



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 15, 2016

CBCA 5017-RELO

In the Matter of NELSON A. KRAEMER

Nelson A. Kraemer, Tyndall Air Force Base, FL, Claimant.

Helen King, Budget Analyst, Air Force Personnel Center, Department of the Air Force, Randolph Air Force Base, TX, appearing for Department of the Air Force.

WALTERS, Board Judge.

Claimant, Nelson A. Kraemer, a civilian employee of the Department of the Air Force, seeks the Board's review of his agency's denial of his request for an extension of benefits for temporary quarters subsistence expenses (TQSE) in conjunction with his permanent change of station (PCS) move from Fort Worth, Texas, to Tyndall Air Force Base (AFB), Florida. For the reasons explained below, we remand the claim to the agency for its reconsideration.

Background

In September 2015, in connection with the PCS move, claimant was provided with twenty-one days of TQSE actual expense reimbursement. Two days before the twenty-one day TQSE period was scheduled to expire, claimant requested an extension of thirty additional days, in order to cover temporary lodging until the planned settlement on a home he was to purchase that was under construction. Among the primary grounds claimant advanced for justifying the requested TQSE extension were: (1) that he could not focus on locating housing, because of his father's recent diagnosis with a serious long-term illness; (2) that he found himself unable to locate readily at a reasonable price and within a reasonable distance from his new duty station housing appropriately sized for his family and

belongings; and (3) that the home he ultimately contracted to purchase was under construction and would not be completed for another several weeks. The agency evaluated claimant's request based on the Air Force's own internal policy and guidance regarding TQSE, determined that claimant failed to present sufficiently compelling justification for the requested extension, and therefore denied his request. Claimant subsequently sought our review.

Discussion

It is well established that 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.*, GSBGA 16682-RELO, 06-1 BCA ¶ 33,168, at 164,357; *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) (2012). The Federal Travel Regulation (FTR), which implements the statute, provides examples of "compelling reasons" that may be acceptable to an agency:

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.

Here, the grounds claimant advanced for seeking an extension coincide with the sort of “compelling reasons” envisioned by the FTR. First, in terms of claimant’s assertions regarding his father’s illness, though the illness may not have qualified as “sudden,” its discovery by claimant shortly before departing for his new duty station appears to have come as a surprise to him, such that it may well have had a negative emotional effect on claimant’s ability to focus effectively on house hunting efforts. Also, though his father may not be considered strictly within the ambit of claimant’s “immediate family,” his illness could easily be regarded as a “similar reason.” Nevertheless, the agency rejected the father’s illness as a basis for TQSE extension here, because its discovery occurred prior to Mr. Kraemer’s departure and prior to the TQSE period, and there was no attempt on Mr. Kraemer’s part to delay the PCS or to take emergency leave. The agency concluded that the father’s illness “doesn’t appear to have had a bearing on the home search at his new PDS.” Because claimant did not furnish specifics on how his father’s illness precluded him from searching for housing, we cannot say that this conclusion was arbitrary or capricious or an abuse of the agency’s discretion.

Next, claimant contends that he was unable to locate a permanent residence adequate to his family’s needs, because of housing conditions near Tyndall AFB. The residence claimant eventually undertook to purchase was under construction, and required several weeks beyond the TQSE period to complete. Claimant provides the following detail as to why he believes the available housing was not suitable and why such lack of housing forced him to contract for newly constructed housing with very little time left within the TQSE period:

The houses . . . were too expensive [and] out of my budget. My wife is currently not working. I can’t move into a house that I can’t [afford] The other houses that we went too [sic] look [at] were not only too small but lacked security. They either had a bar on the sliding door or the back had wooded area with a creek and in some case[s were] in a flood zone. I should at least be able to rent or buy a house of equal size as in Fort Worth to accommodate my furniture. I would have had to put some of my furniture in storage at my expense. There was one house that after further inspection had multiple roof leaks. I would have had to replace the roof or risk damaging my furniture. I

had to cancel this contract. I believe that in my situation and the houses that we went to see, quarters were not available for rent or purchase. This move has placed undue hardship on my wife and me as we are finally in contract to buy a house, but short on TQSE.

