UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 28, 2016

CBCA 4981-RELO

In the Matter of NICHOLAS J. THACKER

Nicholas J. Thacker, FPO Area Pacific, Claimant.

Diana L. King, Assistant Counsel, Space and Naval Warfare Systems Center, Pacific, Department of the Navy, San Diego, CA, appearing for Department of the Navy.

DANIELS, Board Judge (Chairman).

The Department of the Navy transferred Nicholas J. Thacker from California to Japan in August 2014. In conjunction with the move, the Navy paid Mr. Thacker a living quarters allowance (LQA), a temporary quarters subsistence allowance (TQSA), and a foreign transfer allowance (FTA). None of these allowances was paid promptly. Mr. Thacker took out a personal loan while he was in Japan, and he did not repay it until after he had received all of the allowances due him. He claims entitlement to reimbursement of the interest he paid on the loan, while waiting to be paid the allowances. The Navy says that it "could find no authority, and Mr. Thacker has offered no authority, under which the Agency would be permitted to reimburse his personal loan interest." Furthermore, the Navy maintains, even if payment of interest is required, the agency should not have to pay the entire amount claimed, since the employee paid the loan issuer a standard monthly fee, rather than using partial payments of the allowances to reduce the loan balance.

Discussion

The Supreme Court established in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), that "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Id.* at 311. When our predecessor board, the General Services Board of Contract Appeals, was first presented with

the question of whether an agency must pay interest on late-paid relocation benefits, the board denied the employee's claim because no such waiver was in existence at the time the employee moved, in 1997. *Synita Revels*, GSBCA 14935-RELO, 00-1 BCA ¶ 30,716 (1999), *reconsideration denied*, 00-1 BCA ¶ 30,896.

After the claimant in *Revels* relocated, but before we issued our decision in that case, Congress in the Travel and Transportation Reform Act of 1998 waived sovereign immunity by granting interest to employees on certain tardy payments:

> In accordance with regulations prescribed by the Administrator of General Services, the head of an agency shall ensure that the agency reimburses an employee who submits a proper voucher for allowable travel expenses in accordance with applicable travel regulations within 30 days after submission of the voucher. If an agency fails to reimburse an employee who has submitted a proper voucher within 30 days after submission of the voucher, the agency shall pay the employee a late payment fee as prescribed by the Administrator.

Pub. L. No. 105-264, § 2(g), 112 Stat. 2350, 2352 (1998).

Following this directive, the Administrator promulgated sections 301-52.17 through -52.20. of the Federal Travel Regulation (FTR). Under these rules, an agency "must reimburse [an employee] within 30 calendar days after [the employee] submit[s] a proper travel claim to [his] agency's designated approving office." *Id.* 301-52.17 (2014). The agency must notify an employee, as soon as practicable and not later than seven working days after receipt of a travel claim, if the claim contains any error. *Id.* 301-52.18. The agency must pay the employee a "late payment fee," in addition to the proper amount of the claim, if the claim is not paid within thirty calendar days of its submission to the approving official. *Id.* 301-52.19. The agency must calculate the "late payment fee" in one of two ways: it may either (a) calculate the fee "using the prevailing Prompt Payment Act Interest Rate beginning on the 31st day after submission of a proper travel claim and ending on the date on which payment is made" or (b) "[r]eimburse [the employee] a flat fee of not less than the prompt payment amount, based on an agency wide average of travel claim payments." *Id.* 301-52.20. In addition, if the employee had travel expenses charged to a government-issued credit card, the agency must also pay any late payment charges the issuer imposed on the card holder. *Id.*

In *Revels*, the General Services Board questioned whether the then-new statutory provision might apply to relocation claims as well as temporary duty travel claims. 00-1 BCA ¶ 30,716, at 151,712-13 n.7. The FTR, in section 301-52.17, resolves that matter. It

provides that claims for certain relocation allowances "are exempt from this provision." By making some claims for relocation allowances exempt, the regulation effectively makes claims for all other relocation allowances subject to the prompt payment provisions.

With this background, we review Mr. Thacker's claim.

Mr. Thacker received three types of allowance – an LQA, a TQSA, and an FTA. One of these, the LQA, is not a relocation allowance; it is, instead, a species of compensation which accrues to an employee after he has relocated. The FTR provisions in question do not address compensation, so they cannot provide for interest on late payments of LQA. *Cf. Mary D. Wilson*, CBCA 1510-RELO, 09-2 BCA ¶ 34,184 (this Board, which settles claims for civilian federal employee travel and relocation expenses, has no authority to make a determination concerning entitlement to LQA).

The FTR provisions specifically exempt, from the requirement that agencies make late payment fees on travel claims, claims for temporary quarters subsistence expenses (TQSE) which are not paid as a lump sum. 41 CFR 301-52.17(d). TQSE is a benefit which may be paid to employees who relocate within the United States; TQSA is a benefit which may be paid to employees who relocate to a foreign area. *Id.* 302-6.2, -6.4; Department of State Standardized Regulations (DSSR) 121. Because the two allowances have similar purposes, the Board applies principles from one to situations involving the other. *Richard H. Whittier*, GSBCA 16538-RELO, 05-1 BCA ¶ 32,926; *Okyon Kim Ybarra*, GSBCA 15407-RELO, 01-1 BCA ¶ 31,334. Mr. Thacker received TQSA not as a lump sum, but rather, on an actual expense basis. Applying the FTR principle as to late payments of TQSE to the payment of TQSA, we hold that his claim for interest on late payments of TQSA is barred by the regulation's section 301-52.17(d).

Whether the FTA, or portions thereof, is subject to the late payment fee provision requires further analysis. An FTA is "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, its territories, possessions, the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands prior to departure for such post." DSSR 241.1(a). The FTA is composed of four elements: (a) a lump sum miscellaneous expense portion to assist with certain extraordinary costs; (b) a lump sum wardrobe expense portion; (c) a predeparture subsistence expense portion applicable to lodging, meals, laundry, and cleaning and pressing expenses while the transferring employee and family are in temporary quarters; and (d) a lease penalty expense portion to help offset the expense of unavoidable penalties for the early termination of a residence quarters lease. DSSR 241.2. The third and fourth of these elements appear to be

similar to relocation allowances which are exempt from the requirement for payment of interest on late-paid claims – TQSE not paid as a lump sum and residence transaction expenses. *See* 41 CFR 301-52.17(d), (e). The first and second elements of the FTA are not similar to exempt allowances, so they are covered by the requirement.

We know from the declaration of the overseas human resources specialist at the Space and Naval Warfare Systems Center, Pacific, that Mr. Thacker was paid a miscellaneous expense allowance (FTA element (a)) of $1300 for the pay period ending on September 26, 2014.[1] Mr. Thacker says that he submitted his claim for that amount on August 25, 2014. Thus, the Navy appears to have paid this amount a bit more than thirty days after it received the claim. It owes Mr. Thacker interest on $1300, at the rate prescribed by the Secretary of the Treasury for the Prompt Payment Act, 2%, for the period from September 25, 2014, until the date of payment of the $1300. *See* 31 U.S.C. § 3902(a) (Secretary of the Treasury sets the rate); 79 Fed. Reg. 37,391 (July 1, 2014) (setting the rate for this period). There is a proviso to this conclusion, however: interest shall be paid only if the amount of interest is one dollar or more. 31 U.S.C. § 3902(c)(1).

The remainder of Mr. Thacker's FTA claim, $4020.09, was submitted on August 25, 2014, and paid during the pay period ending on May 16, 2015. The record does not show why this amount was paid. Whatever the reason, however, no interest is due, notwithstanding the agency's delay in processing the claim. The first element of an FTA, the miscellaneous expense allowance, was paid in full. *See* JTR C5602-B.1 (limiting amount of that allowance). Pursuant to the JTR, the second element of an FTA, wardrobe expenses, may not be paid to a Department of Defense civilian employee. JTR C1260-C.3.b. Thus, the $4020.09 must have covered the third and/or fourth element(s) of the FTA, and as we have held above, these elements are exempt from the requirement for payment of interest on late-paid claims.

Mr. Thacker's decisions to borrow money to cover expenses he incurred due to his relocation, and to repay the borrowed amount with equal monthly payments regardless of when he received allowances from the Navy, are made irrelevant by the statutory and regulatory provisions concerning interest on travel expense claims. *See Energy Northwest v. United States*, 641 F.3d 1300, 1312 (Fed. Cir. 2011) (Government's sovereign immunity

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[1] Because Mr. Thacker is an employee of the Department of Defense, his miscellaneous expense allowance was authorized under provisions of that department's Joint Travel Regulations (JTR), JTR C5598-5602. JTR C1260-B.1; DSSR 242.6.b; *James R. Dikeman*, CBCA 4238-RELO, slip op. at 6 n.4 (Dec. 22, 2015).

against payment of interest is not affected by fact that claimant had to take out loans and pay interest to a third party because of government action).

STEPHEN M. DANIELS
Board Judge