

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

May 31, 2001

GSBCA 15475-RELO

In the Matter of ROURKE B. O'FLAHERTY

Rourke B. O'Flaherty, Washington, DC, Claimant.

R. Michael Imphong, Chief, Allowances Unit, Personnel Resources Compensation and Entitlements, Department of the Air Force, Washington, DC, appearing for Department of the Air Force.

HYATT, Board Judge.

Claimant, Rourke B. O'Flaherty, accepted a permanent change of station (PCS), effective August 1999, under which he transferred from the Army to the Air Force and relocated from Heidelberg, Germany, to the Washington, D.C. area. His claim concerns reimbursement of temporary quarters subsistence expenses (TQSE).

Mr. O'Flaherty states that prior to his return to the United States he attempted to determine the relocation benefits that would be forthcoming at the new position. He was unable to obtain any explanation in Heidelberg of the nature of his TQSE benefits, but assumed that the payments would be similar to those provided when he originally moved to Germany with the Army.

Mr. O'Flaherty, his spouse, and two children returned to the United States on August 17, 1999. Because his house in northern Virginia was occupied by renters, claimant and his family were unable to reoccupy it until November 22, 1999. The Air Force authorized TQSE for this period.

Since all of his expenses had been covered when he previously moved from the continental United States to Germany, Mr. O'Flaherty assumed he would similarly be reimbursed for all out-of-pocket expenses upon his return. He undertook considerable efforts to confirm his understanding with Air Force personnel when he transferred, but was unable to obtain any specific information about TQSE benefits. When he returned to the Washington, D.C., area, Mr. O'Flaherty and his family checked into two rooms at the Tysons Corner Marriott, paying the government rate of \$118 per room per day. Claimant chose this hotel because it was close to work, to his old home, and to his children's school. He was told by agency personnel that the rate was reimbursable. He was also told to submit vouchers on

a thirty-day basis. Claimant became especially concerned when his initial payments were short of the amounts claimed. He asked about the reduced payments and was informed that the shortfalls were attributable to taxes taken out. He further states that he was repeatedly told that his expenses were within limits and he thus believed he would eventually be reimbursed. Subsequent payments reflected even greater shortfalls, but Mr. O'Flaherty was still not able to obtain helpful and accurate information from the personnel monitoring his TQSE vouchers.

Eventually, Mr. O'Flaherty learned that under applicable regulations his TQSE entitlement was pegged to the standard per diem rate for the continental United States (CONUS), which was \$55 for lodging and \$30 for meals and incidental expenses for a daily rate of \$85 per day. The entitlements for his spouse and dependent children were proportionately less. Because he could not obtain accurate information about the maximum level of expenses he could claim while on TQSE, however, Mr. O'Flaherty incurred considerably more in temporary living expenses than the maximum amounts for which the Air Force could reimburse him. In total, Mr. O'Flaherty expended \$42,710.22 in expenses while living in temporary quarters; his maximum reimbursement under the Joint Travel Regulation (JTR) was limited to \$18,515.45. Some \$4116 of the unreimbursed expenses was for lodging and the remainder was for the cost of meals and incidental expenses.

In its response to Mr. O'Flaherty's request for review, the Air Force acknowledges its contribution to this situation, admitting that "[t]here is no justification for Mr. O'Flaherty's encounter with staff unfamiliar in their area of responsibility" and further stating that "[t]he lack of guidance and service that Mr. O'Flaherty experienced is a discredit to the Air Force and regrettable." Nonetheless, the agency also points out, it cannot reimburse an employee for TQSE in excess of the maximum amount permitted by statute and regulation, even when the agency has provided erroneous or no information to the employee concerning eligibility for reimbursement.

Discussion

Mr. O'Flaherty seeks our review of the Air Force's disallowance of the additional amounts he spent over the regulatory maximum. In claimant's opinion, the regulations set forth in the JTR, which he consulted after he finally was informed what the applicable rates were, are unclear and "confusing in the extreme." He further states that had the regulations been clearer, or had Air Force personnel been able to explain his TQSE benefits properly, he could have made other, less expensive, arrangements while waiting to reoccupy his house.

