

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

August 6, 2001

GSBCA 15592-RELO

In the Matter of JAMES E. ROBERTS

James E. Roberts, Washington, DC, Claimant.

Shirley Ickes, Agricultural Marketing Service Travel Coordinator, Department of Agriculture, representing Department of Agriculture.

NEILL, Board Judge.

On behalf of the claimant in this case, Mr. James E. Roberts, the Department of Agriculture has forwarded his claim for an extension of an authorized reimbursement of temporary quarters subsistence expenses (TQSE). The agency is of the opinion that regulations prohibit extension of this authorization. Based upon the record before us, we conclude that the agency has the discretion to amend Mr. Roberts' orders to extend this authorization, but only if it believes there is a compelling reason for doing so and subject to the usual limits imposed by statute and regulation.

Background

Upon transfer to his agency's offices in Washington, D.C., Mr. Roberts was authorized TQSE for an initial period of thirty days. He took possession of temporary quarters for himself in Washington on September 12, 2000. His family chose to remain behind at his former duty station until the end of the school year. In early October, the original authorization of TQSE was extended for an additional thirty days. In November, Mr. Roberts requested authorization for an additional sixteen days -- until November 26. He explained that he had recently arranged to rent permanent quarters but that they would not be available until after the first of the year. Since he stood to forfeit a considerable amount of annual leave if it was not taken before the end of the year, Mr. Roberts planned to go on annual leave until his apartment in Washington became available. He, therefore, vacated his temporary quarters on November 27 and returned to his former residence to take annual leave with his family.

While on leave, Mr. Roberts was informed that the apartment on which he had already put down a deposit would not be available. The current tenants, who had anticipated vacating in early January, had unexpectedly changed their plans and would not be leaving as expected. As a result, when Mr. Roberts returned to Washington at the start of the new year,

he was still without permanent quarters.

From January 3 to January 8, Mr. Roberts remained in temporary quarters at Washington. He then left the city on a temporary duty (TDY) assignment. He returned January 12. He eventually moved into permanent quarters on February 25, 2001. Shortly before moving into these quarters, he requested that the agency authorize an additional fifty days of TQSE.

The agency denied Mr. Roberts' request for additional TQSE on the ground that when he went on annual leave in November and left the Washington area, his TQSE stopped. Noting that section 302-5.105 of the Federal Travel Regulation (FTR) requires TQSE to run consecutively, the agency contends that the TQSE authorization cannot resume after the interruption for Mr. Roberts' leave.

Discussion

From the facts in this case it is clear that claimant's TQSE authorization did in fact expire on November 26, 2000. In the past, we have posed no objection to an agency amending a claimant's orders to ensure that a previous authorization of TQSE, which has inadvertently expired, continues to run for a transferred employee who still has been unable to locate permanent quarters. Timothy J. Helke, GSBCA 15476-RELO, 01-1 BCA ¶ 31,289. The lapse of the TQSE authorization in Mr. Roberts' case was not inadvertent. Nevertheless, we believe that the holding in our Helke decision can be logically extended to the facts in this case. The authorization of TQSE for Mr. Roberts was permitted to expire because both the employee and, presumably, the agency assumed -- mistakenly as facts turned out -- that no further authorization would be necessary. Arrangements had been made for permanent quarters and the employee planned to be on annual leave until they became available.

As we stated in our Helke decision, in cases such as this, the agency's own aim and intent is of paramount importance. If, after the expiration of an authorized increment of TQSE, an agency learns that a transferring employee has yet to find adequate permanent housing, and the employee's reason for failing to do so is, in the judgment of the agency, acceptable, then we see no reason why it should not be within the discretion of the agency, if it so wishes, to amend the employee's orders to ensure that the authorization continues.

It is clear from the statute authorizing agencies to grant TQSE (5 U.S.C. § 5724a(c) (Supp. V 1999)) and from part 302-5 of the FTR (41 CFR pt. 302-5 (2000)) that the authorization of TQSE is a matter left to the broad discretion of the employee's agency. These are not matters in which we become involved unless we conclude that the agency's exercise of discretion is arbitrary, capricious or contrary to law. E.g., Daniel A. Rische, GSBCA 14444-RELO, 98-1 BCA ¶ 29,677; William T. Stowers, GSBCA 14099-RELO, 97-2 BCA ¶ 29,096; Holly Rowe, GSBCA 14037-RELO, 97-1 BCA ¶ 28,934. By statute and regulation, an agency may extend its authorization of TQSE beyond an initial consecutive sixty days for a "compelling reason." FTR 302-5.105 defines a "compelling reason" warranting extension of authorized TQSE as an event beyond the claimant's control and acceptable to the claimant's agency. If Mr. Roberts' agency believes that the circumstances of this case meet that test, then we pose no objection to the extension of his authorized TQSE

for whatever period of time the agency deems appropriate -- subject, however, to the limits discussed below.

Any such authorization must be continuous. In this regard, the FTR provides the following guidance:

May I interrupt occupancy of temporary quarters?

Yes. Your authorized period for claiming actual TQSE reimbursement is measured in consecutive days, and once begun, normally continues to run whether or not you occupy temporary quarters. You may, however, interrupt your authorized period for claiming actual TQSE reimbursement in the following instances:

(a) For the time allowed for en route travel between the old and new official stations;

(b) For circumstances attributable to official necessity such as an intervening temporary duty assignment or military duty; or

(c) For a non-official necessary interruption such as hospitalization, approved sick leave, or other reason beyond your control and acceptable to your agency.

FTR 305-5.106. This provision accurately reflects the statute which it implements. Under that statute, payment of TQSE is authorized for a "period" of sixty days, which "period" may be "extended" for compelling reasons but for no more than an additional sixty days. See 5 U.S.C. § 5724a(c). Because the statute makes no mention of more than one period, the FTR assumes that, but for the exceptions mentioned, the days of authorized TQSE run consecutively and continue to do so in the event the original period of authorization is extended.

This brings us to the question of whether the annual leave which Mr. Roberts elected to take at the end of the year could be considered to interrupt any further extension of his authorized TQSE which the agency might choose to make. We have previously held that annual leave for vacation or other purposes not related to the employee's transfer does not interrupt the running of authorized TQSE but that expenses incurred during that period of time cannot be paid. Robert E. Jacob, GSBCA 13792-RELO, 97-2 BCA ¶ 29,218. Annual leave is not mentioned in the above-quoted regulation as a legitimate ground for interrupting TQSE because generally it is within the control of an employee to decide when such leave is taken. Nevertheless, in this case, the claimant states that he was in a "use or lose" position regarding his annual leave. Conceivably this might justify a "non-official necessary interruption" under FTR 302-5.106(c) if Mr. Roberts was unable to schedule leave at an earlier date owing to circumstances relating to his official duties. The record before us sheds no light upon this issue and, in any event, this is a matter on which we defer to the agency since, under the regulation, any such alleged justification for interruption must be one adjudged by the agency to be acceptable.

On the other hand, there is no question of whether any TQSE authorization which the agency might choose to extend would be interrupted by Mr. Roberts' TDY travel in early January 2001. Under FTR 302-5.106(b) any such authorization of TQSE authorization would be legitimately interrupted.

Apart from the issue of whether any extended authorization of TQSE might be properly interrupted, is another even more fundamental issue. Mr. Roberts was initially authorized thirty days of TQSE. This authorization was extended twice, once for another thirty-day period and once for an additional sixteen days. When the authorization expired on November 26, a total of seventy-six days had already been authorized. In his claim, Mr. Roberts has asked for an additional fifty days. This request obviously exceeds, at least in part, the maximum allowable number of one hundred twenty days. If the agency in its discretion elects to consider the claimant's request, any extension it might choose to make must, of course, be subject to this limit.

We return this case to the claimant's agency for whatever action the agency deems appropriate in accordance with our decision.

EDWIN B. NEILL
Board Judge