

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

February 20, 2004

GSBCA 16242-RELO

In the Matter of WILLIAM M. MISCZAK

William M. Mischak, East Orange, NJ, Claimant.

Terry Burton, Supervisor, Travel Section, Financial Services Center, Department of Veterans Affairs, Austin, TX, appearing for Department of Veterans Affairs.

HYATT, Board Judge.

Agencies are not authorized to pay temporary quarters subsistence expenses (TQSE) of a transferring employee once that employee has occupied permanent quarters. In this case, the facts provided to us do not necessarily support the agency's determination that the employee moved into an apartment with the intention of occupying it permanently. Thus, the transferred employee, who has stated that he entered into a one-year lease of an apartment with the intent to occupy it temporarily until he was able to sell his former residence and locate a permanent residence at his new duty station, may be eligible for TQSE for part of the time that he occupied the apartment.

Background

In February 2003, claimant, William M. Mischak, an employee of the Department of Veterans Affairs (VA), transferred in the interest of the Government from North Little Rock, Arkansas, to East Orange, New Jersey. Upon reporting to duty in New Jersey, Mr. Mischak stayed for several weeks at the Extended Stay America. He then stayed for two days at a Red Roof Inn, before moving into an apartment for which he entered into a one-year lease. Mr. Mischak had his household goods shipped to the apartment. When he submitted a voucher seeking TQSE reimbursement for the initial period he was in the apartment, the VA Finance Center disallowed the claim, taking the position that he had occupied permanent quarters.

Claimant's supervisor submitted a declaration explaining that when Mr. Mischak accepted the position in New Jersey, the travel specialist was unavailable, for health reasons, to provide detailed advice to Mr. Mischak. She had a brief dialogue with him about selling his house in Arkansas, but did not provide advice concerning the relocation program

available through the VA. She apparently advised him to rent an apartment promptly and sent him newspapers from New Jersey with rental property advertisements. Mr. Mischak understood from this that he should pursue a long-term lease. Both claimant and his supervisor state that he would not have entered into the long-term lease if he had known that the VA would not regard this as temporary and permit him to continue on TQSE. Mr. Mischak states that he will now have to incur the cost of moving his furniture from the apartment and pay for lease termination.

The Finance Center states that based on the information available to it – the one-year duration of the lease and the delivery of claimant's furniture to the apartment – this location appeared to be a permanent, rather than a temporary, arrangement. The authorization to pay TQSE thus expired upon occupancy of permanent quarters. Claimant disputes the VA's disallowance of this portion of his claim for reimbursement of temporary quarters subsistence expenses incurred following his move.

Discussion

The Federal Travel Regulation (FTR) defines TQSE to be "subsistence expenses incurred by an employee and/or his/her immediate family while occupying temporary quarters." 41 FTR 302-5.2 (2002). Temporary quarters are "lodging obtained for the purpose of temporary occupancy from a private or commercial source." Id. 302-5.1. Eligibility for TQSE ends whenever a transferred employee "and/or any member of [that employee's] immediate family occupies permanent residence quarters." Id. 302-5.108. The FTR establishes a procedure for deciding whether an employee's quarters, upon his reporting to a new duty station, are, for purposes of TQSE eligibility, temporary or permanent. Each agency must decide "[w]ho will determine whether quarters were indeed temporary, if there is any doubt." Id. 302-5.301 (e). With respect to the question of when quarters are temporary or permanent, the FTR also provides the following guidance:

In determining whether quarters are "temporary," [the agency] should consider factors such as the duration of the lease, movement of household effects into quarters, the type of quarters, the employee's expressions of intent, attempts to secure a permanent dwelling, and the length of time the employee occupies the quarters.

41 CFR 302-5.305 (2003). See generally Charles F. Ruerup, GSBCA 15955-RELO, 03-1 BCA ¶ 32,227.

This determination is not necessarily cut and dried and can vary depending on the circumstances. The central issue is the employee's intent and the factors available to show what that intent was. In Ruerup, the Board discussed its precedent addressing the determination of the temporary or permanent nature of an employee's occupancy of quarters that have been leased for more than the usual amount of time for which subsistence will be authorized:

The Board has found in other cases that notwithstanding the existence of a lease of at least one year in length, quarters an

agency deemed permanent were more properly considered temporary. In those cases, however, there was a great deal of evidence that the employee and his family were intent on moving from the dwelling in question. For example, in Thomas P. Simon, GSBCA 15131-RELO, 00-1 BCA ¶ 30,792, the employee looked at hundreds of building lots and bought one on which to construct a house; and in Felicia D. DeJesus-Walters, GSBCA 15986-RELO [03-1 BCA ¶ 32,220], the employee made "vigorous and sustained efforts" to sell two houses she owned and also contracted to purchase a home at her new duty station. Mr. Ruerup's situation is more like those where we agreed with the agency as to the permanence of quarters, such as Susan E. Clark, GSBCA 15983-RELO [03-1 BCA ¶ 32,183], where "[t]he only indicium of [the employee's] intent to remain only temporarily was the absence of her [household goods]," and Keith E. Kuyper, GSBCA 15839-RELO, 02-2 BCA ¶ 31,983, where we commented that "[c]laimant's hope to be able to purchase a house when circumstances permit is too vague to qualify the residence as temporary quarters for TQSE purposes."

03-1 BCA at 159,357. In DeJesus-Walters, the Board recognized that the signing of a one-year lease alone will not disqualify an employee from TQSE reimbursement "if all of the factors combined demonstrate the employee's initial intent to remain in the quarters temporarily." 03-1 BCA at 159,346.

Here, the Finance Center, upon learning that Mr. Mischak had signed a one-year lease and had had his household goods delivered to an apartment, concluded that occupancy of temporary quarters had ended. With only this information available, the Finance Center came to an appropriate conclusion. We infer, however, from statements made by claimant and his supervisor in support of his request for our review, that there may be more factors to consider. Claimant's statements suggest that claimant intended to sell his old residence and perhaps buy a new one in New Jersey. There is some suggestion that while claimant entered into a one-year lease, he did so believing he was supposed to do so, and he did so contemplating that he would terminate the lease early, presumably to occupy permanent quarters. To the extent that claimant can provide evidence to support his contention that his intent was for the apartment to serve as a temporary residence, it might still be appropriate for the VA to allow TQSE to continue for the period authorized by the agency. Information relevant to this inquiry would include documentation of efforts to sell the old residence, continuing efforts to locate permanent quarters, and the like. It is claimant's burden to make this case, however.

We lack sufficient information to conclude whether the quarters were permanent or temporary. The critical factor is claimant's intent, which is not readily discernible here. On the information available to it, the Finance Center reached an appropriate conclusion. To the extent that claimant can provide more concrete evidence supporting the temporary nature of his occupancy of the apartment, it would be appropriate for the Finance Center to revisit this determination.

CATHERINE B. HYATT
Board Judge