UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 6, 2008

CBCA 1214-RELO

In the Matter of STEPHEN S.

Stephen S., Washington, DC, Claimant.

Rod Baldwin, Assistant Director for Human Resources, Naval Criminal Investigative Service, Department of the Navy, Washington, DC, appearing for Department of the Navy.

**BORWICK**, Board Judge.

In this matter, claimant, Stephen S., an employee of the Department of the Navy's Naval Criminal Investigative Service (agency or NCIS), contests the agency's assessment of a debt allegedly owed by claimant for erroneous temporary duty (TDY) reimbursement. The agency also refused to pay claimant the amount he claims is due for his temporary quarters subsistence allowance (TQSA). We grant the claim in part.

As to TDY reimbursement, we conclude that the agency correctly found that the TDY orders were erroneous because it had authorized reimbursement of TDY benefits after claimant had transferred to his new permanent duty station (PDS). The agency, in accordance with the Federal Travel Regulation (FTR), properly took corrective action to recover the difference between the amount claimant received on a TDY basis and the amount claimant would have been reimbursed for a permanent change of station.

As for TQSA reimbursement, the agency may properly exercise its discretion, as it says it intends to do, to extend the period of time for TQSA beyond the date claimant reported for duty at his PDS on the basis of the existence of compelling circumstances. The claim is thus granted in part and the matter is returned to the agency to determine the amount of TQSA properly due claimant.

## Background

### Permanent change of station or temporary duty

In January 2005, claimant, a senior employee with NCIS, was assigned as an executive at the agency field office in a foreign country. His tour of duty was scheduled to last through January 2008. While in the foreign country, claimant was accompanied by his wife and children.

Claimant was subject to a mobility agreement and eligible for involuntary reassignment to meet mission requirements. On February 6, 2007, NCIS issued an announcement that claimant had been selected to become a senior manager at NCIS headquarters in Washington, D.C., and that his selection would be effective in either the third or fourth quarter of fiscal year 2007. The agency explains that claimant did not volunteer for this reassignment, but was selected under the mobility agreement. The purported selection was not a grade promotion, but a promotion to a position of greater responsibility within NCIS. Such a reassignment entitles employees to a permanent change of station (PCS) and associated benefits.

On February 26, 2007, NCIS announced that another agent had been selected to fill the executive position in the field office in the foreign country and that his transfer would occur in the fourth quarter of fiscal year 2007.

In order that his children finish the school year in the foreign country, claimant requested that he be allowed to delay his PCS to Washington until December 2007, and if he were needed before then in Washington, that he be briefly assigned to temporary duty there. NCIS management agreed to delay his PCS until December 2007.

On August 3, NCIS directed claimant to report to Washington on a TDY assignment. The NCIS field office issued the travel authorization on August 24, with a "proceed date" of August 29. The TDY period was for 107 days, through December 14, 2007. Although not reflected in the TDY authorization, while on TDY claimant occupied the senior management position, the job for which he had been selected under the mobility agreement.

In the meantime, effective July 31, 2007, the other agent assumed the duties of the executive position in the foreign country, the position from which claimant had been sent on the purported TDY. However, the end of July and August 2007 was a transition period for both claimant and the other agent. From August 16 through August 29, the other agent and claimant jointly conducted turnover activities for the office in the foreign country.

On August 29, 2007, claimant reported for duty on his purported TDY assignment. On September 19, claimant completed a PCS questionnaire to be used by NCIS management in Washington for what claimant thought would be his PCS to Washington in December.[1] Claimant stated in the questionnaire that his PCS transfer would be on or about December 21, with his family transferring on December 21. Claimant chose the fixed-rate method of reimbursement of TQSE.

On September 25, 2007, the agency issued a PCS travel authorization for the transportation of claimant and his family, with the travel occurring on December 21, 2007.

