UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 29, 2021

CBCA 6756-RELO

In the Matter of CHRISTOPHER S.

Christopher S., Claimant.

Renee Achille-Williamson, Budget Analyst, Air Force Personnel Center, Department of the Air Force, Randolph Air Force Base, TX, appearing for Department of the Air Force.

O'ROURKE, Board Judge.

A civilian employee's request to extend his thirty-day allotment of temporary quarters subsistence expense (TQSE) by another fifteen days was denied by the agency. When an extension request is made before the expiration of the initial sixty-day period, as it was here, the circumstances need not be compelling, unforeseeable, or beyond the employee's control. Since the agency applied the more stringent criteria to claimant's request, we return the claim to the agency to exercise its discretion consistent with this opinion.

Background

Claimant, an Air Force civilian employee previously based in Florida, was selected for a position in Washington, D.C., with an entry on duty date (EOD) of September 29, 2019. In preparation for his permanent change of station (PCS) move, claimant attended a mandatory briefing at the Traffic Management Office (TMO) on August 15, 2019, where an Air Force representative informed him that TMO could not accommodate his requested household goods (HHG) pick-up date of September 26, 2019, because it did not comply with

TMO's policy.[1] The representative instructed him to select an earlier date. Claimant complied and rescheduled it for September 19, 2019.

Claimant's PCS orders, dated July 24, 2019, authorized thirty days of TQSE. He and his family began occupying temporary quarters as soon as their HHG were packed. They spent eleven days in temporary quarters in Florida before departing for claimant's new permanent duty station (PDS). They arrived in Washington, D.C., on October 1, 2019, and again checked into temporary quarters.

On October 17, 2019, claimant requested a sixty-day extension of TQSE to facilitate the sale of his residence at his former PDS and the purchase of a home at his new PDS. Claimant also stated that he had used more TQSE days than necessary at his former PDS after he was given incorrect information about his HHG pick-up date. The Air Force denied the extension, stating that "extensions of TQSE may not be granted based on the sale of a home at the previous PDS." Claimant acknowledged and accepted that reasoning. However, because the Air Force only addressed one of the two justifications submitted in his request, claimant asked for permission to revise it and resubmit it based on the remaining justification. The Air Force agreed but asked for an email or other supporting documentation from TMO about its policy.

In his revised request, claimant asked for a fifteen-day extension (instead of sixty days) to cover days spent in temporary quarters at his former PDS. "I originally requested HHG pick up 3 days prior (26 Sep) to my EOD (29 Sep) to preserve my TQSE allotment, but that was declined." Claimant explained that what TMO communicated to him turned out to be incorrect and cost him additional days of TQSE on the front end of his PCS, which he could have used after arriving in Washington, D.C., where he spent thirty days in temporary quarters at personal expense. Claimant included the relevant forms reflecting the original and changed HHG pick-up dates, and also provided an email from the Logistics Readiness Squadron (LRS) commander substantiating the fact that the scheduling requirements of the Joint Personal Property Office, as communicated to claimant by TMO, determined the HHG packing and pick-up dates.

Notwithstanding the justification and documentation provided by claimant, the Air Force denied the revised request, stating, "[T]he justification provided unfortunately does not

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[1] According to information in the record, the policy required a two-week buffer between a member's HHG pick-up date and EOD. Two DD Forms, 1299 and 1797, were included in the record. The initial request (dated August 5, 2019) reflected a HHG pick-up date of September 26, 2019; the revised request (dated August 15, 2019, the same date as the TMO meeting) had a date of September 19, 2019.

meet the criteria for granting an extension, as it did not cause a delay in occupying permanent quarters at the new PDS." Claimant sought the Board's review of the agency's decision.

Discussion

Because claimant is an Air Force employee, he is subject to both the Joint Travel Regulations (JTR) and the Federal Travel Regulation (FTR). *Sheila D. Bacon*, CBCA 4339-RELO, 15-1 BCA ¶ 36,014. In the event of a conflict, however, the FTR takes precedence. *Jimmy D. Graves*, CBCA 963-TRAV, 08-1 BCA ¶ 33,805. The JTR defines TQSE as a "discretionary allowance intended to partially reimburse a civilian employee for temporary lodging, meals, and incidental expenses incurred when it is necessary for the civilian employee or his or her dependent to occupy temporary lodging during a PCS move." JTR 053605. The JTR established two distinct time limitations for TQSE: one for the initial period and one for extensions. For the initial period, it stated "TQSE . . . may be authorized for 60 or fewer consecutive days, but *only* for the time that temporary lodging is required." JTR 054206-A.1. For extensions beyond the initial, sixty-day period, the JTR stated:

> If a civilian employee provides acceptable, written justification and documentation, an [approving official (AO)] may authorize or approve TQSE . . . for an additional 60 or fewer consecutive days to total no more than 120 days, including the initial TQSE . . . The AO may authorize extensions only if he or she determines there are compelling reasons for the continued temporary lodging occupancy due to circumstances beyond the civilian employee's control. The civilian employee's written justification describing the circumstances beyond his or her control and the AO's documentation supporting the approval or denial of the requested extension must be retained.

