



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 10, 2011

CBCA 2201-RELO

In the Matter of KEVIN D. REYNOLDS

Kevin D. Reynolds, Arlington, VA, Claimant.

Paul W. Henne, Assistant Director – Business Management and Operations and Chief Financial Officer, Fish and Wildlife Service, Washington, DC, appearing for Department of the Interior.

DANIELS, Board Judge (Chairman).

An agency rule which conflicts with the Federal Travel Regulation (FTR) is invalid. In this case, a rule which precludes extensions of the period of eligibility for actually-incurred temporary quarters subsistence expenses (TQSE) is invalid because such extensions are expressly authorized by statute and the FTR.

Background

Kevin D. Reynolds reported in May 2010 to a new permanent duty station to which he was transferred by his employer, the Department of the Interior's Fish and Wildlife Service (FWS). In directing this transfer, FWS authorized Mr. Reynolds to receive actually-incurred TQSE for himself and his family for a period of sixty days. FWS also authorized shipment of his household goods by government bill of lading to be prepared by the agency.

Upon arrival at the new duty station, Mr. Reynolds and his family moved into temporary quarters. They looked for a permanent place to live, found one, and on June 15, signed a lease and began paying rent.

As soon as he signed the lease, Mr. Reynolds called the moving company assigned by FWS to make arrangements for delivering his household goods to his new residence. The company told him that the earliest possible delivery date would be July 9.

A delivery on July 9 would necessitate the family remaining in temporary quarters for more than sixty days. Mr. Reynolds informed his new supervisor of this fact, and the supervisor gave written approval for the period of eligibility for TQSE reimbursement to continue until July 16. The family remained in temporary quarters until July 11, and Mr. Reynolds seeks TQSE benefits for all days in temporary quarters up to that date.

FWS issues a manual entitled “Employees on the Move: A Handbook on Travel and Transportation Benefits for Relocating Employees.” The manual contains this provision with regard to extensions of the period of an employee’s eligibility for actually-incurred TQSE:

Extensions will only be authorized in situations where you can demonstrate that the need for additional time in temporary quarters is beyond your control. If you believe your circumstances warrant an extension, you must provide a written justification of your need to your new supervisor Your new supervisor will decide whether to approve the extension request. . . .

. . . Under no circumstances may your time in temporary quarters exceed a total of 60 consecutive calendar days.

Relying on the last-quoted sentence in the manual, FWS has refused to reimburse Mr. Reynolds for TQSE incurred beyond the sixtieth day the family lived in temporary quarters. The agency also seeks repayment of some TQSE benefits it has already paid on his behalf for days beyond that date.

Discussion

Under statute, an agency may pay to or on behalf of an employee whom it transfers in the interest of the Government actually-incurred subsistence expenses of the employee and his family while they are occupying temporary quarters in the United States. These expenses may be paid for a period of up to sixty days, and the period “may be extended up to an additional 60 days if the head of the agency concerned or the designee of such head of the agency determines that there are compelling reasons for the continued occupancy of temporary quarters.” 5 U.S.C. § 5724a(c) (2006). Congress has provided this benefit and others “so that employees will not have to incur financial losses when transferred at the request of the Government.” S. Rep. No. 1357, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2565.

Congress has charged the Administrator of General Services with the responsibility for prescribing regulations to carry out this and other provisions of law dealing with the relocation of government employees. 5 U.S.C. § 5738(a). The Administrator has fulfilled this duty by issuing the Federal Travel Regulation. The FTR contains this provision regarding the length of time of an employee's eligibility for actual TQSE reimbursement:

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 (2009). The provision faithfully implements the statute from which it springs.

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. *E.g.*, *Bryan Trout*, CBCA 2138-RELO (Mar. 18, 2011); *Jimmy D. Graves*, CBCA 963-TRAV, 08-1 BCA ¶ 33,805; *Michael Bilodeau*, CBCA 686-TRAV, 07-2 BCA ¶ 33,716 ("the FWS rules, as interpretative agency rules, are trumped by the FTR, which is a legislative rule"); *Katharine C. Hetts*, CBCA 786-RELO, 07-2 BCA ¶ 33,714; *Edward Queair*, GSBGA 15714-RELO, 02-1 BCA ¶ 31,757.

Here, the FWS manual provision in question falls afoul of this principle. 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 FWS manual precludes authorization of those last sixty days. It is therefore inconsistent with the FTR and may not survive.

The FTR explains that the term "compelling reason" means "an event that is beyond your control and is acceptable to your agency." Examples are given: delay in delivery of household goods; inability to occupy new permanent residence because of unanticipated problems; inability to locate an adequate permanent residence because of housing conditions

at new duty station; and sudden illness, injury, or death of the employee or a member of his immediate family. 41 CFR 302-6.105. All of these examples – which, the FTR states, are not an exhaustive catalog – recite situations in which a continuation of benefits is appropriate to promote the purpose of the statute, to keep employees from incurring financial losses due to no fault of their own when they are transferred at the request of the Government.

FWS has delegated to a transferred employee's new supervisor the authority to determine whether a compelling reason for an extension of the eligibility period exists. Mr. Reynolds' new supervisor determined that such a reason did exist in this employee's situation: although the employee had found and leased a permanent residence well within the initial sixty-day period, despite paying rent for that residence, he was unable to occupy it entirely due to the inability of the moving company assigned by the agency to deliver his household goods with reasonable promptness. This reason fits well within the examples given by the FTR of an event beyond the control of an employee which justifies an extension of the eligibility period.

Decision

We conclude that Mr. Reynolds' period of eligibility for reimbursement of actually-incurred TQSE was permissibly extended for the few days that the employee and his family remained in temporary quarters beyond the initial sixty-day period. Within the confines of the dollar limitations prescribed by the FTR, 41 CFR 302-6.100, FWS must reimburse the employee for, or pay on his behalf, TQSE he actually incurred up to and including July 11, 2010.

STEPHEN M. DANIELS
Board Judge