strengthen Government overseas activities by establishing a uniform system for compensating all Government employees in overseas posts irrespective of the agency by which they were employed." *Charles E. Brookshire*, B-196809 (May 9, 1980). The Board finds that the Navy has applied an overly restrictive interpretation of the criteria for reimbursement of an unavoidable lease penalty under the DSSR that is inconsistent with statute. Neither statute nor the DSSR contain any language that would suggest that an unavoidable lease penalty expense is reimbursable only if an employee's transfer is directed by his or her agency and, therefore, involuntary. The fact that Mr. Dikeman applied for the counsel position in Naples is irrelevant to the circumstances that led to the unavoidable expense he incurred when he terminated his lease. Mr. Dikeman incurred the added expense of terminating his lease because the Navy issued orders that required him to report to Naples in less than thirty days, and he incurred the expense of rent on his apartment for eleven days after he turned it over to his landlord.

Miscellaneous Expense Allowance

Mr. Dikeman seeks reimbursement of his MEA at the with-dependents rate instead of the without-dependents rate. The JTR provides that "MEA is to reimburse various costs . . . associated with an authorized/approved . . . residence relocation." JTR C5300.A.[4] Additionally, the JTR provides that "[f]or an employee to be authorized MEA at the 'with dependents' rate, the employee's dependents must discontinue a prior residence and establish a new residence [in accordance with] the employee's [permanent change of station]." *Id*. C5310-B; *see also Richard J. Waldman*, B-194061 (Sept. 12, 1979); *Joe D. Brockman*, B-184558 (Aug. 12, 1976). Reimbursement of Mr. Dikeman's MEA at the higher with-dependents rate is proper because his spouse

[4] Because Mr. Dikeman is a DoD employee, guidance regarding MEA is provided under the JTR and not the DSSR. JTR C1260-B.1; DSSR 242.6.b; *see also Mary M. Kay*, GSBCA 15816-RELO, 03-1 BCA ¶ 32,061, at 158,467 (2002) ("DSSR miscellaneous expense allowance is inapplicable to DoD employees who are transferred from the United States to a foreign country.").

established a permanent residence with him after he arrived in Naples. *See Robert L. Rogers*, B-209002 (Mar. 1, 1983).

The Navy erroneously contends that Mr. Dikeman should only be reimbursed for MEA at the without-dependents rate because "his dependent did not relocate with him and was already a resident of Naples when he arrived in October 2013." Although Mr. Dikeman's spouse lived in Naples, she had only a temporary residence with her mother while he was working in CONUS, and she relocated to a permanent residence after he returned to Naples. Both Mr. Dikeman and his spouse, consequently, established together a new residence in Naples, and, in doing so, he is entitled to reimbursement of MEA at the with-dependents rate.

Temporary Quarters Subsistence Allowance

Mr. Dikeman also seeks reimbursement of TQSA for his spouse. Statute provides for "[a] temporary subsistence allowance for the reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and his family . . . for a period not in excess of 90 days after first arrival at a new post of assignment in a foreign area or a period ending with the occupation of residence quarters whichever is shorter." 5 U.S.C. § 5923(a)(1)(A). The authority to issue regulations with regard to TQSA "has been delegated by the President to the Secretary of State." *William P. McBee, Jr.*, CBCA 943-RELO, 08-1 BCA ¶ 33,760, at 167,115 (citing Exec. Order No. 10,903, § 2, *reprinted as amended in* 5 U.S.C. § 5921 app. at 1071-72). The Secretary of State "has exercised this authority by promulgating sections 120 through 129 of the [DSSR]." *Id*. at 167,115-16.

At issue is whether Mr. Dikeman is entitled to TQSA for his spouse even though she was already living in Naples. An employee's entitlement to TQSA commences upon his or her arrival at the new post. DSSR 123.1.a. Whether an employee is entitled to certain relocation benefits for his or her spouse is determined by the couple's intent to maintain the same household. *See Vanessa G. Outenreath*, GSBCA 16316-RELO, 04-2 BCA ¶ 32,681, at 161,733 (citing *Marilyn Daterman*, GSBCA 13686-RELO, 97-1 BCA ¶ 28,880); *Robert L. Rogers*. Reimbursement of TQSA for the employee's spouse and other family members commences when they enter temporary quarters. *See Stephen S.*, CBCA 1214-RELO, 08-2 BCA ¶ 34,005, at 168,166-67; *see also Charles P. Moukoury*, GSBCA 15965-RELO, 04-1 BCA ¶ 32,610, at 161,399 (temporary quarters subsistence expenses allowed for spouse and children). Reimbursement of TQSA for an employee's family members has been allowed when those family members, who did not relocate in the same manner as the employee, experienced a material change in the financial arrangement of their housing. *See Richard H. Whittier*, GSBCA 16538-RELO, 05-1 BCA ¶ 32,926, at 163,102. As discussed above, Mr. Dikeman has represented that his spouse had a

temporary living arrangement with her mother in Naples while he was employed by the Navy in CONUS, and that arrangement ceased upon his arrival in Naples. Although Mr. Dikeman relocated from CONUS and his spouse only needed to move within the Naples area, his spouse experienced a material change in the financial arrangement of her housing as a result of his relocation, and he is entitled to reimbursement of TQSA for his spouse.

