

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

February 12, 2002

GSBCA 15687-RELO

In the Matter of NORA L, DONOHUE

Nora L. Donohue, Redford, MI, Claimant.

Robert D. Brown, Deputy Director, Finance Center, United States Army Corps of Engineers, Millington, TN, appearing for Department of the Army.

HYATT, Board Judge.

Claimant, Nora L. Donohue, is a civilian employee of the United States Army Corps of Engineers. In May 2001, she accepted a promotion which involved a permanent change of station (PCS) from the Portland District in Oregon to the Detroit District in Michigan. Her request for an extension of temporary quarters subsistence expenses (TQSE) from sixty to 120 days was concurred in by her immediate supervisor and approved by the Detroit District Commander, but subsequently questioned by the finance office, which ultimately denied her claim. She seeks review of that decision.

Background

Upon being notified of her impending transfer, Ms. Donohue promptly put her house on the market in late May 2001. She arrived in the Detroit area on June 8, 2001, and began receiving TQSE. Because she had pets, there were only a few places in the Detroit area where she could arrange for temporary, short-term housing. After two months had lapsed, claimant requested an extension of TQSE for another sixty days, with the brief explanation that she had experienced difficulty selling her home in Oregon. Her supervisor, who was the "order-issuing/authenticating official," and the Detroit District Commander, the "travel approving official," approved her request.

Subsequently, Ms. Donohue learned that the travel voucher reviewer for the Corps' finance office in Tennessee did not feel that the reason for an extension was sufficient. Ms. Donohue did not know what was required under the circumstances and sought guidance from the local finance office in Detroit. She was directed to the JTR. After reviewing the JTR provisions, Ms. Donohue revised her request for an extension to provide a fuller explanation of the circumstances, but the finance office in Tennessee apparently still was not persuaded that the extension had been properly authorized.

In her submission to the Board, Ms. Donohue explained that the difficulty encountered in selling her home in Oregon was largely attributable a slow real estate market in the Portland area, which had recently experienced several large corporate layoffs. In light of the difficulties experienced in selling her home, claimant asked, in late August 2001, to have her travel orders amended to provide for relocation contractor services. The orders were amended, and eventually she accepted an offer from the relocation contractor for less than the amount for which she had hoped to sell her house. At the same time she experienced difficulty in selling her former residence, Ms. Donohue had trouble locating a suitable home in Michigan, where houses apparently were selling more quickly. She states that she would locate a potentially suitable home and find that it was sold by the time she returned to take a second look and perhaps make an offer. She did locate an available house in late August, but it took several weeks to conclude price negotiations and reach a deal. Thereafter, the seller delayed the closing several times. Closing finally took place in late October 2001.

Discussion

Employees who are "transferred in the interest of the Government from one official station or agency to another for permanent duty" may be reimbursed for certain expenses incident to the transfer. These expenses include "[s]ubsistence expenses of the employee and his immediate family for a period of sixty days while occupying temporary quarters when the new official station is located within the United States." Reimbursement of TQSE may be extended for up to an additional sixty days if the head of the agency concerned, or his designee, determines that there are compelling reasons for the continued occupancy of temporary quarters. 5 U.S.C. § 5724a(c)(1), (2) (2000). This statutory provision is implemented by provisions of the Federal Travel Regulation (FTR), and by the Joint Travel Regulations (JTR), which apply to civilian employees of the Department of Defense. Both the FTR and the JTR explain that a "compelling reason" is an event that is beyond the relocating employee's control and is acceptable to the agency. Examples include, but are not limited to, situations in which the employee cannot occupy the new permanent residence because of unanticipated problems such as a delay in settlement on the new residence or a short-term delay in construction of the residence, or the employee is unable to locate a permanent residence which is adequate for the family's needs because of housing conditions at the new official station. 41 CFR 302-5.105 (1998); JTR C13115-B.1; see generally John E. Joneikis, GSBCA 15455-RELO, 01-2 BCA ¶ 31,514.

The finance officer's concerns are based on previous decisions in which both the Board and its predecessor in considering these cases, the General Accounting Office (GAO), have generally upheld agency decisions denying extensions of TQSE. These decisions recognize that the authorizing official has considerable and broad discretion to determine what constitutes a "compelling reason" to support an extension, whether those conditions are present, and whether to extend TQSE benefits for periods beyond the initial sixty days. The Board will not overturn an agency's determination as to an extension of the period unless we find it to have been arbitrary, capricious, or contrary to law. See, e.g., Joneikis; Victoria E. Caldwell, GSBCA 14666-RELO, 99-1 BCA ¶ 30,364; Ralph M. Martinez, GSBCA 14654-RELO, 98-2 BCA ¶ 30,105; Roland J. Landis, GSBCA 13690-RELO, 97-2 BCA ¶ 29,157.

The decision to extend TQSE is an exercise of discretion on the part of the authorizing official. There are some cases reflecting agency determinations that, by itself, the inability to sell a house located at the prior duty station will not suffice as a compelling reason, arising during the first sixty days of TQSE, to justify approving a request to extend TQSE for an additional time period. See, e.g., Michael E. Perez, GSBCA 14412-RELO, 98-1 BCA ¶ 29,608; Baron L. Hudson, GSBCA 14284-RELO, 98-1 BCA ¶ 29,527. Under the regulation in effect at the time these cases were decided, however, the compelling reason justifying the extension had to relate to events arising during the initial period of TQSE. This requirement has subsequently been deleted from the regulations. The FTR was amended in March 1997; the corollary revision to the JTR took effect on December 17, 1997.

In a case cited by claimant, the Board addressed a situation in which the authorizing official had approved an extension and subsequently been overruled by the disbursing official. In that case, the authorizing official approved an extension of TQSE for an employee who asked for the extension because construction times for new homes at the new duty station exceeded five months and he had been unable to sell his house at the old duty station. He was required to satisfy the old mortgage to qualify for a new one for either construction or purchase of an existing home. The disbursing officer questioned the legality of the extension and the matter was presented to the Board for review. The Board found that the official could not approve an extension of TQSE because the regulation at the time the request was approved contained a requirement that the compelling reason for extending TQSE must have arisen from circumstances occurring during the initial sixty days of TQSE. Annot Berresford, GSBCA 15054-RELO, 00-1 BCA ¶ 30,647 (1999). In Berresford, however, the Board also recognized that under the revised regulation, which eliminated the requirement that the compelling reason arise during the initial TQSE period, the commanding officer would have had the discretion to approve the request. His decision at the time it was made, however, was contrary to law. Subsequent to Berresford, the Board revisited this issue in Joneikis. In that case, the employee entered into a contract for new construction because of a lack of suitable available housing in the vicinity of the new duty station. The command approved the request for an extension of TQSE, and this decision was overruled by the disbursing office. Because the revised regulation was in effect when the request was approved, however, the Board concluded that the commanding officer's exercise of discretion to grant an extension was proper and should stand.

Ms. Donohue's case is remarkably similar to the facts of Berresford, in which the Board recognized that the exercise of discretion by the commanding officer would probably have been allowed to stand had it occurred after the effective date of the revised regulation. Ms. Donohue experienced difficulty selling her old home for reasons beyond her control. At the same time, she had trouble locating and purchasing a house in Michigan, again, apparently, for reasons beyond her control. Here, it is significant that the commanding officer examined the reasons underlying claimant's request for an extension and presumably considered that they were compelling and sufficient to justify approving the extension. Regardless of the views of the agency finance office, nothing in the record suggests that the official's decision was arbitrary, capricious, or contrary to law. As such, the extension of TQSE was properly granted and claimant is entitled to be paid.

CATHERINE B. HYATT
Board Judge