UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 3, 2016

CBCA 5424-RELO

In the Matter of PATRICK S. HORAN

Patrick S. Horan, Wiesbaden, Germany, Claimant.

Yanir M. Hill, Assistant Deputy Chief of Staff, and Ilona M. Keller, Human Resources Specialist, Civilian Personnel Directorate, Department of the Army, APO Area Europe, appearing for Department of the Army.

LESTER, Board Judge.

Claimant, Patrick S. Horan, asks us to review a decision of the Department of the Army (Army) denying his request for a foreign transfer allowance (FTA) covering a four-day period. For the reasons set forth below, we grant Mr. Horan's request for the requested FTA for the period ending May 12, 2016, when he departed from his original United States post of assignment, and we direct the Army to consider whether to reimburse Mr. Horan for expenses that he incurred over the course of the next two days as travel costs.

Background

On or about April 6, 2016, the Army issued permanent change of station (PCS) orders transferring Mr. Horan from his former duty station at the White Sands Missile Range (outside of Las Cruces, New Mexico) to his current duty station in Wiesbaden, Germany. Pursuant to the PCS orders, Mr. Horan was to report for duty in Wiesbaden on May 15, 2016.

The PCS orders provided for the shipment of Mr. Horan's personally owned vehicle (POV) to Wiesbaden. The nearest vehicle processing center (VPC), through which the Army

would ship Mr. Horan's POV to Wiesbaden, was in Dallas, Texas, which was more than a 600-mile drive from Las Cruces.

The PCS orders authorized Mr. Horan and his family to travel from Las Cruces to Wiesbaden by rail, air, and/or personally owned conveyance (POC). The PCS orders also authorized per diem for both Mr. Horan and his dependents while on travel.

For two nights beginning May 10, 2016, Mr. Horan and his family, having apparently vacated their Las Cruces residence, stayed at a hotel in Las Cruces at a rate of $94 plus taxes per night, an amount within the General Services Administration's Fiscal Year (FY) 2016 maximum per diem lodging rates for the Las Cruces area. On May 12, 2016, Mr. Horan and his family departed Las Cruces in their POV and drove to the Dallas area. Upon arrival late that evening, the Horan family checked into an area hotel well within the GSA maximum lodging per diem for the Dallas area. The next morning, they dropped their POV at the Dallas VPC for shipment to Wiesbaden. They then stayed a second night at the Dallas-area hotel and, on May 14, 2016, departed from the Dallas-Fort Worth International Airport on a direct flight to Germany.

On or about July 14, 2016, Mr. Horan submitted a request for payment of four days of an FTA for himself and his family members. He sought a total of $424.52 for the two first days (from May 10 through 12) when he and his family stayed in a hotel in Las Cruces, and a total of $440.18 for the next two days (from May 12 through 14) when they were at a hotel in the Dallas area.

On July 25, 2016, an Army representative informed Mr. Horan that he was not entitled to an FTA for any of the four days. According to the representative, only those individuals who depart for their new overseas duty station from their original home base in the United States are entitled to an FTA. Because Mr. Horan and his family departed from the Dallas airport rather than from the airport closest to Las Cruces, they were not entitled to any FTA. Although recognizing that the closest VPC to Las Cruces was in Dallas, the Army representative stated that, to recover an FTA, Mr. Horan would have to have traveled to Dallas to deliver his vehicle to the VPC and then traveled back to Las Cruces, after which he and his family could then have departed for Wiesbaden. Because Mr. Horan did not follow that routing, the Army denied his FTA claim in its entirety.

Mr. Horan subsequently submitted his claim to the Board.

Discussion

General Requirements For Obtaining A Foreign Transfer Allowance

"The FTA is paid pursuant to implementing regulations issued by the Secretary of State and set out in the Department of State Standardized Regulations (DSSR)." *Gregory J. Bird*, GSBCA 16110-RELO, 04-1 BCA ¶ 32,425, at 160,478 (2003).[1] The DSSR defines the FTA as "an allowance under 5 U.S.C. 5924(2)(A) for extraordinary, necessary and reasonable expenses, not otherwise compensated for, incurred by an employee incident to establishing him or herself at any post of assignment in a foreign area, including costs incurred in the United States . . . prior to departure for such post." DSSR 241.1(a).