JTR 054206-A.2. The JTR also provided examples of "acceptable circumstances" that included but were not limited to: (1) delays in the transport or delivery of HHG, (2) delays in the occupancy of new private-sector permanent housing due to unanticipated problems, such as unforeseen delays in closing on a residence or new construction, (3) inability to locate permanent private-sector housing adequate for family needs due to housing conditions, and (4) sudden illness, injury, or death of the employee or of an immediate family member. *Id*.

In this case, the agency denied claimant's request because the event "did not cause a delay in occupying permanent quarters at the new PDS." After claimant sought the Board's review, the agency elaborated on its decision, stating three reasons for denying the fifteen-day extension: (1) erroneous advice by a government representative did not create an entitlement to reimbursement; (2) the agency considered the requested and actual HHG pick-up dates, and determined the circumstance was not unanticipated or unforeseen, since

scheduling was arranged more than a month in advance; and (3) the eight-day difference was not determined "to be a compelling circumstance warranting extension [in accordance with] the JTR." The agency also noted that there was no indication the information presented to its office for review was erroneous or faulty, and that it did not require an employee to use TQSE during a PCS move.

The Board has consistently affirmed the discretion of agency officials in granting TQSE. *See Scott T. Downey*, CBCA 6777-RELO, 20-1 BCA ¶ 37,621; *Michael P. Voich*, CBCA 6635-RELO, 20-1 BCA ¶ 37,595. The Board will not overturn an agency decision unless it is arbitrary, capricious, or contrary to law. *Donald E. Coney*, CBCA 702-RELO, 07-2 BCA ¶ 33,605 (citing *Vicky Lynn Tucci*, GSBCA 16826-RELO, 06-2 BCA ¶ 33,366). We address each of the agency's reasons for denying the extension in accordance with this standard of review.

No Entitlement Based on Erroneous Advice by a Government Official

In its response to claimant's appeal, the agency pointed to the Board's well-established case law which holds that claims based on the erroneous advice of government officials do not entitle employees to reimbursement. *Linda Cashman*, CBCA 3495-RELO, 14-1 BCA ¶ 35,535. However, in characterizing our decisions, the agency misconstrued the Board's reasoning by omitting the critical part—that payments cannot be made based on erroneous advice *in contravention to a regulation or statute*. See *Monika M. Derrien*, CBCA 5901-TRAV, 18-1 BCA ¶ 36,967 ("An agency employee's erroneous advice cannot obligate the Government to make payment of monies that are not authorized by statute and regulation."); *see also Rourke B. O'Flaherty*, GSBCA 15475-RELO, 01-2 BCA ¶ 31,449 ("[E]rroneous advice, and failure to provide any advice at all, cannot override the regulations that govern payment of TQSE benefits.").

Categorically denying claims prompted by bad advice punishes the employee twice—first with the bad advice, then again by refusing to consider the underlying issues. When a regulation confers discretion on an agency to grant or deny an allowance, the agency is free to exercise its discretion to remedy the ill effects of bad advice, as long as the remedy is legally sufficient. To be clear, it is not the *fact* that an employee received bad advice that precludes relief. Rather, it is the fact that what the employee seeks, the law does not allow.

Here, the extension request was well within the maximum allowable limits of TQSE, and the agency was not precluded from granting the request simply because it was premised on bad advice. Had the agency halted its inquiry at this point, we would be obliged to find its decision arbitrary and contrary to regulations. However, since the agency provided additional justification for its position, we continue our examination consistent with regulations and relevant case law.

Claimant's Circumstances Were Foreseeable and Not Beyond His Control

The agency's second reason for denying claimant's TQSE extension request was that, after considering the difference between the two HHG dates (September 26, 2019, the requested date, and September 19, 2019, the actual date), it determined that "the circumstance was not unanticipated or unforeseen, as the scheduling was arranged more than a month in advance." Claimant attended the TMO briefing on August 15, 2019, where he was instructed to select an earlier HHG pick-up date of September 19, 2019. In pointing out that claimant had over one month to consider this schedule of events, the agency posited that he had sufficient time to make other arrangements, a fact which, in the agency's view, rendered his lodging circumstances *foreseeable*, and therefore, not beyond his control. Since the JTR specifically identified "unanticipated problems," such as unforeseen closing or construction delays, as acceptable circumstances warranting TQSE extensions, the agency appears to have reasoned that the opposite must also be true—that where circumstances were foreseeable, they did not merit extending TQSE benefits. This premise certainly bears out in the case law where residential closings and construction delays were concerned. See *Dean W. Yoder*, CBCA 5426-RELO, 17-1 BCA ¶ 36,893; *Charles J. Shedrick*, CBCA 5066-RELO, 16-1 BCA ¶ 36,431; *Beverly K. Joiner*, CBCA 1675-RELO, 09-2 BCA ¶ 34,273; *Rafael Alvarez*, GSBCA 15651-RELO, 02-1 BCA ¶ 31,636; *Chaturbhuj N. Gidwani*, GSBCA 14910-RELO, 99-2 BCA ¶ 30,504.