In early October 2007, the Department of the Navy's Office of Inspector General (OIG) commenced an investigation of NCIS's issuance of TDY orders to claimant and two other employees. NCIS requested permission to advise claimant of the investigation so that he might cease incurring TDY expenses.

Claimant says he was informed of the OIG investigation during his meeting with management on October 25, 2007. After that meeting, claimant checked out of his hotel, turned in his rental car, and remained in Washington at his own expense.

Claimant submitted three TDY vouchers. On October 7, 2007, claimant submitted a travel voucher for the period August 29 through September 28. On November 2, claimant submitted a TDY voucher for the period September 29 and 30. On November 8, claimant submitted a TDY voucher for the periods October 1 through 10, October 14 through 16, and October 18 through 31. Claimant says that he has incurred expenses of $16,709.99 of what he maintains should have been reimbursable TDY expenses.

The OIG requested an opinion from the Department of the Navy's Office of Civilian Human Resources (OCHR) as to the correctness of the TDY order NCIS had issued to claimant. By memorandum of November 8, 2007, the OCHR determined: (1) that claimant was definitively notified on February 6, 2007, of his selection and promotion; (2) that claimant's transfer was to be effective in the third or fourth quarter of fiscal year 2007; (3) that claimant requested a delay in his PCS transfer until December to allow his children to complete the school year in the foreign country and that the agency had so agreed as an accommodation to claimant; (4) that when claimant reported for duty on TDY in Washington

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[1] The agency explains that NCIS field offices issue TDY authorizations for their employees on TDY while NCIS headquarters in Washington, D.C., issues all PCS authorizations for employees both at headquarters and at the NCIS field offices.

in August, he was performing the duties of his new permanent position for which he had been selected the previous February; and (5) that when claimant departed the foreign country in August 2007, he had no reasonable expectation of returning there, since his old position in the foreign country had been filled on July 31.

The OCHR recommended the following corrective action: (1) that claimant be promoted to his new position effective August 29, 2007; (2) that his PCS be treated as if it had occurred on August 29, 2007; (3) that it be established that the employee has two years from August 29, 2007, to use his fixed rate TQSE benefit; (4) that all claimant's home leave rights and overseas allowances accruing by virtue of his occupying an overseas position terminate as of August 29, 2007; and (5) that the employee be required to repay all reimbursements from the erroneous temporary duty assignment, including the round-trip air fare.

Throughout this period, the agency refused to permit claimant to return to the foreign country on official business.

Claimant's return trip to the foreign country and the move of claimant's family into temporary quarters

Claimant says that on October 1, 2007, his family packed the first of its two household goods shipments and vacated its permanent military-supplied residence in the foreign country. Claimant states that his family began incurring the TQSA expenses on or about that date.

On December 13, 2007, claimant took annual leave to return to the foreign country at his expense to assist his family in its move. Claimant also attended departure conferences with the foreign country's police officials and other farewell functions with foreign government representatives. Claimant had originally been issued travel orders for this trip, but according to claimant an agency official verbally advised him that the trip was no longer authorized. Consequently, claimant canceled the government air ticket.

## Discussion

Permanent change of station or temporary duty

Statute provides in pertinent part:

Per diem; employees traveling on official business

> (a)(1) Under regulations prescribed pursuant to section 5707 of this title, an employee, *when traveling on official business away from the employee's designated post of duty*, . . . is entitled to any one of the following:
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> > (A) a per diem allowance at a rate not to exceed that established by the Administrator of General Services for travel within the continental United States, and by the President or his designee for travel outside the continental United States;
> >
> > (B) reimbursement for the actual and necessary expenses of official travel not to exceed an amount established by the Administrator for travel within the continental United States or an amount established by the President or his designee for travel outside the continental United States; or
> >
> > (C) a combination of payments described in subparagraphs (A) and (B) of this paragraph.

