



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 8, 2015

CBCA 4613-RELO

In the Matter of MICHAEL R. LUJAN

Michael R. Lujan, Salt Lake City, UT, Claimant.

Eric J. Teegarden, Attorney-Adviser, Department of the Army, Fort McCoy, WI,
appearing for Department of the Army.

SOMERS, Board Judge.

Claimant, Michael R. Lujan, seeks review of the Department of the Army's (Army) decision rejecting his request to extend the periods of time authorized for temporary quarters subsistence expenses (TQSE) and the storage of his household goods (HHG). For reasons explained below, we affirm the agency's determination and deny the claim.

Background

The Army issued orders transferring Mr. Lujan from Vancouver, Washington, to Salt Lake City, Utah. The orders authorized temporary storage of the HHG for sixty days and TQSE for a period of sixty days on an actual expense basis.¹ Mr. Lujan reported for duty in Salt Lake City on January 27, 2015.

¹ Mr. Lujan's original orders, dated December 17, 2014, limited TQSE to ten days. An amendment to these orders, dated December 18, 2014, changed the authorized TQSE period to sixty days.

On February 6, 2015, Mr. Lujan asked the United States Army Reserve Command (USARC), through the Civilian Personnel Advisory Center (CPAC), for a ninety-day extension of HHG storage and a sixty-day extension of TQSE, explaining that he needed more time to sell his residence in Vancouver and to buy or rent a residence in Salt Lake City. To support his claim, Mr. Lujan submitted a letter from a mortgage company stating that Mr. Lujan could not qualify for a mortgage to purchase a specific property until he sold his house in Vancouver. Mr. Lujan also presented a memorandum from a real estate broker, which stated that residences in Vancouver stayed on the market for an average of sixty-four days, with additional time sometimes required due to delays surrounding the buyer's financing.

CPAC's representative notified Mr. Lujan that the agency denied his claims for additional TQSE and HHG. An email message dated February 18, 2015, stated that "[Mr. Lujan's] request for an extension is disapproved. The justification does not meet the Additional TQSE(AE) period outlined in the JTR [Joint Travel Regulations] 5802 B.2.a(2)."

Mr. Lujan submitted a second request for an extension of his HHG benefits in March 2015.² Mr. Lujan explained that he could not purchase or rent a home at his new duty station until he sold his home at the previous duty station. Citing JTR 5802-B.2.a(2), Mr. Lujan contended that the request for an extension of storage of HHG should be authorized because of "unforeseen delays in permanent private sector housing settlement/closing." Mr. Lujan noted that he had offered a monetary incentive to encourage the sale of his house and had lowered his asking price for the house.

By email message dated March 12, 2015, the CPAC representative advised Mr. Lujan that the agency had rejected his second request. The agency determined that:

Request for extension is disapproved. As PCS [permanent change of station] entitlements are geared toward the new PDS [permanent duty station] and not the old. [sic] Thus, based on JTR Chapter 5, Part E, Section 5, Mr. Lujan does not meet the below criteria:

1. Serious illness of the employee,
2. Serious illness or death of a dependent,

² On March 10, 2015, in an email message transmitting the request, Mr. Lujan stated that he had "dropped the request for TQSE and am requesting HHG only."

3. An intervening TDY [temporary duty] or long-term training assignment,
4. Non-availability of suitable civilian housing,
5. Awaiting completion of residence under construction,
6. Acts of God, or
7. Other circumstances beyond the employee's control.

On March 18, 2015, Mr. Lujan asked the Board to review the agency's denial of his claims.³

Discussion

Mr. Lujan states that because he is paying the mortgage on his house in Vancouver, “[I am] unable to secure a new mortgage, build contract or rental housing because our debt to income ratio would be too high because we are a one income family. . . . I have sought housing through the rental program at the nearest military facility, Hill Air Force Base (HAFB) and I received notification from the housing contractor that there isn't any availability for our family.” For these reasons, Mr. Lujan believes that the agency should have granted his request to extend his HHG storage for a period of ninety days and TQSE for an additional sixty days, pointing to various provisions in the JTR. We address each claim in turn.

a. TQSE claim

“Statute provides that an agency may pay an employee [actual TQSE] for ‘a period up to 60 days’ while an employee or family is occupying temporary quarters when the new official station is within the United States.” *Joseph S. Mikac*, CBCA 822-RELO, 08-1 BCA ¶ 33,725, at 166,978 (2007) (citing 5 U.S.C. § 5724a(c)(1)(A) (2000)). The agency may extend TQSE for up to an additional sixty days if the head of an agency or his or her designee determines there are compelling reasons for continued occupancy of temporary quarters. 5 U.S.C. § 5724a(c)(2) (2012).

