UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 6, 2020

CBCA 6657-RELO

In the Matter of DAVID C. SCHEIVERT

David C. Scheivert, APO Area Europe, Claimant.

Ilona M. Keller, Human Resources Specialist, Civilian Personnel Directorate, Department of the Army, APO Area Europe, appearing for Department of the Army.

ZISCHKAU, Board Judge.

Claimant, David C. Scheivert, seeks reimbursement of approximately $1591 in temporary quarters subsistence allowance (TQSA) expenses. Mr. Scheivert disputes the agency's refusal to grant him an extension for TQSA from August 25 through September 12, 2019, while he waited for availability of on-base housing. Relying on the Army in Europe Regulations (AER), the agency denied his request for an extension of TQSA but reimbursed his lodging expenses at the living quarters assistance (LQA) rate. Mr. Scheivert sought reimbursement for $7922 in expenses using the TQSA rate, but the Army only reimbursed him for $6331 under the LQA rate. We find that the agency's blanket prohibition against extensions is contrary to the purpose of 5 U.S.C. § 5923 (2018) and the applicable Department of State Standardized Regulations (DSSR). For the reasons set forth below, we remand to the agency for reconsideration of Mr. Scheivert's extension request.

Background

Mr. Scheivert is a civilian employee of the Department of the Army. Effective May 26, 2019, the agency transferred Mr. Scheivert and his dependents from Baumholder, Germany, to Weisbaden, Germany. They were pre-approved for ninety days of TQSA, from May 26 through August 24. Mr. Scheivert, his spouse, and his children resided in apartment-style housing from May 26 through June 5, and in hotel accommodations from June 6

through July 24. He took leave from July 25 through August 12 (during which no expenses were claimed), and resumed hotel accommodations from August 13 through September 12. On September 13, they moved to government quarters on base.

Mr. Scheivert explains that they remained in hotel accommodations instead of seeking more permanent housing because they expected to receive on-base housing. Shortly after they arrived, the base command asked Mr. Scheivert if he was interested in on-base housing. Mr. Scheivert agreed that would be the best option and ceased all efforts to locate other longer-term quarters. The record includes a series of communications regarding the process of moving on base and obtaining an exception to the policy to allow a civilian to reside in on-base housing. On August 14, 2019, the base command submitted its request for approval of Mr. Scheivert's on-base housing, and that same day, Mr. Scheivert requested an extension of thirty days of TQSA because he realized the initial TQSA deadline of August 25 was fast approaching and he anticipated the on-base housing assignment might not come through until after the deadline. On August 16, 2019, the base commander submitted a request for approval of a 30-day extension for TQSA based on the fact that Mr. Scheivert was currently awaiting his on-base housing assignment. Mr. Scheivert and his family were approved to move into government quarters starting September 13.

On September 19, the Civilian Human Resources Agency (CHRA) Europe notified Mr. Scheivert of a decision by the Civilian Personnel Directorate that "[a] fourth extension of TQSA beyond 90 days cannot be authorized." She notified Mr. Scheivert that AER 690-500.592 mandates that LQA replace TQSA on the ninety-first day if the employee still resides in temporary housing.

Consistent with the facts above, Mr. Scheivert contends that his circumstances merit an extension because the process to obtain on-base housing was out of his control. He states that he relied on the Garrison Command for approval, the Garrison Command had to develop the policy allowing civilians to occupy on-base housing (although several civilian employees had been assigned on-base housing before), and his travel orders offered TQSA extensions up to 120 total days if needed. In addition, Mr. Scheivert points out that the agency's interpretation of the AER conflicts with his travel orders. The travel orders state:

> You may be authorized to claim actual TQSA in increments of 30 days or less, not to exceed 60 consecutive days. An additional 60 days may be authorized if individual circumstances are deemed compelling by the authorizing official. Under no circumstances may you be authorized reimbursement for actual TQSA for more than a total of 120 consecutive days.

In a follow-up email, Mr. Scheivert was informed that "an extension after 90 days is subject to approval by our higher headquarters which . . . was disapproved. This is the final decision." The agency maintains that it exercised delegated authority to formulate the AER, limit incoming TQSA to ninety days, prohibit extensions beyond ninety days, and allow for conversion to LQA. *See* Agency's Response at 3, 5.

Discussion

We review the agency's refusal to grant an extension to Mr. Scheivert's TQSA. The Overseas Differentials and Allowances Act, 5 U.S.C. § 5923, authorizes agencies to reimburse employees who are stationed abroad for housing expenses when they are not provided government quarters without charge. The statute reads in pertinent part as follows:

> (a) When Government owned or rented quarters are not provided without charge for an employee in a foreign area, one or more of the following quarters allowances may be granted when applicable:
> (1) A temporary subsistence allowance for the reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and his family—
> (A) for a period not in excess of 90 days after first arrival at a new post of assignment in a foreign area or a period ending with the occupation of residence quarters, whichever is shorter . . . .