Our predecessor board for these matters, the General Services Board of Contract Appeals (GSBCA), in one case sustained an agency's exercise of its discretion in denying an extension of the TQSE period, where the transferred employee entered into the purchase contract knowing that the construction would extend beyond the initial TQSE period. *Melinda Salmon*, GSBCA 15832-RELO, 02-2 BCA ¶ 31,965. By the same token, in another case, the GSBCA upheld the discretion of an authorizing official in approving a request for TQSE extension where new construction was known to extend beyond the TQSE period, and did so in spite of a reviewing (disbursing) office's refusal to approve, in a situation where the employee was forced to purchase a newly constructed house, because there was a lack of suitable existing housing at his new duty station. *John E. Joneikis*, GSBCA 15455-RELO, 01-2 BCA ¶ 31,514; *see also Nora L. Donohue*, GSBCA 15687-RELO, 02-1 BCA ¶ 31,780.

The agency in the present case, however, takes issue with claimant's contention regarding the lack of suitable housing. In this regard, the agency's stance appears to stem from the following language set forth in the Air Force's TQSE policy and guidance memorandum:

In order for TQSE to be extended based on lack of suitable housing at the new duty station, the employee must show that quarters are not available to either purchase or rent. High cost of housing and personal preferences that are not justified, such as minimum square footage or a garage, may not be used to support an extension request (GSBCA 15455-RELO & 15687-RELO).

There is nothing in the statute or regulation that suggests that the price of available housing ought not be considered as a factor in determining the lack of suitable housing. Moreover, neither GSBCA decision cited in the guidance memorandum (i.e., *Joneikis* or *Donohue*) stands for the proposition that price is not to be considered when determining the suitability of available housing, nor does either decision support the agency's view that adequacy of space is not a factor to consider. And, although we might not agree with claimant that housing near Tyndall AFB would have to equal the square footage of his Fort Worth residence in order to be considered "suitable," the amount of space provided obviously would have to be reasonable.

To counter claimant's complaint regarding affordable housing in the Tyndall AFB area being too small for his family's needs, the agency relies heavily on our Board's decision

in *Donald E. Coney*, CBCA 702-RELO, 07-2 BCA ¶ 33,605. That case is inapposite. The claimant in *Coney* was looking for a house that would be configured to accommodate two massive clothing storage units ten feet high that he had purchased in Europe. Here, there is nothing to indicate that Mr. Kraemer's need for space to accommodate furniture from his Fort Worth house was in any way comparable or that his furniture presented unusual challenges in terms of space requirements.

In a recent decision, *Israel Vega-Marrero*, CBCA 4584-RELO, 15-1 BCA ¶ 36,151, a case which claimant cites, we noted that "federal statutes and the regulations implementing them trump agency policies." *Id.* at 176,437 (citing *Charles A. Houser*, CBCA 2149-RELO, 11-1 BCA ¶ 34,769). Thus, it has been repeatedly held, "[a]ny agency rule which is inconsistent with an FTR provision is consequently trumped by the FTR and must give way." *Houser*, 11-1 BCA at 171,112 (quoting *Kevin D. Reynolds*, CBCA 2201-RELO, 11-1 BCA ¶ 34,756, at 171,061 (and cases cited therein)). Although we recognize and appreciate that agencies have wide discretion when addressing requests for extensions of time for TQSE reimbursement, 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." *Vega-Marrero*, 15-1 BCA at 176,438, citing *Houser*, 11-1 BCA at 171,112. Contrary to the Air Force TQSE policy and guidance memorandum, the statute and regulation do not limit the definition of housing "suitability" by eliminating consideration of either price or square footage. Rather, the statute and regulation contemplate a "broader consideration" of what constitutes available "suitable" housing, a consideration that would take both such factors into account. It would therefore be appropriate for the agency to reconsider and reassess the "circumstances supporting" claimant's extension request in this manner. *See Vega-Marrero*, 15-1 BCA at 176,438. It would also be appropriate for claimant to take this opportunity to furnish the agency with any other specific details or documentation he may have regarding his efforts to secure housing during the TQSE period (including, inter alia, any documentation regarding his cancellation of the contract for the house with the leaky roof – something the agency refused to address absent such documentation).

Decision

We remand the matter to the agency for it to reconsider claimant's extension request in light of this decision.

RICHARD C. WALTERS
Board Judge