The starting place to determine the benefits available in connection with a federal civilian employee's permanent change of station (PCS) is the Federal Travel Regulation (FTR), which is promulgated by the Administrator of General Services pursuant to statute, 5 U.S.C. § 5707 (1994 & Supp. V 1999). The FTR applies to employees of the Federal Government and has the force and effect of law. Murray Lumpkin, GSBCA14513-TRAV, 98-2 BCA ¶ 30,042; Russell Strach, GSBCA 13675-RELO, 97-1 BCA ¶ 28,695 (1996). The FTR is supplemented for civilian employees of the Defense Department by the JTR. Both the FTR and the JTR provide specific guidance with respect to the payment of TQSE for a relocating federal employee. Both regulations also, as a general guideline, advise the government traveler on official business, whether on permanent duty travel (relocating) or on temporary duty travel, to "exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business." 41 CFR 301-2.3 (1999); JTR C1058-A; see Wendy Castineira, GSBCA 15092-RELO, 00-1 BCA ¶ 30,740 (1999); Wesley G. Chubb, GSBCA 13672-RELO, 97-2 BCA ¶ 29,034.

Section 302-5.100 of the FTR provides that the agency will pay the actual expenses incurred during the occupancy of temporary quarters providing that the expenses are reasonable and do not exceed the maximum allowable amount. The employee is entitled to the full amount of the per diem for the first thirty days of TQSE; his or her accompanying spouse and children over age twelve each qualify for three quarters of the applicable per diem rate for the first thirty days of TQSE. Children under the age of twelve receive half the applicable per diem rate. After the first thirty days of TQSE, the maximum daily amount for additional days of TQSE is three quarters of the applicable rate for the employee; half the applicable per diem rate for the spouse and children over twelve; and four tenths of the applicable rate for children under the age of twelve. 41 CFR 302-5.100. The FTR states that the "applicable per diem rate" for TQSE for locations within the continental United States (CONUS) is the standard CONUS rate.

The pertinent provision of the JTR essentially sets forth the same information, in somewhat greater detail, and with various examples intended to illustrate how the regulation is applied. JTR C13205. This section refers the reader to Appendix D for the standard CONUS rate. Appendix D sets forth both the standard CONUS rate and rates for various cities and localities within the United States. The reader must refer to Appendix A to determine that the term "standard CONUS rate" prescribes the rate for any localities within the continental United States that are not specifically listed in Appendix D and "is also the per diem rate prescribed for all locations within CONUS when permanent duty travel is involved." The Board has previously recognized that the JTR sections dealing with TQSE,

which is permanent duty travel, are "not a model of clarity." Ricky E. Wood, GSBCA 15110-RELO, 00-1 BCA ¶ 30,752.

Although the Air Force is sympathetic and apologetic about Mr. O'Flaherty's circumstances, nonetheless, it has correctly recognized that erroneous advice, and failure to provide any advice at all, cannot override the regulations that govern payment of TQSE benefits. Elizabeth Lynn Taylor, GSBCA 15128-RELO, 00-1 BCA ¶ 30,749; Cheryl A. Korman, GSBCA 14916-RELO, 99-2 BCA ¶ 30,419. Under applicable regulations, claimant's maximum eligibility for TQSE payments was limited to the standard CONUS per diem rate, as modified by the sliding scale for accompanying family members and for reimbursement of expenses after the first thirty days. Claimant has already been reimbursed the maximum amount allowed. Neither the Air Force nor the Board may reimburse the additional expenses Mr. O'Flaherty incurred while occupying temporary quarters.

The Air Force has requested that, if the Board cannot provide relief under an existing statute or regulation, the Board send the matter to the Administrator of General Services, for possible referral to Congress under the Meritorious Claims Act, 31 U.S.C. § 3702 (d) (Supp. V 1999). In accordance with this request, we will forward Mr. O'Flaherty's claim to the appropriate office within the General Services Administration.

CATHERINE B. HYATT
Board Judge