UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 10, 2018

CBCA 6083-RELO

In the Matter of WALTER C. MOYNIHAN

Walter C. Moynihan, Bellevue, NE, Claimant.

Maj. Gen. Daniel L. Karbler, Chief of Staff, United States Strategic Command, Department of the Army, Offutt Air Force Base, NE, appearing for Department of Defense.

LESTER, Board Judge.

Claimant, Walter C. Moynihan, seeks reimbursement of temporary quarters subsistence expenses (TQSE) incurred during the summer of 2017. We deny Mr. Moynihan's request.

Background

In June 2017, Mr. Moynihan, based upon return rights from the Department of the Army, effected a permanent change of station (PCS) from the United States Africa Command (USAFRICOM) in Stuttgart, Germany, to the United States Strategic Command (USSTRATCOM) at Offutt Air Force Base (AFB), Nebraska. Prior to his PCS date, USAFRICOM declined to include TQSE in his PCS orders, apparently indicating that TQSE was a benefit that the gaining authority, USSTRATCOM, would have to authorize.

Mr. Moynihan asserts that, when he arrived at his new duty station in Nebraska, he did not receive any briefing telling him that he needed to seek TQSE authorization immediately and assumed that TQSE would be treated "like other reimbursable expenses and provided after [he] had receipts." Subsequently, in August 2017, when he was ready to leave

temporary housing and move into a permanent residence, Mr. Moynihan approached the USSTRATCOM's finance office about obtaining TQSE reimbursement. Sometime in September 2017, he submitted a written request for TQSE reimbursement, accompanied by a package containing receipts associated with his temporary housing and meal expenses. That request was apparently denied sometime in October 2017, although that denial does not appear to be contained in the record before us.

Subsequently, in an email message on November 13, 2017, Mr. Moynihan requested that his TSQE request and its accompanying materials be forwarded to the USSTRATCOM Chief of Staff for review and decision, although he asked for permission to supplement the package with additional information. By email message dated November 15, 2017, another USSTRATCOM representative, responding to a part of Mr. Moynihan's November 13 email message seeking copies of any written agency guidance regarding TQSE entitlements, informed Mr. Moynihan that "[t]here is no written STRATCOM policy on paying TQSE, as of now," and that, "[w]ith this being the first time this has come up, there was no need for guidance," but the representative indicated that "we plan on writing some guidance to cover" the TQSE issue in the future. Further, on November 17, 2017, the agency, responding to a request that Mr. Moynihan had made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), represented that, during the time frame covered by the FOIA request, Mr. Moynihan's TQSE request was the only one that the office had received, but the agency acknowledged that there were certain "hard to fill," "forced moves," and "special program" hires within USSTRATCOM for which the agency had previously authorized TQSE.

Mr. Moynihan's TQSE package, including the supplements that Mr. Moynihan added, was sent to the USSTRATCOM Chief of Staff on or about November 29, 2017. On February 12, 2018, the Chief of Staff disapproved that request, stating that, under the Joint Travel Regulations (JTR), TQSE could not be authorized after temporary lodging was occupied and costs incurred.

On March 20, 2018, Mr. Moynihan submitted his TQSE claim to the Board. As part of the agency's response to that claim, the USSTRATCOM Chief of Staff represented that, even if Mr. Moynihan had submitted his TQSE authorization request as soon as he arrived in Nebraska, the Chief of Staff would have denied it because the agency was able to attract qualified employees without providing that benefit.

Discussion

"A TQSE allowance 'is intended to reimburse [a transferred] employee reasonably and equitably for subsistence expenses incurred when it is necessary to occupy temporary quarters."' *Melinda Slaughter*, CBCA 754-RELO, 07-2 BCA ¶ 33,633, at 166,579 (quoting

41 CFR 302-6.3 (2006)). Except for employees returning from foreign areas through the Department of Defense's Priority Placement Program (which is inapplicable to Mr. Moynihan's situation), *see* JTR 5778-E, TQSE is "not . . . a benefit to which [relocating employees] are automatically entitled." *Nelson A. Kraemer*, CBCA 5017-RELO, 16-1 BCA ¶ 36,224, at 176,716. The statute that authorizes agencies to reimburse TQSE provides that "an agency *may* pay" such benefits in appropriate circumstances, 5 U.S.C. § 5724a(c)(1) (2012) (emphasis added), but, as we have previously recognized, it "does not have to do so." *Scott E. Beemer*, CBCA 4250-RELO, 15-1 BCA ¶ 35,960, at 175,712. Similarly, both Federal Travel Regulation (FTR) 302-6.6, which implements that statutory authorization, and JTR 5772 leave it to the agency to decide when to grant TQSE. *See* 41 CFR 302-6.6 (2017) (FTR 302-6.6) ("Must my agency authorize payment of a TQSE allowance? No, your agency determines whether it is in the Government's interest to pay TQSE."); JTR 5772 ("TQSE is a discretionary, not mandatory, allowance"); JTR 5774-D.1 ("The [agency], not the employee, determines if TQSE is necessary."). Accordingly, "whether to provide reimbursement for [TQSE] is a determination which is wholly within the discretion of the agency." *Christopher Sickler*, CBCA 1010-RELO, 08-1 BCA ¶ 33,825, at 167,421. "'[W]e honor [agency] determinations' regarding TQSE 'unless they are arbitrary or capricious.'" *Beemer*, 15-1 BCA at 175,712 (quoting *Jerry Hersh*, CBCA 3376-RELO, 14-1 BCA ¶ 35,534, at 174,135).