5 U.S.C. § 5702 (2000) (emphasis added).

TDY per diem is authorized only to employees on official travel away from their posts of permanent duty. *Robert W. Arndorfer*, B-214966 (Dec. 27, 1984) (employee receiving definite notice of transfer not entitled to TDY per diem upon arrival at new duty station). As our predecessor board settling claims for travel and relocation expenses explained, an employee transferred to his or her new permanent duty station may not be placed on temporary duty upon arrival at his new permanent duty station:

> Payment of temporary duty per diem and allowances is authorized only when an employee is traveling away from the employee's permanent duty station. 5 U.S.C. § 5702(a); *Kenneth E. Billings*, GSBCA 15264-TRAV, 00-2 BCA ¶ 30,961. An employee's permanent duty station is the place at which he performs the major portion of his duties and where he is expected to spend the greater part of his time. *John P. DeLeo*, GSBCA 14042-TRAV, 97-2 BCA ¶ 29,156. [Claimant's] transfer to The Pentagon, for permanent duty, was effective on the date he reported for duty there. 41 CFR 302-1.4(1) [now 41 CFR 302-2.4 (2007)]. Because [claimant's] permanent duty station is The Pentagon, he cannot be placed on temporary duty there. Any attempt to amend his travel orders to place him on temporary duty at The Pentagon would be ineffective. *Erwin E. Drossel*, B-203009 (May 17, 1982).

*Timothy C. Ford*, GSBCA 15719-RELO, 02-1 BCA ¶ 31,752, at 156,839.

One exception to this rule occurs when an employee performs a period of temporary duty at his new duty station between the time the employee receives his transfer orders and the stated effective date of those orders if such a period of temporary duty is terminated by a return to the old station on official business. *Arndorfer*.

Here, claimant's old duty position in the foreign country had been filled effective July 31, 2007. Claimant had been selected for the position in Washington, D.C., in February 2007 and the agency had directed him to report for duty on August 3. Claimant transferred to his new duty station on August 29. When claimant traveled from the foreign country to Washington, D.C., he was not "traveling on official business away from his designated post of duty" as required by statute; rather, he was traveling from one permanent duty station to another.

The agency might have relied upon the *Arndorfer* exception to approve claimant's temporary duty in Washington between August 29 and December 21 (the effective date of claimant's unamended PCS orders), if it had allowed claimant's return to the foreign country on official business. However, that exception does not apply because the agency refused to allow claimant's return to the foreign country for official business during that period. The NCIS issuance of TDY orders for claimant's transfer from the foreign country to Washington, D.C., violated 5 U.S.C. § 5701. An agency is not bound by erroneously issued orders. *Defense Intelligence Agency Employee*, CBCA 976-RELO, 08-2 BCA ¶ 33,900. Therefore, the agency acted correctly in treating claimant's PCS transfer orders effective as of August 29.

<u>Temporary Quarters Subsistence Allowance</u>

The statute dealing with quarters allowances provides in pertinent part:

> (a) When Government owned or rented quarters are not provided without charge for an employee in a foreign area, one or more of the following quarters allowances may be granted when applicable:
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> > (1) A temporary subsistence allowance for the reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and his family–
> >
> > . . . .

> (B) for a period of not more than 30 days immediately before final departure from the post after the necessary evacuation of residence quarters.
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> (b) The . . . 30-day period under subsection (a)(1)(B) may . . . be extended for not more than 60 additional days if the head of the agency concerned or his designee determines that there are compelling reasons beyond the control of the employee for the continued occupancy of temporary quarters.

5 U.S.C. § 5923.

The authority to issue regulations implementing the statue has been delegated by the President to the Secretary of State, under Executive Order No. 10,903, § 2. *William P. McBee, Jr.*, CBCA 943-RELO, 08-1 BCA ¶ 33,760; *Richard H. Whittier*, GSBCA 16538-RELO, 05-1 BCA ¶ 32,926. The Secretary has issued the Department of State Standardized Regulations (DSSR) implementing the statute. *McBee*, 08-1 BCA at 167,114. The Department of Defense's Joint Travel Regulations (JTR) provide that the Department follows the TQSA rules established in the DSSR. JTR C1003.