One of the four reimbursable elements of an FTA is a "predeparture subsistence expense," which provides reimbursement of "lodging, meals (including tips), laundry, cleaning and pressing expenses in temporary quarters for [the] employee and each member of [his or her] family." DSSR 241.2(c). The predeparture subsistence expense is available "for up to 10 days before final departure from a post in the United States to a post in a foreign area, beginning not more than 30 days after [the employee and his or her family] have vacated residence quarters." *Id.* "The amount of predeparture subsistence expense granted to an employee for expenses in departing a post in the United States for a post in a foreign area shall be determined according to the maximum per diem rate for the U.S. locality from which transferred and according to family status." *Id.* 242.3. "[T]he 'ten days' referred to in the DSSR may be spent anywhere in the United States 'as long as [the] employee or family members have not begun travel on orders and final departure is from the U.S. post of assignment.'" *Gregory J. Bird*, 04-1 BCA at 160,479 (quoting DSSR 242.3(c)).

Expenses Incurred Before Departure From Las Cruces

The agency here denied Mr. Horan's request for an FTA because he and his family did not fly out of an international airport near the Las Cruces area when leaving for Wiesbaden. The Army asserts that, because Mr. Horan and his family drove to Dallas to deliver their POV to the VPC and then flew directly from Dallas to Germany instead of returning to Las Cruces before departing for Wiesbaden, Mr. Horan does not fit within the parameters of the DSSR requirements for any FTA reimbursement.

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[1] The DSSR governs foreign area travel and relocation of the Department of Defense's civilian employees. *Keith Hill*, CBCA 5029-RELO, 16-1 BCA ¶ 36,295, at 176,994-95 (citing Joint Travel Regulations (JTR), Introduction, B-3.c(1)).

The agency is correct in asserting that, under the DSSR, any FTA expenses have to be incurred before the employee or family members have "begun travel on orders" and before "final departure" of the employee or his family "from the U.S. post of assignment," DSSR 242.3(c), which, in this case, is Las Cruces. "[T]he regulations governing the FTA are unforgiving," and "they do not allow granting the allowance to anyone, no matter the circumstances, for any days after an employee begins travel on orders." *MarieLouise R. Assing,* CBCA 4921-RELO, 15-1 BCA ¶ 36,173, at 176,509. Accordingly, "[a]n employee may be reimbursed for expenses of pre-departure [FTA] only if the [FTA] occurred prior to departing his/her old duty station." *Jessica M. Koldoff*, CBCA 2656-RELO, 12-2 BCA ¶ 35,151, at 172,528.

The dispositive issue with regard to Mr. Horan's FTA claim is identifying when Mr. Horan made his "final departure" from his "U.S. post of assignment." Resolution of that issue is very simple: the record is clear that, from May 10 to 12, 2016, Mr. Horan and his family stayed at a hotel in Las Cruces, Mr. Horan's original duty station area, before they began their travel. When Mr. Horan and his family drove out of Las Cruces for Dallas on May 12, 2016, Mr. Horan made his "final departure from [his] post in the United States," as contemplated by DSSR 241.2(c), or "from the U.S. post of assignment," as contemplated by DSSR 242.3(c). That Mr. Horan then drove more than 600 miles to Dallas before boarding an international flight that would take him to Germany does not make his May 12 departure from his original post of assignment in Las Cruces any less "final," and his May 12 departure from Las Cruces plainly was the start of his travel to Wiesbaden. In such circumstances, the Army's decision to deny Mr. Horan FTA reimbursement for the period from May 10 through 12, when he and his family had vacated their Las Cruces residence and were staying in a hotel in Las Cruces, was erroneous. Mr. Horan is entitled to recover an FTA for the period from May 10 to 12, 2016.