The agency's denial was rational. Under FTR 302-6.7, one of the conditions for receipt of a TQSE allowance is that the "agency authorize[] it before [the employee] occup[ies] the temporary quarters." 41 CFR 302-6.7(a); *see* JTR 5774-D.2 ("TQSE must be authorized before temporary lodging is occupied and may not be approved after the fact for any days that have passed before TQSE is initially authorized"). We have previously approved the denial of TQSE where authorization was not obtained before the employee incurred such expenses. *See, e.g.*, *Sam Tyson, Jr.*, CBCA 2311-RELO, 11-1 BCA ¶ 34,745, at 171,044-45; *Sickler*, 08-1 BCA at 167,421. Although travel orders may, in limited circumstances, be amended retroactively to conform with applicable statutes and regulations or to correct an agency error or inadvertence in preparing the authorization, *see Peggy L. Clevenger*, CBCA 3854-RELO, 14-1 BCA ¶ 35,796, at 175,080, there is no evidence here that the agency intended, but mistakenly failed, to include TQSE in Mr. Moynihan's original PCS orders. In fact, the agency presents evidence that, even if TQSE had been timely requested, the USSTRATCOM Chief of Staff would not have approved it because TQSE was deemed unnecessary for attracting qualified employees, a reasonable rationale that Mr. Moynihan has presented no basis for challenging.

Mr. Moynihan argues that, because USSTRATCOM has no written or coherent policy on TQSE for overseas returnees, the agency's denial of TQSE was automatically arbitrary and capricious and that, until such a written policy is developed, TQSE claims should be

granted. The statute authorizing agencies to provide TQSE designates the Administrator of General Services to develop regulations implementing that authorization, 5 U.S.C. §§ 5738, 5724a(c)(1), and the Administrator fulfilled that duty by promulgating the previously identified TQSE provisions of the FTR. The Department of Defense (DoD), through the JTR, has provided additional guidance to DoD agencies that "applies to the extent it is consistent with the FTR." *Dean W. Yoder*, CBCA 5426-RELO, 17-1 BCA ¶ 36,893, at 179,787. Mr. Moynihan has identified no statute or regulation that would require individual agencies, such as USSTRATCOM, to adopt additional written TQSE policies or to develop further written guidance regarding TQSE. Without such a requirement, "the absence of such a writing hardly indicates arbitrary and capricious behavior." *Alsup v. Northwest Shoals Community College*, No. 3:15-CV-00248-CLS, 2016 WL 5253212, at *15 (N.D. Ala. Sept. 22, 2016); *see Matherly v. Gonzales*, No. 5:11-CT-3020-BR, 2015 WL 2371550, at *7 (E.D.N.C. May 18, 2015) ("While written guidelines regarding such procedures are certainly preferable, the court cannot conclude that the lack of such formal policies renders [the agency's] . . . practices arbitrary or irrational."), *aff'd*, 859 F.3d 264 (4th Cir.), *cert. denied*, 138 S. Ct. 399 (2017); *Coady Corp. v. Toyota Motor Distributors, Inc.*, 346 F. Supp. 2d 225, 241 (D. Mass. 2003) ("The lack of a written policy is not . . . *per se* arbitrary and unfair because nothing in [the statute at issue there] requires . . . a written policy.").

In fact, it is the *absence* of an agency-level written policy (beyond the wide parameters set forth in the FTR and in JTR 5772 and 5774) that keeps the scope of the agency's discretion broad. Were an agency to issue its own agency-level policies or regulations regarding TQSE, the agency could voluntarily impose upon itself standards with which it would be obligated to comply, *Timothy J. Fisher*, CBCA 4978-RELO, 16-1 BCA ¶ 36,243, at 176,832, and an agency's failure to apply them could, in appropriate circumstances, constitute an abuse of discretion. *See ThinkGlobal, Inc. v. Department of Commerce*, CBCA 4410, 16-1 BCA ¶ 36,489, at 177,796-97; *Fisher*, 16-1 BCA at 176,832. Absent the agency's adoption of such tangible standards, though, it is extremely difficult for a claimant to show an abuse of discretion. *ThinkGlobal*, 16-1 BCA at 177,796-97; *see Baird Corp. v. United States*, 1 Cl. Ct. 662, 664 n.2 (1983) ("the more discretion that underscore[s] a challenged determination, the heavier the burden of proof the [challenger] ha[s]" in seeking to overturn it). Here, having identified no specific standards that the agency was required, but failed, to apply in deciding whether to authorize TQSE, Mr. Moynihan has no basis for showing that USSTRATCOM's denial of TQSE was arbitrary, capricious, or an abuse of discretion.

Mr. Moynihan also complains that, before he departed Stuttgart, one of his USAFRICOM contacts informed him that, even though his original PCS orders indicated no TQSE, that indication would not affect his ability to obtain TQSE retroactively once he arrived at his new duty station in Nebraska. To the extent that Mr. Moynihan is alleging that he received ill-informed advice that affected his TQSE entitlement, "incorrect advice

provided by government officials cannot create or enlarge entitlements that are not authorized by statute or regulation." *Linda Cashman*, CBCA 3495-RELO, 14-1 BCA ¶ 35,535, at 174,136.

To the extent that Mr. Moynihan asserts that he was treated differently by USSTRATCOM than other TQSE applicants, we need not consider that argument because Mr. Moynihan has presented no evidence of disparate treatment. *See Lamonte A. Johnson*, CBCA 4967-RELO, 16-1 BCA ¶ 36,271, at 176,925 (declining to consider disparate treatment argument in TQSE context where no evidence of such treatment existed).

Decision

For the foregoing reasons, Mr. Moynihan's claim is denied.

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