UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 20, 2015

CBCA 4250-RELO

In the Matter of SCOTT E. BEEMER

Scott E. Beemer, Mesa, AZ, Claimant.

Diane Foose, Associate Legal Advisor, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Washington, DC, appearing for Department of Homeland Security.

LESTER, Board Judge.

Claimant, Scott E. Beemer, requests that we order Immigration and Customs Enforcement (ICE) to reimburse him for 120 days of temporary quarters subsistence expenses (TQSE) following his permanent change of station (PCS) from Kansas City, Missouri, to Mesa, Arizona. For the reasons discussed below, we deny his request.

Background

On March 24, 2014, Mr. Beemer received a notice by e-mail message acknowledging a management-directed reassignment from his position in Kansas City to a similar position in Mesa. In that notice, ICE indicated that "[r]elocation expenses are authorized," but instructed him not to "incur any relocation expenses until you receive your travel orders."

Mr. Beemer subsequently completed a pre-printed questionnaire incident to his relocation. In that questionnaire, in response to the question, "Will you need temporary quarters at your new station?," Mr. Beemer responded, "No." He also indicated that he would not need temporary quarters at his current duty station in Kansas City because "I have a motorhome." He represented that he intended to purchase a home at his new duty station.

On April 22, 2014, the agency issued PCS travel orders authorizing payment to Mr. Beemer of various relocation costs, including real estate expenses associated with the purchase of a home in Mesa, costs for the shipment and storage (for sixty days, later amended to ninety days) of household goods, mileage costs, and per diem for four days of travel from Kansas City to Mesa. Under the headings "House Hunting Trip Payment Method" and "Temporary Quarters Payment Method," the PCS order indicated "N/A."

Mr. Beemer and his family traveled from Kansas City to Mesa in late July 2014. In August 2014, Mr. Beemer requested reimbursement for meals and incidental expenses (M&IE) for himself and his family associated with that travel, as well as mileage allowance for two personally-owned vehicles. In response to an agency question about the absence of any request for lodging expenses, Mr. Beemer explained that, during the trip, he and his family stayed in the motor home that he drove to Mesa, making lodging expenses unnecessary. After some adjustments, the agency approved that request.

Mr. Beemer asserts that, beginning August 1, 2014, he utilized his motor home as temporary quarters in Mesa while he and his family searched for a permanent home, "park[ing] the vehicle in a RV [recreational vehicle] Park suitable for accommodating the motorhome." In September 2014, Mr. Beemer submitted a voucher seeking reimbursement for thirty days of TQSE in the amount of $3556.40. On October 8, 2014, the agency denied Mr. Beemer's request in its entirety, stating that his PCS orders did not authorize reimbursement of TSQE "because you indicated that you did not need [temporary quarters] on your transfer questionnaire because you had a Motorhome."

Mr. Beemer responded to that denial with an e-mail message stating that, when using his motor home for lodging, "it is very reasonable to believe that you can't park these vehicles anywhere for free." An ICE financial program specialist replied that she could not process a voucher for temporary quarters because "it is not an entitlement on your orders," but that he could reach out to individuals responsible for his orders to request an amendment to add TQSE. On October 16, 2014, a supervisory auditor in ICE's Financial Operations office in Dallas, Texas, reiterated that suggestion. Nevertheless, on October 21, 2014, in response to Mr. Beemer's request for reconsideration, the agency reaffirmed its denial.

Rather than seeking an amendment to his travel orders, Mr. Beemer filed a claim with the Board on October 29, 2014, seeking payment of $3556.40 for his and his family's first thirty days in Mesa. In his submission to the Board, he also requested payment of $6838.50 to cover an additional ninety days of TQSE beginning September 1, 2014, even though he has not submitted a claim to ICE seeking those specific costs.

Discussion

I. Mr. Beemer's First Thirty-Day TQSE Request

"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)). Nevertheless, "[i]t is totally within the discretion of the agency whether or not to authorize TQSE." *Neal K. Matsumura*, CBCA 2341-RELO, 11-2 BCA ¶ 34,829, at 171,363; *see Christopher Sickler*, CBCA 1010-RELO, 08-1 BCA ¶ 33,825, at 167,421 ("whether to provide reimbursement for [TQSE] is a determination which is wholly within the discretion of the agency"); 41 CFR 302-6.6 (2013) ("Must my agency authorize payment of a TQSE allowance? No, your agency determines whether it is in the Government's interest to pay TQSE.").

Mr. Beemer argues that agencies are required to pay certain relocation expenses to their employees pursuant to 5 U.S.C. § 5724(a)(2) (2012). The cited statute, though, covers payment for the transport and temporary storage of household goods, a benefit that the agency here has already authorized and is not at issue. TQSE is governed by 5 U.S.C. § 5724a(c)(1), which "says that 'an agency *may* pay' these benefits," but does not have to do so. *Sickler*, 08-1 BCA at 167,421 (italics in original). "[W]e honor [agency] determinations" regarding TQSE "unless they are arbitrary or capricious." *Jerry Hersh*, CBCA 3376-RELO, 14-1 BCA ¶ 35,534, at 174,135. Here, although Mr. Beemer believes that the agency should have realized his need for TQSE when he stated on his relocation questionnaire that he would be staying in his motor home, we cannot find the agency's actions in relying on Mr. Beemer's own statement that he did not need TQSE to be arbitrary or capricious. We must deny his challenge to the agency's TQSE decision.

II. Mr. Beemer's Additional Ninety-Day TQSE Request

ICE has requested that we dismiss Mr. Beemer's request for an additional ninety days of TQSE because he never submitted a claim to the agency requesting those costs.

Congress vested in the Administrator of General Services the authority to resolve "claims involving expenses incurred by Federal civilian employees . . . for relocation expenses incident to transfers of official duty station," 31 U.S.C. § 3702(a)(3), an authority that the Administrator has redelegated to the Board. Implementing that delegation, CBCA Rule 401 identifies the procedures that apply to the Board's review of "[c]laims for reimbursement of expenses incurred in connection with relocation to a new duty station." 48 CFR 6104.401(b) (2014). Pursuant to that rule, "[a]ny claim for entitlement to travel or

relocation expenses must first be filed with the claimant's own department or agency (the agency)." *Id.* 6104.401(c). After "[t]he agency . . . initially adjudicate[s] the claim," the "claimant disagreeing with the agency's determination may request review of the claim by the Board." *Id.*

"Ordinarily, under Rule 401, we would dismiss a travel or relocation claim filed with the Board that had not first been presented to the agency." *Leon Rodgers, Jr.*, GSBCA 14678-TRAV, 99-1 BCA ¶ 30,376, at 150,156; *see Steve Resch*, GSBCA 14526-RELO (Mar. 26, 1998) (dismissing relocation expenses claim as premature because it had never been submitted to agency for initial adjudication). Nevertheless, the requirement for a prior claim submission to and decision by the agency comes from the Board's rules, not from the language of 31 U.S.C. § 3702(a)(3) itself. "[I]n the absence of a statute requiring exhaustion of remedies, application of a rule like this one is a matter of judicial discretion." *Rodgers*, 99-1 BCA at 150,156. Under the futility exception to the exhaustion doctrine, "[w]here a litigant can demonstrate that resort to administrative remedies would be futile because of the certainty of an adverse decision, exhaustion of administrative remedies will be excused." *Id.*; *see Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990) ("A party need not exhaust his administrative remedies where invoking such remedies would be futile."). That futility principle applies to the requirements of Rule 401. *Richard M. Biter*, GSBCA 16062-RELO, 04-1 BCA ¶ 32,528, at 160,880 (2003); *Rodgers*, 99-1 BCA at 150,156.

Here, Mr. Beemer's claim for an additional ninety days of TQSE seeks costs similar to those in the TQSE claim that he actually submitted to the agency, and it suffers the same defect as that claim: his official orders do not authorize TQSE. In these circumstances, we can review his claim based upon the futility exception, but we deny it for the same reasons that we have denied his other TQSE claim.

Decision

For the foregoing reasons, we deny Mr. Beemer's claims for TQSE. We take no position on whether, in the circumstances here, the agency could elect to amend Mr. Beemer's PCS orders to add TQSE if he were now to seek such an amendment.

HAROLD D. LESTER, JR.
Board Judge