UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 11, 2016

CBCA 4940-RELO

In the Matter of PETER E. GODFREY

Peter E. Godfrey, Cheyenne, WY, Claimant.

Chris Barned, Relocation Specialist, Bureau of Land Management, Department of the Interior, Denver, CO, appearing for Department of the Interior.

GOODMAN, Board Judge.

Claimant Peter E. Godfrey is an employee of the Department of the Interior's Bureau of Land Management (BLM) in Cheyenne, Wyoming. He has asked this Board to review the agency's denial of reimbursement of costs incurred during a permanent change of station (PCS).

Factual Background

Claimant and his wife completed a PCS move from Riverside, California, to Cheyenne, Wyoming. His travel orders authorized temporary quarters subsistence expenses (TQSE) for thirty days. He elected the actual expense method for TQSE. The initial thirty-day period began January 9, 2015. When he arrived at the new permanent duty station (PDS), claimant's principal concern was to find suitable existing housing that would not be adverse to his wife's health, but he was unable to do so. He states:

> Our home search was steady and diligent. There were numerous houses within our price range; however, the list of adequate housing grew increasingly short when considering health issues. Floor covering and stairs were a principal consideration in this regard, needing fewer stairs (orthopedic concerns) and no carpet (limit allergen traps). Several houses came under contract before we could put an offer in. We finally settled on a newly constructed home (one

> level—no basement) for which we could specify tile and laminate throughout . . . . This home was largely completed and lacked only superficial details in construction such as interior paint and floor covering. . . . I signed a sales contract for this home, with a contracted closing date of April 17, 2015.

Before the first thirty days of TQSE expired, in light of the closing date for his home, claimant requested and was granted an additional thirty days of TQSE, authorized by the Wyoming State Director of BLM (State Director). Claimant performed temporary duty (TDY) in Arizona from February 21 to April 4, 2015. During that time, the TQSE period was suspended. The sixty days of TQSE therefore ended on April 20, 2015. Claimant's wife accompanied him on TDY.

Claimant states that upon return from TDY, he was informed that the earliest possible closing date for his new home was May 18, 2015, because several construction tasks had not been completed, and because of the need for documentation demonstrating completion of a home buyer education course. Claimant justifies this delay as follows:

> Until our return to Cheyenne in April, we fully intended and expected to move into our new home on April 18, 2015, per our original sales contract closing date. This "planned" date to end TQSE was within the existing authorized timeline. It is also of note that we did not "have a home constructed," but purchased a home already largely constructed and near ready to move in.

Claimant requested and received approval on April 14, 2015, for thirty-two additional days of TQSE, for a total of ninety-two days of TQSE, through May 22, 2015. He was told to direct this request to the State Director who had granted his previous request, rather than to the Washington, D.C., office, as this would result in a faster approval process. Claimant's request for additional TQSE was approved by the State Director on the basis that he had unanticipated delays in the settlement of his home.

On April 30, 2015, a BLM auditor reviewed the request for additional TQSE and informed claimant that, pursuant to agency policy, the authority for approving TQSE in excess of the initial sixty-day period resided with the BLM Deputy Assistant Director in Washington, D.C., and the State Director who had approved the last thirty-two days of TQSE did not have the authority to do so. On May 6, 2015, claimant was instructed to submit a new request directly to the BLM Deputy Assistant Director, Business and Fiscal Services, who had the delegated authority to approve or deny such requests. Claimant submitted a new request as directed.

Claimant settled on the new home on May 20, 2015, and he moved his household goods out of storage and occupied the home on May 21, 2015, ending his stay in temporary quarters one day before the expiration of the additional thirty-two-day period. Claimant incurred various TQSE expenses from the time his initial sixty days of TQSE expired until he moved into his home, for which he expected reimbursement in reliance upon the thirty-two day extension he had received.

By letter dated May 20, 2015, claimant's new request for additional TQSE was denied by the BLM Deputy Assistant Director. The request was denied on several grounds. The agency found no compelling reason for granting the extension, stating:

> [Claimant] decided to have a home constructed. This was a personal decision.
>
> When issues arose with construction that delayed settlement, perhaps [claimant's] wife might have been able to address them but she was in Arizona with him.
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> Cheyenne is a moderately sized town with a moderate number of houses for sale. [Claimant] does not state why no existing homes were adequate. In a town with a moderate real estate market, there should, without question, have been a number of adequate existing homes to choose from.
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> DOI [Department of the Interior]/BLM adopted the 60 day T[emporary] Q[uarters] policy in October 2008.[1] At no time since has a BLM employee been approved for TQ in excess of 60 days, for any reason. The policy is in place to ensure that employees attempt to secure permanent housing relatively quickly. This also results in reduced costs to the agency by reducing reimbursement for lengthy, sometimes unnecessary, occupancy of TQ. . . .

In its submission to this Board, the agency states:

> This denial was neither arbitrary nor capricious. BLM has not found compelling enough reason to reason to grant any employee TQSE in excess of 60 days since the Departmental guidance became much stricter in 2008.

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[1] Apparently the agency is referring to an unwritten policy distinct from its published Permanent Change of Station Policy (Oct. 2012).

Claimant appealed the agency's denial to the agency on August 13, 2015, and the appeal was denied. Claimant then asked this Board to review the agency's denial.

Discussion

TQSE reimbursement is an allowance provided to government employees as a matter solely within the discretion of their agencies and not as a benefit to which they are automatically entitled. 5 U.S.C. § 5724a(c) (2012); *Christopher W. Harding*, CBCA 4542-RELO, 15-1 BCA ¶ 35,990, at 175,830; *Thomas G. Tucker, Jr.*, GSBCA 16682-RELO, 06-1 BCA ¶ 33,168, at 164,357 (2005); *see also Charles J. Wright*, CBCA 4799-RELO, 15-1 BCA ¶ 36,138; 41 CFR 302-6.6 (2014). When addressing requests for extensions of periods of TQSE reimbursement, the applicable statute permits agencies to allow extensions of such periods when the employee can demonstrate that "compelling" reasons exist. 5 U.S.C. § 5724a(c)(1), (2). The Federal Travel Regulation (FTR), which implements the statute, provides the limits for the duration of TQSE and examples of "compelling reasons" that may be acceptable to an agency:

> **§ 302–6.104 How long may I be authorized to claim actual TQSE reimbursement?**
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> 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.

> **§ 302–6.105 What is a "compelling reason" warranting extension of my authorized period for claiming an actual TQSE reimbursement?**
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> 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:
>
> . . . .

> (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.

41 CFR 302-6.105.

In this case, claimant was authorized an initial thirty-day period for TQSE. After a search for existing housing, he could not find a home suitable for his wife's health issues, and entered into a contract to purchase a home that was under construction and scheduled to be completed in approximately two-and-a-half months. He therefore requested and was granted an additional thirty days of TQSE, with the anticipated closing date at the end of this second thirty-day period. The agency does not challenge the validity of the first extension for thirty days of TQSE, authorized by the State Director, which was granted because of the "compelling reasons" for the extension contemplated by the FTR under 41 CFR 302–6.105.

When the settlement of the newly-constructed home was delayed for another thirty days, claimant again requested and was granted another thirty-two day extension of TQSE by the State Director who had granted his previous request, on the same basis of compelling reasons. Acting in good faith in reliance upon the State Director's decision, claimant made financial decisions and began to incur costs. When the BLM auditor raised the issue of the State Director's lack of authority,[2] claimant promptly submitted a new request to the official with proper authority, the BLM Deputy Assistant Director.

Claimant was not advised that the State Director's granting of the thirty-two-day extension would be reversed until the end of that period, after claimant had incurred additional expenses. Claimant challenges the reversal of that decision, in light of his circumstances that he believes were fairly and reasonably considered by the State Director, but incorrectly interpreted by the BLM Deputy Assistant Director.

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[2] It is black-letter law that the Government cannot be bound by the acts of unauthorized officials. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *ServiTodo LLC v. Department of Health & Human Services*, CBCA 4777, 15-1 BCA ¶ 36,161; *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636 (2010).