The Navy argues erroneously that Mr. Dikeman is not entitled to reimbursement of TQSA for his spouse because she was already living in Naples and did not have an "arrival" as required under the DSSR. TQSA begins when the employee arrives or, in the alternative, when family members arrive before the employee. DSSR 123.1.a-b. In this case, TQSA commenced upon Mr. Dikeman's arrival. There is no requirement in the DSSR, as suggested by the Navy, that reimbursement of TQSA for Mr. Dikeman's spouse is conditioned on her also arriving from either CONUS or some other location outside of Naples, and the Board finds no requirement in the DSSR that would preclude reimbursement of TQSA for Mr. Dikeman's spouse.

Additionally, the Navy contends that Mr. Dikeman and his spouse stayed at "one of the more expensive, luxury hotels in the area." The DSSR provides that TQSA "is intended to assist in covering the average cost of adequate but not elaborate or unnecessarily expensive accommodations." DSSR 122.1. In response to the Navy's contention, Mr. Dikeman submitted a list of hotels in the Naples area that was prepared for military and civilian personnel either transferring or on temporary duty, and that list included the hotel where he and his spouse stayed. The Board finds such evidence persuasive in establishing that those hotels on the list were, in all likelihood, not luxury accommodations. The Navy also contends that other employees who submitted TQSA claims during that same period in 2013 paid less for lodging than Mr. Dikeman, but the only hotel specifically identified was a Navy Lodge. At most, the Navy has only established that the Navy Lodge could have been less expensive than the hotel where Mr. Dikeman and his spouse stayed, but that contention does not prove that Mr. Dikeman selected a luxury hotel. The Board finds that the Navy has not shown that Mr. Dikeman and his spouse stayed in a hotel that was either elaborate or unnecessarily expensive.

With regard to his TQSA claim, Mr. Dikeman has requested that the Board determine whether he is required to submit receipts in support of each of his expenses in excess of seventy-five dollars because the Navy had informed him that all, or most, expenses must be supported with receipts. TQSA is reimbursed at the lesser of actual expenses incurred by an employee and his or her family members or an amount computed on the basis of a percentage of the per diem rate. DSSR 123.3. The Board has recognized the following:

> "The DSSR is very specific as to documentation necessary to prove that an expense was actually incurred." [Okyon Kim] *Ybarra*, [GSBCA 15407-RELO,] 01-1 BCA [¶ 31,334,] at 154,763. For temporary lodging, "[s]upporting receipts or other appropriate documentation for the daily cost" is required. DSSR 125. However, "[e]vidence of the daily cost of meals, laundry and dry cleaning shall be a certified statement by the employee." *Id*.

Miriam E. Bolaffi, CBCA 4029-RELO, 15-1 BCA ¶ 35,962, at 175,716-17. The Board finds that both Mr. Dikeman and the Navy have taken positions regarding supporting receipts for a TQSA claim that impose requirements that are not consistent with the DSSR. Mr. Dikeman's TQSA claim, however, is supported by receipts for his lodging, and he has provided a certified statement of his other expenses. The Board finds that Mr. Dikeman has supported his actual TQSA expenses, and additional documentary evidence is not required to support his claim.

Although the Board has found that Mr. Dikeman is entitled to reimbursement of TQSA for his spouse and that he has provided adequate support for his TQSA claim, the Board's decision does not make a determination as to the specific amount of reimbursement. Mr. Dikeman has submitted extensive documentation for his claim, but the Navy has raised a valid point that it has not had the opportunity to review the calculation of the total dollar amount of his TQSA claim, which is $22,331.12. Mr. Dikeman provided the supporting documentation of his TQSA claim after he filed this matter at the Board, and he has represented that the Navy should pay him the remainder of his total TQSA claim, which is $8034.32. In granting the claim, the Board recognizes that the Navy will need to confirm the accuracy of the total dollar amount of his claim in a manner consistent with the decision of this Board.[5]

---

[5] Mr. Dikeman has requested that the Board rule that he be reimbursed for his lodging expense in the dollar amount charged by his credit card company. The Navy has contended that Mr. Dikeman's lodging expense, which was originally charged in euros, should be converted to dollars using the Naples HRO's exchange rates. Mr. Dikeman has submitted copies of his TQSA claim that show a total hotel expense of $18,359.44. Also, he has submitted a copy of an electronic mail message from Naples HRO that shows a separate calculation by that office of his hotel expense at $18,805.61, which appears to have been based upon currency exchange rates used by that office. The Board does not find that Mr. Dikeman has shown facts that amount to a claim because the Navy's method of converting his lodging expense to dollars would result in a greater reimbursement for lodging than the amount he has claimed.

Decision

The claim is granted. The Navy shall, in accordance with this decision, reimburse Mr. Dikeman for eleven days of rent after vacating his former residence, additional reimbursement of MEA at the with-dependents rate, and TQSA for his spouse.

H. CHUCK KULLBERG
Board Judge