The Army asserts that, because Mr. Horan did not fly out of the Las Cruces area (or, at least, from the international airport nearest to Las Cruces) directly to the international airport in Germany closest to Wiesbaden, he cannot recover any FTA because an FTA-eligible employee must, when making his or her "final departure" from his or her United States post of assignment, travel directly from there to the new foreign duty post. It relies on DSSR 242.3(c), which provides that an employee can receive an FTA if he stays "anywhere in the U.S." during the ten-day FTA period "as long as [the] employee or family members have not begun travel on orders *and* final departure is from the U.S. post of assignment." (Emphasis added.) The Army reads this provision as meaning that final departure *from the United States* must be "from the U.S. post of assignment." When read in conjunction with DSSR 242.1(c), it is clear that the language in DSSR 242.3(c) means only that, once the employee and his family make their "final departure" from the employee's U.S. post of assignment to begin their travel to the new foreign duty post, the period for an FTA

comes to an end. The provision cannot mean that the employee is required directly to depart the United States itself from the U.S. post of assignment – if it did, employees assigned to relatively remote United States posts without any nearby local air service could never qualify for an FTA because they could not fly directly out of the United States from their remote United States posts to their new foreign duty posts. We do not read the DSSR as limiting FTAs to employees who happen to be stationed in urban areas with easy access to international airports. To the contrary, the DSSR provisions, read together, provide for an FTA for a limited period of time up until the employee makes his or her "final departure" from the original post for the new foreign post, but without defining how long it might take the employee to get to his or her new foreign duty station or the modes of transportation that the employee might take to get there.

Accordingly, the DSSR does not preclude an employee like Mr. Horan, as long as his travel orders permit travel by POC, from choosing to depart Las Cruces by driving to Dallas and then taking a plane from there to Germany to get to his new foreign duty station. The Army offers no credible reason that we should not consider Mr. Horan's departure from Las Cruces by POC on May 12 to constitute the start of his travel to his new foreign duty post, particularly since it was quickly followed by a direct flight from Dallas to Germany. The Army's application of a requirement for a "final departure" from the United States itself from the airport closest to the original United States post of assignment finds no support in the DSSR.

To the extent that the Army believes that the Board's decision in *Tyler F. Horner*, CBCA 4468-RELO, 15-1 BCA ¶ 35,899, supports its position, the Army is misreading that decision. *Horner* dealt with an employee who sought an FTA for expenses that he incurred at an alternate location in the United States *after* he had already made his final departure from his original United States post of assignment. *Horner*, 15-1 BCA at 175,504. It was because the employee had already made his final departure from his original United States post before incurring expenses at the alternate location, and did not return to or depart from the post of assignment after incurring those expenses, that the employee was precluded from reimbursement for an FTA. *Horner* did not purport to change or add to the requirements of the DSSR.

Here, Mr. Horan is entitled to an FTA until he made his final departure from Las Cruces on May 12, 2016, to begin his journey to his new foreign duty post.

Expenses Incurred After Departure From Las Cruces

Once Mr. Horan and his family made their final departure from Las Cruces on May 12, 2016, Mr. Horan's entitlement to an FTA ended. At that point in time, he had begun

his travel to his new duty station in Wiesbaden (albeit with a scheduled stop in Dallas to drop his POV at the VPC). He cannot recover any FTA for expenses incurred after his final departure from Las Cruces.

Mr. Horan complains that he was not told of any need to return to Las Cruces after delivering his POV to the Dallas VPC if he wanted to continue to be eligible for an FTA and, further, that various literature that the agency provided to him as he was planning his travel did not mention the need to return to his home duty station to continue his FTA. Even if Mr. Horan had been affirmatively misled by the agency's representations or by agency literature, it would not create a reimbursement entitlement because "[t]he Government may not authorize the payment of money in violation of statute or regulation." *Gregory J. Bird*, 04-1 BCA at 160,480. "Payment [of an FTA], in the absence of proper authorization, cannot be justified solely by the fact that a claimant may have relied in good faith and to his or her detriment on the incorrect advice of an agency official or publication." *Id.*; *see Delbert C. Steorts, II*, CBCA 2468-RELO, 12-1 BCA ¶ 34,890, at 171,590 (2011) (Board "has no authority to reimburse an employee for an expense contrary to statute or regulation").

Although we cannot authorize an FTA for the period after which Mr. Horan had made his final departure from Las Cruces, that does not necessarily mean that Mr. Horan personally must cover his costs of travel from May 12 to 14, 2016. Although Mr. Horan cannot recover any FTA after his final departure from Las Cruces, we have recognized in similar circumstances that an employee who had been authorized to travel both by air and by POC might be able to recover his or her expenses as costs of travel:

> We note that the Army authorized [the claimant] to travel from [her original duty post] to Germany by privately owned conveyance as well as by air. If the agency has not already paid the employee for the expenses that she incurred in driving from [the original duty post] to [the location in the United States from which she flew to Germany], it should consider whether those expenses may be paid as costs of travel, even though they may not be paid through the FTA mechanism.

MaryLouise R. Assing, 15-1 BCA at 176,509. Mr. Horan's PCS orders authorize travel by air, by rail, and by POC, and they further authorize per diem for Mr. Horan and his family while on travel. Mr. Horan has indicated that, by flying out of Dallas rather than El Paso (the closest major airport to Las Cruces), he saved the agency over $1000 – he did not incur the expenses that would have been necessary for him to fly back to Las Cruces after he delivered his POV to the Dallas VPC, and he did not incur the additional costs involved in having his family fly out of El Paso (rather than out of Dallas) to Germany, a trip that would have involved a layover and change of planes in, of all places, Dallas. In such circumstances, the

agency, to the extent that it has not already done so, should consider whether Mr. Horan should recover his expenses from his departure from Las Cruces on May 12 through his departure from Dallas on May 14, 2016, as travel costs as part of his journey from Las Cruces to Wiesbaden.

We recognize that the Joint Travel Regulations (JTR) generally do not contemplate "reimbursement of per diem when an employee drives his or her POV to a VPC," *Patrick L. Keller*, CBCA 5151-RELO, 16-1 BCA ¶ 36,384, at 177,360 (citing JTR 5726), which was one of the main reasons, if not the sole reason, that Mr. Horan and his family went through Dallas on their way to Wiesbaden. Nevertheless, that preclusion only applies "when an employee/designated representative makes a *separate* trip to a port/VPC to deliver/pick up the POV," JTR 5726-B.1 (emphasis added), or engages in round-trip travel. *See* Federal Travel Regulation (FTR) 302-9.104, 41 CFR 302-9.104 (2015) (when delivering POV to VPC, "[y]ou may not be reimbursed a per diem allowance for *round-trip travel* to and from the post involved"). Here, Mr. Horan was not making a "separate" trip or a "round-trip" to deliver his POV to the VPC. Instead, the delivery was part of his direct travel from Las Cruces to Wiesbaden. In such circumstances, the preclusion on per diem identified in JTR 5726-B.1 does not necessarily apply, and, for the reasons stated above, the agency should consider whether to reimburse as travel costs a portion or all of the expenses that Mr. Horan and his family incurred in traveling from Las Cruces to Dallas en route to Germany.

Decision

For the foregoing reasons, Mr. Horan is entitled to reimbursement representing an FTA for the time that he and his family spent at a hotel in Las Cruces from May 10 through 12, 2016, prior to the family's "final departure" from that location. We remand this matter to the Army to calculate the appropriate amount of that FTA. Although we cannot grant an FTA for the period from May 12 to 14, 2016, when the family was traveling to and staying in the Dallas area before departing for Wiesbaden, the agency should consider reimbursing Mr. Horan for expenses incurred on those days as costs of travel.

HAROLD D. LESTER, JR.
Board Judge