The DSSR provide in pertinent part:

> 122 Scope
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> 122.1 Purpose
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> The temporary quarters subsistence allowance is intended to assist in covering the average cost of adequate but not elaborate or unnecessarily expensive accommodations in a hotel, pension, or other transient-type quarters at the post of assignment, plus reasonable meal and laundry expenses for a period not in excess of 90 days after first arrival at a new post of assignment in a foreign area, ending with the occupation of residence quarters if earlier, or 30 days immediately preceding final departure from the post following necessary vacating of residence quarters.
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> 122.2 Extension
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> The 90 and 30 day temporary quarters subsistence periods may be extended up to but not more than an additional 60 days in each case if it is determined by the head of agency that compelling reasons beyond the control of the employee require continued occupancy of temporary quarters.

. . . .

124.1 Commencement

If the head of agency determines that it is necessary for an employee to occupy temporary quarters immediately preceding final departure from the post, the grant of a temporary quarters subsistence allowance may commence as of the latest of the following dates:

a. the date following the necessary vacating of government owned or leased quarters or termination of the living quarters allowance grant (exception: the head of agency or designee may determine that up to five days are required for payment of both the living quarters allowance and the temporary quarters subsistence allowance because the employee must necessarily vacate permanent residence quarters in order to comply with stringent lease requirements for cleaning and repair);

b. the date expenditures for temporary lodging are first incurred following the necessary vacating of residence quarters. However, see Section 124.33 for employee occupying no cost temporary quarters.

The agency head or designee may authorize the grant of temporary quarters subsistence allowance up to five days prior to the termination of the grant of living quarters allowance if such agency head or designee determines that it is necessary for the employee to vacate existing quarters in order to meet lease requirements for cleaning and repair.

124.2 Termination

A temporary quarters subsistence allowance granted immediately preceding the employee's final departure from the post shall terminate as of the earliest of the following dates:

a. on the 31st day following commencement of the grant unless an extension is authorized under Section 122.2 by the head of agency;

b. the date expenses for temporary lodging are no longer incurred; however, see Section 124.33 for employee occupying no cost temporary quarters;

c. the date of the employee's departure, or the date of departure of family members if later, under transfer orders. Where the employee's departure for transfer precedes that of family members, the temporary quarters subsistence allowance at the previous post shall not extend beyond the date preceding the date of the arrival of the new employee at the new post; or

d. the date of separation from a Federal agency.

DSSR 122, 124.

In this matter, the agency states that it was compelled by DSSR 124.2(c) to deny claimant's family any TQSA allowance because the agency properly treated claimant as having arrived at his new permanent duty station on August 29, 2007, well before claimant's family entered temporary quarters on October 1, 2007. The family entered temporary quarters under the assumption that claimant's permanent duty transfer would not occur until December 21, 2007, under the erroneously issued PCS transfer orders of September 25, 2007, later corrected to provide for his transfer on August 29.

In its submission of September 4, 2008, the agency states that it is prepared to pay claimant the allowable TQSA allowance, if justified, consistent with the provisions of DSSR 124.2.

The "compelling reasons" provisions of 5 U.S.C. § 5923(b) and DSSR 122.2 contemplate an agency determination based upon an employee's individual circumstances as to extension of TQSA beyond the ending date. In short, the statute and provisions of the DSSR allow a maximum of ninety days of TQSA, if the period is appropriately authorized. *Whittier*, 05-1 BCA at 163,103. It is not an abuse of discretion for the agency to make a determination that in this case compelling reasons exist that would justify the extension of the TQSA beyond the initial termination date. The agency is therefore free to compensate claimant for his family's allowable TQSA (which in fact began on October 1, 2007), for the period August 29 through November 27, 2007.

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ANTHONY S. BORWICK
Board Judge