The tangle here is that the parties pointed to different issues to demonstrate whether the circumstances were beyond claimant's control, neither of which was a delay related to a closing or new construction. The agency looked at whether compliance with TMO's policy left claimant with enough time to make other lodging arrangements, whereas claimant looked at the policy itself. While both assertions can be true, the agency's discretion is broad and usually prevails. *Lawrence K. Hoskin*, CBCA 5521-RELO, 16-1 BCA ¶ 36,548 (citing *Melinda Slaughter*, CBCA 754-RELO, 07-2 BCA ¶ 33,633). Since TQSE is a discretionary responsibility of the agency, using a foreseeability standard to determine whether an event was beyond an employee's control was consistent with its authority. The agency referenced its regulatory obligation to administer TQSE extension requests in a uniform manner and cited to Air Force Manual 36-606, *Civilian Career Field Management and Force Development*, paragraph 5.8.3.2.3. Thus, if the agency routinely employed a foreseeability standard when analyzing such requests—even ones unrelated to delays in closings or construction—then applying it here was consistent with that duty.

We are troubled, however, that in reviewing the record, the agency also stated "[T]here was no indication the information presented to our office for review was erroneous or faulty." The evidence presented by claimant clearly showed that he changed his HHG pick-up date based on TMO's representations about its policy. Claimant subsequently learned that TMO was incorrect about the policy, an error which caused him to use additional

days of TQSE, as evidenced by the forms. The LRS commander made a statement to that effect. The agency now states that claimant was not required to use those TQSE days because he had time to make other arrangements. That may be true, but when the agency asked claimant for evidence of the erroneous information, and claimant provided it, the agency had those dates, yet failed to make that argument. Indeed, at each step of this process the agency has provided different justifications for its denial. See *J.D. Jamar, Jr.,* GSBCA 16646-RELO, 05-2 BCA ¶ 33,053 (where the Board found the agency's decision arbitrary and capricious due to varying justifications among multiple levels of review).

Eight-Day Difference Was Not a Compelling Circumstance Warranting an Extension

The agency's third reason for denying claimant's extension request was that the eight-day difference was not "a compelling circumstance warranting an extension." In its response, the agency listed examples of acceptable circumstances "as they relate to HHG," which included transit delays due to ocean transport, strikes, customs clearance, hazardous weather, fires, floods, or other acts of God. *See* JTR 054206. The agency found that claimant's circumstances did not meet any of these and, therefore, was not acceptable or compelling.

We understand the agency's desire to utilize the more defined aspects of the JTR's framework to analyze each and every request. Such an approach undoubtedly results in a more uniform application of the governing regulations. But that is not always possible. For this reason, the same framework gave agencies the flexibility to consider reasons that do not fit neatly into the defined categories. This was one such case. By trying to make it fit into a category where new construction and residential closings often delay an employee's occupancy of permanent quarters, the agency's various decisions were disjointed. Add to that, the agency's focus on HHG delivery delays, a topic wholly irrelevant to the facts of this case, and the agency's bare statement that an eight-day difference was not a compelling circumstance warranting an extension, and the analysis appears to be a scattered, "spaghetti-at-the-wall" approach to evaluating TQSE extensions, although that might not have been the agency's intention.

Another area where the agency's analysis went wrong was in applying more stringent criteria to claimant's request than the law required. The FTR, which implements the statute providing for TQSE, "allows an agency to authorize as many as 120 [consecutive] 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." *Stephen J. Collier*, CBCA 4395-RELO, 15-1 BCA ¶ 35,979 (quoting *Kevin D. Reynolds*, CBCA 2201-RELO, 11-1 BCA ¶ 34,756). While less clearly articulated, the JTR is consistent with the FTR in that it does not impose a compelling reason requirement on

TQSE extension requests that do not seek extensions beyond the initial period of sixty consecutive days.

Claimant's first request exceeded the sixty-day period, requiring the agency to identify a compelling reason for extending it. Claimant's revised request, on the other hand, was a mere fifteen days, so the agency had no such mandate. Nonetheless, the agency applied the more stringent criteria to claimant's request. While we recognize and appreciate that agencies have broad discretion in granting TQSE extensions, we have also found that an agency's discretion is not unfettered and must be applied in a manner that is not arbitrary, capricious, or in violation of the law. *Nelson A. Kraemer*, CBCA 5017-RELO, 16-1 BCA ¶ 36,224 (citing *Israel Vega Marrero*, CBCA 4584-RELO 15-1 BCA ¶ 36,151). Because the agency misconstrued the guidance set forth in the FTR and JTR, the agency has not properly exercised its discretion or articulated an acceptable basis for denying the request.

The agency does not dispute that claimant used eight days of his thirty-day TQSE allotment at his former PDS based on TMO counseling, nor does it dispute that claimant actually stayed in temporary quarters at the new duty station for the additional eight days. When an extension request is made before the expiration of the initial sixty-day period, as it was here, the circumstances need not be compelling, unforeseeable, or beyond the employee's control. Therefore, unless the agency can articulate a reasonable basis for denying the request, it should grant it.

Decision

We return the request to the agency to exercise its discretion consistent with this opinion.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge