

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

April 29, 2005

GSBCA 16573-RELO

In the Matter of SHEILA BAKER

Sheila Baker, Port St. Lucie, FL, Claimant.

Shirley L. Autry, Deputy Director, Finance, United States Army Corps of Engineers Finance Center, Millington, TN, appearing for Department of the Army.

NEILL, Board Judge.

Claimant, Ms. Sheila Baker, is a civilian employee of the United States Army Corps of Engineers. In May 2003, she underwent a permanent change of station move. She was originally authorized an allowance for temporary quarters subsistence expenses (TQSE), based on actual expenses, for a period of sixty days. She subsequently sought to have this period extended by an additional fifteen days. Her request was granted and she was later paid expenses incurred during the extended period. The following year she was advised that an agency audit had determined that she was not entitled to payment of TQSE for this final fifteen-day period. She asks that we review the agency's determination. Our conclusion is that the fifteen-day extension of the original sixty-day period was valid and that Ms. Baker is entitled to keep the amounts paid to her for this period.

Background

Ms. Baker's reporting date to her new permanent duty station in Jacksonville, Florida, was May 5, 2003. The agency tells us that her authorized sixty days of TQSE expired on July 5, 2003. Her reason for requesting an extension of her authorized TQSE for an additional fifteen days was that settlement on her newly purchased home was delayed and minor renovations were required before she actually moved into her permanent quarters. During this interim period of fifteen days, she remained in temporary quarters.

What renders this case somewhat unusual is that Ms. Baker did not submit a written request for an extension of her initial sixty days of authorized TQSE until September 24, 2003. The agency tells us that her reason for delay in filing the written request was a lack of time for her own official business. Her request, however, was approved and her travel authorization was eventually revised to provide for seventy-five days of authorized TQSE. Ms. Baker then submitted a claim for the additional period and received payment.

In July 2004, the agency advised Ms. Baker that, upon completion of an audit of her account, it had determined that she should not have been reimbursed for expenses incurred during the last fifteen days she was in temporary quarters. The agency's position is that the Joint Travel Regulations (JTR) of the Department of Defense, to which claimant is subject as a civilian employee of the Department, provide that the continued occupancy of temporary quarters may only be authorized before temporary quarters are occupied and may not be approved after the fact.

Ms. Baker explains that initially it appeared that the agency was prepared to cancel its claim since various agency officials with whom she conferred believed that she had acted in accordance with applicable regulation. Nevertheless, the agency's Finance Center eventually elected to stand by the audit findings and advised Ms. Baker of her right to appeal its determination to this Board. She has now done so.

Discussion

In explaining its position in this case, the agency refers us to a provision in the Federal Travel Regulation (FTR), namely, 41 CFR 302-5.7 (2001). This citation is to an earlier version of the FTR which was revised effective February 19, 2002. 66 Fed. Reg. 56,194 (Nov. 20, 2001). By the time Ms. Baker reported for duty at her new permanent duty station in Jacksonville, however, the provision, although unchanged, was found in 41 CFR 302-6.7 (2002) (FTR 302-6.7). Then, as now, the provision read as follows:

Under what circumstances will I receive a TQSE allowance?

You will receive a TQSE allowance if:

- (a) Your agency authorizes it before you occupy the temporary quarters (the agency authorization must specify the period of time allowed for you to occupy temporary quarters);
- (b) You have signed a service agreement; and
- (c) You meet any additional conditions your agency has established.

The portion of this provision on which the agency has focused in this case is the first condition mentioned, i.e., that the agency must authorize the TQSE allowance before the employee occupies the temporary quarters. In May 2003, the JTR provision corresponding to this FTR provision was found at C13205-B.1 (May 2003). This particular section of the JTR dealt with the authorization of an allowance for TQSE based upon actual expenses and, like the FTR, stated that one condition to the authorization of TQSE was that it occur before temporary quarters are occupied and not after the fact.

We do not read the requirement that a TQSE allowance for actual expenses be authorized before occupancy of temporary quarters as applicable to extensions of the time for which this allowance will be available. Neither the FTR nor the JTR permit an official to authorize initially a TQSE allowance for the maximum number of 120 days allowable under statute and regulation. Rather, the allowance is to be authorized in segments. FTR 302-6.104; JTR 13210-A. Extension after the start of occupancy, therefore, is a very real possibility. It makes little sense, therefore, that one condition to an extension would be that the temporary quarters not yet be occupied. Not surprisingly, among the provisions regarding

the authorization of additional time for TQSE allowances based upon actual expenses, we find no mention of any such condition.

At best, the agency in this case is attempting to apply to an extension of TQSE, by way of analogy, the requirement that initial authorization occur before temporary quarters are occupied. That is to say, just as an initial authorization must be given before temporary quarters are occupied, so also, the authorization of an extension must occur before the start of an extended period. In the absence of a logical predicate for such an interpretation and, particularly, in the absence of any mention of such a condition among the provisions which deal expressly with the authorization of additional time for TQSE, we cannot agree with the agency's contention that the requirement that authorization precede occupancy applies not only to the initial authorization, but also to the authorization of additional TQSE.

Indeed, in other decisions, we have found no such requirement with regard to the authorization of additional time for TQSE. In *Timothy J. Helke*, GSBCA 15476-RELO, 01-1 BCA ¶ 31,289, we posed no objection to an agency authorizing an extension of TQSE after the original authorization had lapsed through inadvertence. In *James E. Roberts*, GSBCA 15592-RELO, 01-1 BCA ¶ 31,567, we extended the position taken in *Helke* to include situations where the authorization of additional TQSE was issued after the original period of TQSE had deliberately been permitted to expire on the mistaken assumption at the time that the time authorized was sufficient for the employee's needs.

As we pointed out in *Helke* and *Roberts*, the statute (5 U.S.C. § 5724a(c) (2000)) and implementing regulations authorizing agencies to grant TQSE provide the agencies with broad discretion. What is of paramount importance is that the agency be free to exercise this discretion in a manner that best meets its aim and intent. We will not interfere with the exercise of this discretion unless we conclude that the agency is acting in an arbitrary, capricious, or illegal fashion. Here, the reasons given by Ms. Baker and found acceptable by the agency for granting her request for a fifteen day extension are among the very examples set out in the JTR which an agency may consider in deciding whether or not to grant an employee's request for additional time. See JTR C13210-B.1.b. We have no reason, therefore, to question the agency official's judgment in this regard.

In this particular case, the agency granted Ms. Baker's belated request for additional TQSE, amended her orders, and paid her claim for expenses incurred during the additional fifteen day period. For the reasons stated, we are satisfied that it was within the discretion of the agency to do so. This, however, does not mean that it is likewise within the discretion of the agency to withdraw the authorization once given. In *Marvin R. McGee*, GSBCA 15829-RELO, 02-2 BCA ¶ 32,002, we held that, when an agency authorizes a relocation benefit such as TQSE, which it has the discretion to provide, it may not, after the employee incurs allowable costs and requests reimbursement, deny reimbursement of those costs. Our holding in *McGee* is no less applicable to this case where the agency has gone so far as to pay the claim but then demands the employee refund the payment made.

Decision

It was within the agency's discretion to authorize an additional fifteen days of TQSE

for Ms. Baker. That authorization, once given, cannot now be rescinded. Consequently, the agency's demand that Ms. Baker refund the payment previously made to her must be rescinded.

EDWIN B. NEILL
Board Judge