



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 3, 2015

CBCA 4584-RELO

In the Matter of ISRAEL VEGA-MARRERO

Israel Vega-Marrero, Sarasota, FL, Claimant.

Melinda Grow, Budget Analyst, Natural Resources Conservation Service, Department of Agriculture, Davis, CA, appearing for Department of Agriculture.

POLLACK, Board Judge.

Background

Claimant, Israel Vega-Marrero, is a civilian employee of the United States Department of Agriculture, Natural Resources Conservation Service (NRCS). NRCS transferred claimant from his permanent duty station (PDS) in Puerto Rico to his new PDS in Sarasota, Florida. Mr. Vega-Marrero elected the actual expense reimbursement method for temporary quarters subsistence expenses (TQSE) and enrolled in the commercial relocation services program, through which the NRCS provides assistance to employees in locating and buying homes to facilitate transfer.

Mr. Vega-Marrero was approved for thirty days of TQSE, from November 28 to December 28, 2014. He reported to his new PDS on December 1, 2014. Mr. Vega-Marrero states that, due to the holiday season, he encountered difficulty finding suitable housing. Around mid-December, Mr. Vega-Marrero located housing; however, the real estate company informed him that the approval process for his rental application would take fourteen days. On December 23, 2014, with five days remaining under his travel voucher, Mr. Vega-Marrero submitted to NRCS his formal reimbursement claim, as well as a request to extend his TQSE through January 9, 2015.

On December 30, 2014, the real estate company notified Mr. Vega-Marrero that his application was approved and that his lease would begin January 1, 2015. Mr. Vega-Marrero states that, on the same day he was notified of his lease approval, he “immediately contacted the moving company to set up the earliest day available for them to deliver [his] House Hold Goods (HHG) to [his] new location.” He was informed that, due to the holidays, and because the company did not provide weekend services, January 9, 2015, was the earliest delivery date. He received the keys to the property on January 2, 2015.

As revealed by his expense record for temporary quarters, on the afternoon of January 3, 2015, Mr. Vega-Marrero departed his original temporary quarters at the Residence Inn Sarasota and checked in to the Hampton Inn & Suites Sarasota/University Park, where he lodged until January 9, 2015. The additional TQSE for the period from December 29 to January 8, including the last five nights at the Residence Inn and the six-night stay at the Hampton Inn & Suites, totaled \$2111.11.

By e-mail message dated January 16, 2015, in follow-up to his TQSE extension request of December 23, 2014, NRCS replied to Mr. Vega-Marrero, citing the policy on temporary quarters and TQSE extensions contained in the agency’s Employee Relocation Handbook (Handbook). In relevant part, the Handbook provides:

You may be provided up to a maximum of 60 consecutive days [of temporary quarters] by your relocation coordinator (30 days with commercial relocation services) for yourself together with each member of your family.

....

A second period of up to 60 calendar days (approved in increments of 30 days) can be considered by the FMD Division Director at National Headquarters (NRCS GM Title 30, Part 400, Subpart B Item 28) with the approval of your state conservationist when there are compelling reasons for you to continue temporary quarters. . . . Temporary quarters may be extended only in situations where there is a demonstrated need. Such circumstances include acts of God, death of a family member or incapacitating illness for [sic] yourself.

The agency applied the thirty-day, commercial relocation services limitation and denied Mr. Vega-Marrero’s request.

In reply, claimant noted his disagreement with the agency’s interpretation of the policy. Conceding that when using commercial relocation services, the maximum time allowable for the initial period of TQSE is thirty days, Mr. Vega-Marrero claimed that he was

nevertheless entitled to an extension of the period. Based on his reading of the NRCS policy, Mr. Vega-Marrero believed the policy permitted, upon a showing of compelling circumstances, an extension for up to an additional sixty days for both employees that have elected to use commercial relocation services and those who have not made such an election. He further contended that his circumstances qualified as compelling. NRCS advised claimant to clarify the justification for his extension and to submit a second voucher for formal consideration.

On January 23, 2015, Mr. Vega-Marrero provided the requested clarification, citing the rental application approval process, the lease start date, and the moving company's availability for delivery of his household goods as the reasons supporting his extension. On February 6, 2015, NRCS denied his request. Again referencing the Handbook, NRCS indicated its denial was based on the agency policy limiting TQSE to thirty days when using commercial relocation services and further on the basis that in order to qualify under compelling circumstances, Mr. Vega-Marrero had to establish that he fit within one of the three criteria set out in the NRCS Handbook. In addition, NRCS cited a General Services Board of Contract Appeals (GSBCA) decision, *Holly Rowe*, GSBCA 14037-RELO, 97-1 BCA ¶ 28,934, as holding that an "agency's determination to extend the TQSE period is an exercise of discretion" that will not be overturned "unless that exercise was arbitrary, capricious, or contrary to law."

The Federal Travel Regulation (FTR) provides the following as to what are "compelling reasons" justifying an extension of TQSE:

What is a "compelling reason" warranting extension of my authorized period for claiming an actual TQSE reimbursement?

A "compelling reason" is an event that is beyond your control and is acceptable to your agency. Examples include, but are not limited to when:

(a) Delivery of your household goods to your new residence is delayed due to strikes, customs clearance, hazardous weather, fires, floods or other acts of God, or similar events.

(b) You cannot occupy your new permanent residence because of unanticipated problems (e.g., delay in settlement on the new residence, or short term delay in construction of the residence).

(c) You are unable to locate a permanent residence which is adequate for your family's needs because of housing conditions at your new official station.

(d) Sudden illness, injury, your death or the death of your immediate family member; or

(e) Similar reasons.

41 CFR 302–6.105 (2014).

For the reasons that follow, we find that the NRCS policy is contrary to law and that the agency arbitrarily exercised its discretion. Accordingly, we grant Mr. Vega-Marrero's claim.

Discussion

Under well-settled principles, federal statutes and the regulations implementing them trump agency policies. *Charles A. Houser*, CBCA 2149-RELO, 11-1 BCA ¶ 34,769. Thus, “an agency cannot issue rules or regulations which run afoul of the express purpose stated by Congress or as implemented through regulation by the properly charged agency.” *Id.* at 171,112. In *Charles A. Houser*, we explained:

[T]he 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 statute. . . . It therefore has controlling weight—the force of law—unless the provision in question is arbitrary, capricious, or manifestly contrary to statute. An agency rule which is inconsistent with an FTR provision is consequently trumped by the FTR and must give way.

Id. (quoting *Kevin D. Reynolds*, CBCA 2201-RELO, 11-1 BCA ¶ 34,756, at 171,061 (citing cases)).

The NRCS Handbook authorizes payment of relocation expenses for up to sixty days of actually-incurred subsistence expenses. The agency limits that period to thirty days of TQSE in those instances in which a transferred employee elects to use a commercial relocation services. NRCS's use of that limitation on the duration of the TQSE period does not conflict with either the statute or federal regulations. The Handbook also provides for a potential sixty day extension of the TQSE period. The plain meaning of the Handbook language does not limit the sixty day extension to employees who have not elected commercial relocation services. Rather, the plain meaning of the Handbook is that the extension may be available to any employee for whom TQSE has been authorized.

Accordingly, the agency had the right to provide an extension, and to the extent it read the Handbook otherwise, that is in error.

Having determined that the Handbook allows for the consideration of an extension in this matter, the issue that remains is whether NRCS application of “compelling” meets the legal requirements.

We find that NRCS improperly defined “compelling,” by limiting its consideration to those instances identified in the Handbook. Those limitations conflict with the FTR, which provides a broader consideration of what is compelling. The controlling FTR defines “compelling reason” as an event that is beyond the employee’s control and is acceptable to the agency. The regulation then goes on to provide several examples, those examples being more expansive than the limitations set out in the Handbook. Moreover, the regulation specifically provides that the examples listed are not limited to those specified.

NRCS did not consider the broader breadth of circumstances allowable under the FTR and did not consider circumstances such as those here—the holiday season during which the employee relocated, his initial inability to find suitable housing, the two-week lease application process, and the delayed delivery of his household goods. Under the FTR, these matters merited some consideration.

While NRCS correctly points out that the matter of extending TQSE is a proper question for agency discretion, we have noted “that discretion [should] not be unfettered and [should] still have to be applied in a manner that [is] not arbitrary and capricious and not in violation of the law.” *Houser*, 11-1 BCA at 171,112. Before a “compelling reason” justifying an extension can be found, the controlling regulation requires that a requisite circumstance exist *and* that the event be “*acceptable to [the] agency.*” 41 CFR 302–6.105 (emphasis added). Thus, “the law links the granting of extensions to an assessment of whether there are compelling reasons.” *Houser*, 11-1 BCA at 171,113.

Here, we find that NRCS undertook no such assessment of the circumstances supporting Mr. Vega-Marrero’s TQSE extension request, apparently relying entirely on the limitations in the agency’s Handbook. Therefore, NRCS did not properly exercise its discretion. “In complying with the law, so as to make the required judgment, an agency must make its decision based on the assessment of specific facts and not on the basis of a pre-decided policy.” *Houser*, 11-1 BCA at 171,113.

Accordingly, the matter is remanded to the agency for it to consider the extension request in light of this decision.

HOWARD A. POLLACK
Board Judge