While the agency has the discretion to grant TQSE, it must exercise that discretion reasonably. Claimant has asked this Board to review the agency's exercise of discretion. "[W]e will not disturb an agency's discretional judgements unless we are convinced that they are arbitrary, capricious, or clearly erroneous." *Brian J. Ebel*, CBCA 4357-TRAV, 15-1 BCA ¶ 36,037, at 176,021, *reconsideration granted* 15-1 BCA ¶ 36,082; *William T. Orders*, GSBCA 16095-RELO, 03-2 BCA ¶ 32,389, at 160,290. While the State Director was not the proper person with delegated authority to authorize TQSE for greater than sixty days, the agency's subsequent denial of claimant's new request does not properly apply the requirements of the FTR. In so doing, the agency relies upon a written policy published in October 2012 and an unwritten policy that it states has been in effect since 2008 that is contrary to the FTR.

The agency based its decision denying claimant's request on its Permanent Change of Station Policy (Oct. 2012). This policy reiterates the requirement of the FTR and states:

> Extensions of TQSE will be authorized only in situations where there is a demonstrated need for additional time due to circumstances that have occurred during the first 60-day period of temporary quarters and which are determined to be beyond the employee's control, such as: . . . New residence cannot be occupied because of unanticipated problems, because of delays in settlement.

The policy then states the following "situations that would not generally justify and extension of time beyond 60 days," which include:

> Inability to locate permanent housing (rental, lease, or purchase) in an area of moderate housing availability, due to personal preferences and decision;
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> Personal decisions to have a home constructed in areas of moderate housing availability (Construction typically requires 90 to 120 days or longer).

The agency applied this policy inconsistently with the claimant's circumstances. The agency's characterization of claimant's actions as a personal decision to "have a home constructed" in an area of moderately available housing is not accurate. Claimant explained that he was unable to purchase an existing housing because of his wife's medical condition. He did not decide to have a home constructed, but purchased a home already under construction with an anticipated settlement date of approximately ten weeks after the purchase contract. This anticipated period from purchase contract until settlement is reasonable, and is not necessarily greater than the time that could be anticipated had claimant purchased an existing home. The unanticipated delay in settlement was beyond his control. This is clearly within the justification for an extension of TQSE contemplated by the FTR,

which does not require a transferred employee to purchase existing housing that does not meet his family's needs, nor penalize an employee for purchasing a newly constructed home that meets the employee's needs.

The agency's denial also refers to and relies upon an apparently unwritten agency policy in effect since 2008, by which the agency has determined that no extension of the TQSE period in excess of sixty days will be granted to any employee, regardless of circumstances.[3] This policy is clearly contrary to law and the FTR, which allow extensions of TQSE up to 120 days for the specified compelling reasons. 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 a statute . . . . 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.

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

In *Israel Vega-Marrero*, CBCA 4584-RELO, 15-1 BCA ¶ 36,151, this Board found a policy issued by the Department of Agriculture was contrary to the same regulation applicable in this case. Accordingly, the enforcement of that policy was contrary to law, and the agency's enforcement of that policy was therefore an arbitrary exercise of its discretion. By the same reasoning, in the instant case, the agency's enforcement of an unwritten policy that automatically denies extensions of TQSE in excess of sixty days, contrary to the clear provisions of the FTR that allow extensions under certain conditions, is an arbitrary exercise of discretion. As discussed above, while the State Director did not have authority to issue the extension, the State Director did properly consider the requirements of the FTR when initially granting the extension. The subsequent reversal of the granting of the extension

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[3] Claimant requested a copy of this policy, but did not receive it. The agency did not submit any documentation of this policy in this case.

incorrectly applies the FTR and appears to rely upon an unwritten policy contrary to law and regulation, resulting in an arbitrary exercise of discretion.

This matter is returned to the agency for reconsideration of claimant's request, in light of his circumstances and the requirements of the FTR, without application of an unwritten policy which denies all requests for extensions in excess of sixty days. If, after reconsideration, claimant believes that the agency's determination is arbitrary, capricious, or clearly erroneous, he may request this Board to review that decision.

Decision

This matter is returned to the agency for reconsideration under the criteria stated above.

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ALLAN H. GOODMAN
Board Judge