



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 20, 2015

CBCA 4375-RELO

In the Matter of STEVEN P. LYONS

Steven P. Lyons, Fishers, IN, Claimant.

Sheila Melton, Director, Travel Functional Area, Enterprise Solutions and Standards, Defense Finance and Accounting Service, Indianapolis, IN, appearing for Department of Defense.

HYATT, Board Judge.

Claimant, Steven P. Lyons, a civilian employee of the Department of Defense (DoD), challenges the denial of an extension of temporary quarters subsistence expenses (TQSE) benefits incident to his permanent change of station (PCS) move from Dageu, Korea, to Indianapolis, Indiana, to accept a position with the Defense Finance and Accounting Service (DFAS).

Background

Mr. Lyons was offered the position in Indiana as a participant in the DoD Priority Placement Program (PPP). The travel authorization for this relocation was issued on January 27, 2014, with a reporting date of March 9, 2014. The initial PCS travel orders did not provide for TQSE, but were subsequently amended by the gaining office, which authorized sixty days of TQSE on an actual expense basis on February 11, 2014.

Claimant entered into temporary quarters at his new duty station on March 8, 2014. He has been reimbursed by the agency for the first sixty days of TQSE occupancy, from March 8 through May 6, 2014. On May 19, 2014, however, Mr. Lyons suffered a serious illness and was hospitalized for one week, followed by approximately two-and-one-half weeks of convalescence at the temporary residence. Claimant states that his medical

condition hindered his ability to close on and move into the home he had purchased. Closing on the house was completed on June 6, 2014, and the family moved into the house on June 8, 2014, but had to wait for delivery of household furniture until June 27, 2014.

When Mr. Lyons asked DFAS to extend his TQSE benefits through June 8, 2014, to accommodate his medical circumstances, the agency responded that under the Joint Travel Regulations (JTR) it had no authority to extend TQSE beyond the sixty days initially approved for employees returning from an overseas assignment under the PPP, even in the presence of extenuating circumstances.

Discussion

The purpose of TQSE is to reimburse transferred employees reasonably and equitably for subsistence expenses incurred when it is necessary to occupy temporary quarters. *See, e.g., Stephen J. Collier, CBCA 4395-RELO, 15-1 BCA ¶ 35,979; Zenaida Canaba, CBCA 3993-RELO, 15-1 BCA ¶ 35,958.* By statute, 5 U.S.C. § 5724a(c) (2012), federal agencies are authorized to pay the subsistence expenses of a transferring employee who is occupying temporary quarters incident to a transfer in the interest of the Government for a period of up to sixty days, and may reimburse such expenses for up to an additional sixty days if the designated agency official determines there are compelling reasons for the continued occupancy of temporary quarters.

The Federal Travel Regulation (FTR), which governs travel entitlements for civilian employees of the Federal Government, provides the following with respect to actual expense TQSE:

Your agency may authorize you to claim actual TQSE in increments of 30-days or less, not to exceed 60 consecutive days. However, if your agency determines that there is a compelling reason for you to continue occupying temporary quarters after 60 consecutive days, it may authorize an extension of up to 60 additional consecutive days. Under no circumstances may you be authorized reimbursement for actual TQSE for more than a total of 120 consecutive days.

41 CFR 302-6.104 (2014).

This FTR provision is further implemented in the JTR, which contains a similar provision applicable to most civilian DoD employees. JTR C5364. There is a separate provision, however, in effect at the time of Mr. Lyons' transfer, applicable specifically to employees returning from foreign areas through the PPP program. *See JTR C5778-E.1.d.*

This provision states that participants in the PPP may be authorized a maximum of sixty days of actual expense TQSE. It is silent with respect to an extension of time in excess of the initial sixty-day period to accommodate a compelling reason for continued occupancy of temporary quarters. DFAS interprets this provision to deprive it of authority to extend Mr. Lyons' TQSE for any additional time beyond sixty days, regardless of circumstances.

The Board has previously addressed the effect of agency rules that differ from the FTR:

As we have explained many times, the FTR is a "legislative rule" -- a regulation issued under express authority from Congress, for the purpose of affecting individual rights and obligations by filling gaps left by a statute, after following the Administrative Procedure Act's notice and comment provisions. It therefore has controlling weight -- the force of law -- unless the provision in question is arbitrary, capricious, or manifestly contrary to statute. Any agency rule which is inconsistent with an FTR provision is consequently trumped by the FTR and must give way.

Kevin D. Reynolds, CBCA 2201-RELO, 11-1 BCA ¶ 34,756, at 171,061 (citations omitted); *accord Stephen M. England*, CBCA 3903-TRAV, 15-1 BCA ¶ 35,870 (citing *Robert A. Cherry*, CBCA 3878-TRAV, 14-1 BCA ¶ 35,707).

The *Reynolds* decision is directly on point. In that case, the agency had a rule expressly providing that no more than sixty days of actual expense TQSE could be authorized. The Board explained that this blanket limitation could not stand:

The FTR, implementing the statute, allows an agency to authorize as many as 120 days of eligibility for reimbursement of actually-incurred TQSE, with the last sixty contingent on a determination that a compelling reason for continued occupation of temporary quarters exists. The [agency] manual precludes authorization of those last sixty days. It is therefore inconsistent with the FTR and may not survive.

11-1 BCA at 171,061.

We note that the provision in question is silent about the availability of an extension of TQSE for PPP participants. Even if DoD intends through this provision to preclude any extensions of TQSE for individuals returning from overseas through the PPP, it cannot do so. This position is at variance with the express purpose of the statute and FTR. The FTR envisions a case-by-case consideration of the circumstances presented in support of a request

for authorization of up to an additional sixty days of TQSE beyond the initial sixty-day period, and an appropriate exercise of discretion by the agency official charged with the authority to make the determination.

In this case, the appropriate DFAS official should consider the information provided by Mr. Lyons in support of his request for additional days of TQSE to determine if the type of compelling circumstances envisioned by the statute and applicable FTR provision have been demonstrated in this case and would justify granting some or all of the time he seeks. *Pamela S. Boyd*, CBCA 2574-RELO, 12-1 BCA ¶ 35,052. We return the matter to the agency for this purpose.

Decision

The claim is granted to the extent stated herein.

CATHERINE B. HYATT
Board Judge