“TQSE ‘is intended to reimburse [a transferred employee] reasonably and equitably for subsistence expenses incurred when it is necessary to occupy temporary quarters.’” *Stephen J. Collier*, CBCA 4395-RELO, 15-1 BCA ¶ 35,979, at 175,801 (quoting *Zenaida Canaba*, CBCA 3993-RELO, 15-1 BCA ¶ 35,958). “This benefit is granted at the discretion of the administering agency.” *Id.* Whether to grant extensions of TQSE is wholly within the

³ Despite Mr. Lujan's statement to the agency that he was “dropping” his claim for TQSE, it appears that he had decided to pursue that claim in this appeal.

agency's discretion, "and that exercise of discretion 'will not be overturned unless that decision is found to have been arbitrary and capricious.'" *Id.* (quoting *Rajiv R. Singh*, GSBCA 16892-RELO, 06-2 BCA ¶ 33,418, at 165,672); *see Marvin R. McGee*, GSBCA 15829-RELO, 02-2 BCA ¶ 32,002, at 158,114. "The requirement that there be 'a compelling reason' for extending an employee's TQSE reimbursement beyond the initial sixty-day period is itself a statutory requirement." *Paula K. Fowler*, GSBCA 15670-RELO, 02-2 BCA ¶ 31,861, at 157,444 (citing 5 U.S.C. § 5724a(c)); *see also Rafael Alvarez*, GSBCA 15651-RELO, 01-2 BCA ¶ 31,636, at 156,285.

The Federal Travel Regulation (FTR), which implements the statute providing for TQSE, allows an agency to authorize up to 120 days of TQSE. *See* 41 CFR 302-6.104 (2014). The initial period of actual TQSE may not exceed sixty days. *Id.* The agency may extend the period for up to an additional sixty days if it "determines that there is a compelling reason for [the employee] to continue occupying temporary quarters." *Id.*; *see also Collier*, 15-1 BCA at 175,802. A compelling reason necessary to extend TQSE beyond the first sixty-day period is "an event that is beyond [the employee's] control and acceptable to [the] agency." 41 CFR 302-6.105.

As a civilian employee of the Department of Defense, Mr. Lujan's travel and transportation are also governed by the JTR. "The JTR, as an agency rule which implements the [FTR], must be construed in a way which is consistent with the FTR, since the latter regulation is a 'legislative rule' that has the force of law." *Catherine Grace Bowles*, CBCA 4035-TRAV, 15-1 BCA ¶ 35,912, at 175,539 (citing *Stephen M. England*, CBCA 3903-TRAV, 15-1 BCA ¶ 35,870; *Robert A. Cherry*, CBCA 3878-TRAV, 14-1 BCA ¶ 35,707). The JTR explains that, with limited exceptions, "TQSE is a *discretionary, not mandatory*, allowance intended to partially reimburse an employee for reasonable subsistence expenses incurred when it is necessary for the employee and/or the employee's dependents to occupy *temporary lodging incident to a PCS move*." JTR 5772. The JTR provides examples of circumstances that may be beyond the employee's control and therefore compelling reasons for extending the period of eligibility for actual TQSE. These include:

- (1) Delayed HHG transportation and/or delivery to the new permanent private sector housing due to extended transit time incident to ocean transportation, strikes, customs clearance, hazardous weather, fires, floods, or other Acts of God;

- (2) Delayed occupancy of new permanent private sector housing because of unanticipated problems (e.g., unforeseen delays in permanent private sector settlement/closing, or unforeseen short-term delay in new dwelling construction); ([John E. Joneikis] GSBCA 15455-RELO, [01-2 BCA

¶ 31,514,] 26 June 2001, [J. D. Jamar, Jr.,] GSBCA 16646-RELO, [05-2 BCA ¶ 33,053,] 8 August 2005, and par. 5776-B1c).

- (3) Inability to locate permanent private sector housing adequate for family needs because of a new PDS housing conditions;
- (4) Sudden illness, injury, or death of the employee or of an immediate family member; and
- (5) Similar factors.

JTR 5802-B.2.a. The JTR requires the employee to provide acceptable written justification and documentation before an additional actual TQSE period is allowed. JTR 5802-B.2.c.

Here, Mr. Lujan justifies his request for additional TQSE by stating that he is “unable to carry two mortgages or a mortgage and rental contract,” as evidenced by the letter suspending his loan application for a residence in Utah pending the sale of his residence in Washington. Mr. Lujan contends that this justification shows that an exception should be authorized due to “. . . unforeseen delays in permanent private sector housing settlement/closing.” The agency rejected this request, finding that the unforeseen delays resulted from delay in selling the house at the previous assignment, and that “PCS entitlements are geared toward the new PDS and not the old.”

In its submission in response to the claim, the agency, focusing on the home in Vancouver, asserts that the delay in its sale is well within Mr. Lujan’s control. The agency suggests that Mr. Lujan has many options, including reducing the price to sell the house or leasing the house to a tenant. The agency also notes that Mr. Lujan did not provide any evidence to support his claim that housing conditions in Utah inhibited his ability to obtain suitable housing at his new location.

It is clear that the agency exercised its broad discretion when it rejected Mr. Lujan’s claim. TQSE is intended for use when it is necessary for an employee to occupy temporary quarters. 41 CFR 302-6.300. “A generally poor market condition for the sale of a house [is] not a compelling reason justifying an extension of the TQSE period. A determination as to extending the period of TQSE eligibility is left to the sound discretion of the agency, and its discretion will not be overturned unless it is arbitrary and capricious.” *Mikac*, 08-1 BCA at 166,980 (citing *Melinda Slaughter*, CBCA 754-RELO, 07-2 BCA ¶ 33,633; *Charles A. Nalley, III*, GSBCA 16798-RELO, 06-1 BCA ¶ 33,263).

The agency reasonably exercised its discretion when it denied Mr. Lujan's claim for an extension of TQSE, so we do not overturn its decision.

b. HHG claim

Agencies are authorized to pay the "expenses of transporting, packing, crating, temporarily storing, draying, and unpacking" a transferred employee's HHG. 5 U.S.C. § 5724(a)(2). The FTR states, in relevant part:

The initial period of temporary storage at Government expense may not exceed 60 days. You may request additional time, up to a maximum of 90 days, and you must make such a request prior to the expiration of the original 60 days. This extension must be approved by the agency official designated for such requests. Under no circumstances may temporary storage at Government expense for CONUS [Continental United States] to CONUS shipments exceed a total of 150 days.

41 CFR 302-7.9(a). The regulation lists reasons justifying temporary storage beyond the initial ninety-day period, including, but not limited to:

- (a) An intervening temporary duty or long-term training assignment;
- (b) Non-availability of suitable housing;
- (c) Completion of residence under construction;
- (d) Serious illness of employee or illness or death of a dependent;
- (e) Strikes, acts of God, or other circumstances beyond the control of the employee.

41 CFR 302-7.10. The JTR identifies slightly different reasons that may permit extending the temporary storage of HHG beyond sixty days:

1. Serious illness of the employee,
2. Serious illness or death of a dependent,
3. An intervening TDY [temporary duty] or long-term training assignment,

4. Non-availability of suitable civilian housing,
5. Awaiting completion of residence under construction,
6. Acts of God, or
7. Other circumstances beyond the employee's control.

JTR 5672-C.

Here, Mr. Lujan's original orders authorized temporary storage of his HHG for sixty days. As noted previously, the agency denied Mr. Lujan's request for an extension of ninety days "for storage of household in order to allow for more time to settle the closing of both the sale and purchase of each residence."

In evaluating Mr. Lujan's claim, we note that "the standards for extending the TQSE period and extending the period of authorized storage of [HHG] are not the same." *Fowler*, 02-2 BCA at 157,444-45 (citing *Clifford E. Peterson*, GSBCA 15112-RELO, 00-1 BCA ¶ 30,812; *Daniel A. Rishe*, GSBCA 14444-RELO, 98-1 BCA ¶ 29,677). However, we have also held that "an extension of the normal . . . period of authorized temporary storage is readily justifiable when an actual event or circumstance over which a claimant has virtually no control necessitates continuation of the temporary storage." *Fowler*, 02-2 BCA at 157,444.

Mr. Lujan has pointed to no meaningful evidence that his delay in obtaining a permanent residence at his new assignment is attributable to causes beyond his control. As noted by the agency, Mr. Lujan has failed to show that he is unable to find suitable housing in the Salt Lake City area that is adequate for his family's needs because of housing conditions at the new location. The single letter presented by Mr. Lujan to show that he could not close on one property until he sold his property in Vancouver is insufficient. Nothing indicates that Mr. Lujan could not have pursued other potential residences in Salt Lake City, or that his circumstances met the criteria set forth in the FTR and the JTR.

Accordingly, we find the agency acted reasonably and in accordance with applicable statute and regulations in concluding that Mr. Lujan's request for an extension of the authorized period for temporary storage should also be rejected.

Decision

For the reasons stated, we affirm the agency's decision and deny the claim.

JERI KAYLENE SOMERS
Board Judge