UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 11, 2011

CBCA 2390-RELO

In the Matter of WILLIAM ARNOLD KRISTAPOVICH

William Arnold Kristapovich, St. Peters, MO, Claimant.

William J. Guinan, Office of the Chief Counsel, Army Audit Agency, Department of the Army, Alexandria, VA, appearing for Department of the Army.

BORWICK, Board Judge.

Claimant, William A. Kristapovich, contests the United States Army's (agency's) request for reimbursement of permanent change of station (PCS) relocation expenses it had erroneously paid him as a reinstatement eligible employee. The agency states that it should have paid claimant as a new appointee. Claimant maintains that he was entitled to treatment as a reinstatement eligible employee under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301-4335. We deny the claim, as claimant has not demonstrated that he meets statutory requirements.

Background

Claimant, a certified public accountant, was employed as an auditor with the Defense Contract Audit Agency (DCAA). On April 5, 2007, claimant resigned from the DCAA, according to his standard form (SF)-50, for "personal reasons." On April 28, 2007, claimant was activated for military duty as a lieutenant colonel with the United States Army Central Command. His military service ended on November 1, 2007.

Effective on August 18, 2008, claimant was hired as an auditor with the agency's audit agency in St. Louis, Missouri. The agency, believing claimant was a reinstatement eligible employee, granted claimant a travel authorization for a PCS and authorized claimant temporary quarters subsistence expenses (TQSE) and real estate expenses.

Later, the agency concluded that claimant had been hired as a new appointee and that it had improperly authorized reimbursement of TQSE and real estate expenses. Consequently, the agency issued an amended travel authorization reflecting claimant's status as a new appointee and sought a refund for the $13,732.22 it had paid him for those expenses. The amount claimed is not in dispute.

Claimant filed a case at the Board from the agency's determination, contending that under USERRA, as an employee returning from uniformed service, he should have been treated as a reinstatement eligible employee and thus entitled to full relocation benefits.

In response, the agency states that claimant did not provide DCAA officials with advance notice of his military service prior to his separation as required by USERRA, 38 U.S.C. § 4312(a)(1). The agency states that it inquired of DCAA management, who could not confirm that claimant had provided such notice, and that claimant had not demonstrated that any lack of notice was due to military necessity. 38 U.S.C. § 4312(b).

In the record before the Board, claimant admits that "there is no citation in the [April 5, 2007] SF 50 that pending military duty existed." He also states that DCAA management knew that he had been mobilized in 1991 and 1992 and that he "was expecting mobilization to US HQCENTCOM." He also later states that "verbally I had been telling DCAA management that I was subject to mobilization as an individual augmentee." He admits, however, that he did not have orders or a "published mobilization document" when he resigned for personal reasons from DCAA.

Discussion

It is settled that new employees are entitled to limited benefits that do not include reimbursement of TQSE or real estate expenses. JTR C5010-B (tbl. 2); *Maxia Dong*, CBCA 733-RELO, 07-2 BCA ¶ 33,626. An agency that erroneously pays a new employee those benefits available only for transferred employees may recover the erroneous payment from the employee, because an erroneous authorization creates no entitlement to payment. *Evester Edd*, CBCA 1582-RELO, 09-2 BCA ¶ 34,232.

An employee who returns to federal employment after a break in service is considered a new appointee, for the purpose of determining relocation benefits. JTR C5080-B(2)(b)(3).

In this instance claimant resigned from DCAA on April 5, 2007, and was hired by the Army effective August 18, 2008.

Claimant says he should be treated as a re-employed annuitant under USERRA. We disagree. USERRA provides that any person "whose absence from a position of employment is necessitated by reason of service in the uniformed services" shall be entitled to the statute's re-employment rights and benefits if the person has given "advance written or verbal notice of such service to the person's employer." 38 U.S.C. § 4312(a)(1).

The record does not demonstrate that claimant's leaving DCAA was an "absence from a position of employment" that was "necessitated by reason of service" in the uniformed services. Generally, under statute and governing regulations, a person who leaves a position because of service in the armed forces is deemed to be on furlough or leave of absence while performing such service and is to be carried on leave without pay status unless the employee uses other leave freely or provides a written notice of intent not to return to a position of employment with the agency. 38 U.S.C. § 4316(b)(1)(A); 5 CFR 353.106(a). Claimant did not request a furlough or a leave of absence from DCAA or to be put on leave without pay status by DCAA because of his upcoming military service.

One court held that an absence from a job to attend a military event without orders deprives an employee of USERRA re-employment rights because under 38 U.S.C. § 4312(a), the absence must be necessitated by military service. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 901 (9th Cir. 2002). The record does not establish that claimant's resignation of April 5, 2007, was necessitated by military service.

Claimant did not provide verbal or written notice that he was resigning from DCAA because of his military service. Claimant's SF-50 shows a resignation "for personal reasons," not due to military service. The most the record demonstrates is that claimant provided his supervisors at DCAA with warnings at some undisclosed time before his resignation that he might be called to active duty. A statement of a possible activation to military duty does not meet the "advance notice of . . . such service" requirement of 38 U.S.C. § 4312(a)(1).

For the reasons stated above, the Board denies the claim.

_____

ANTHONY S. BORWICK
Board Judge