Under subsection (b), the statute addresses extensions as follows:

> (b) The 90-day period under subsection (a)(l)(A) . . . may . . . be extended for not more than 60 additional days if the head of the agency concerned or his designee determines that there are compelling reasons beyond the control of the employee for the continued occupancy of temporary quarters.

The statute is implemented through the DSSR at section 120 to apply to civilian employees. *See William P. McBee, Jr.*, CBCA 943-RELO, 08-1 BCA ¶ 33,760.

However, the substance of the dispute here arises from a conflict between the agency's internal guidance and the DSSR. The agency contends that its regulations, found at AER 690-500.592, are controlling. *See* Agency's Response at 3 ("Exercising the authority as described [below] in formulating AER 690-500.592, this command determined incoming TQSA for eligible employees shall not be extended beyond 90 days . . . ."). The agency asserts that Department of Defense Instructions (DODI) delegated the authority pursuant to DSSR sections 122.2 and 123.34 to "approve payment of [TQSA] for up to 60 days past the

usual maximum of 90 days, when an extension of time is necessary due to compelling reasons beyond the control of the employee," including the authority to prohibit payment. *See* DODI 1400.25, vol. 1250, at ¶ 4.a(1)(e) (Feb. 23, 2012).

Despite these contentions, "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." *Charles A. Houser*, CBCA 2149-RELO, 11-1 BCA ¶ 34,769. This Board has found that agency polices and procedures, written or unwritten, which prohibit extension requests are inconsistent with the intent of 5 U.S.C. § 5923 and therefore contrary to law. *See Peter E. Godfrey*, CBCA 4940-RELO, 16-1 BCA ¶ 36,250 (finding that the agency's reliance upon an unwritten policy prohibiting extensions regardless of circumstances was contrary to law); *Kevin D. Reynolds*, CBCA 2201-RELO, 11-1 BCA ¶ 34,756 (finding an agency rule precluding extensions for actually-incurred temporary quarters subsistence expenses (TQSE) conflicts with the Federal Travel Regulation (FTR) and is invalid).

Here, as we understand it, the agency interprets the AER to prohibit any review of TQSA extensions. *See* Agency's Response at 5 (stating that "extensions, albeit provided for under the DSSR 122.2, should not be allowed"). The AER omits to mention, or explicitly prohibit, TQSA extensions. *See* AER 690-500.592(12)(a). We reject the agency's argument that it may systematically prohibit extensions merely because the AER states that incoming TQSA is limited to ninety days and does not mention extensions. The agency's position, based on its interpretation of AER 690-500.592, contradicts Congress' clear intent to allow for extensions up to sixty additional days in situations where the agency finds compelling reasons for the delays. *See* 5 U.S.C. § 5923; *Houser*. To comply with the governing statute and the DSSR, the agency "must make its decision [whether to grant an extension] based on the assessment of specific facts and not on the basis of a pre-decided policy." *See Houser*. Here, the agency erred when it refused to review Mr. Scheivert's request for an extension.

An agency has broad discretion to determine whether compelling circumstances exist beyond the employee's control to justify the grant of additional TQSA. *See Houser*. We do not overturn an agency's determination unless it is arbitrary, capricious, or contrary to law. *See, e.g*, *Raymundo R. Lomboy*, CBCA 5979-RELO, 18-1 BCA ¶ 37,079 (upholding Air Force denial of extension request when it based its decision on claimant's voluntary actions and not circumstances beyond his control, and when the conversion to LQA fully covered claimant's hotel bills); *Stephen S.*, CBCA 1214-RELO, 08-2 BCA ¶ 34,005 (finding that DSSR 122.2 allows agency to determine whether an extension of TQSA is permissible based upon the employee's individual circumstances). In analogous situations, the FTR, 41 CFR 302-6.105 (2018) (FTR 302-6.105), provides examples of compelling circumstances warranting the extension of the authorized period for claiming TQSE reimbursement:

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.

See Reynolds. The agency improperly declined to consider Mr. Scheivert's request for extension on its merits. We remand this matter to the agency to review the circumstances of Mr. Scheivert's request in light of the requirements of the DSSR. Mr. Scheivert indicates that the delay in his moving to the on-base housing was outside of his control. That factor should be considered by the agency.

Decision

We remand to the agency for reconsideration of claimant's request for an extension of TQSA under the criteria stated above.

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge