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

December 10, 2003

GSBCA 16267-RELO

In the Matter of LARRY A. SEMM

William A. Hughes, Esq., Bozman, MD, appearing for Claimant.

Robert Cooke, Chief, Fiscal Services Branch, Food Safety and Inspection Service, Washington, DC, appearing for Department of Agriculture.

**DANIELS**, Board Judge (Chairman).

The version of the Federal Travel Regulation (FTR) in effect in 1999[1] gives a transferred employee who has been authorized to receive temporary quarters subsistence expenses (TQSE) substantial flexibility in choosing when to begin the period of time for which he claims TQSE. This version gives especial flexibility when the employee chooses the fixed method of TQSE reimbursement. Agency rules which limit this flexibility are inconsistent with the FTR and must give way to that controlling Government-wide regulation.

## Background

The Department of Agriculture's Food Safety and Inspection Service (FSIS) transferred Larry A. Semm, a supervisory veterinary medical officer, from Oregon to Alaska at the end of 1999. In conjunction with the move, the agency authorized Dr. Semm and his wife to take separate house-hunting trips to Alaska, and to receive TQSE while they resided there in temporary quarters. Dr. Semm was allowed to chose either the actual or fixed method of reimbursement for TQSE, and he selected the fixed amount method. His travel orders provided for fixed amount TQSE for a period of thirty days.

[1]As always, we apply the version of the regulation in effect on the date the transferred employee reported for duty at his new official station. 41 CFR 302-1.4(l) (1999); cf. Brownlee v. DynCorp (Fed. Cir. Nov. 13, 2003) (in contract case, applying statutes and regulations in effect on the date of the contract); Johnson v. All-State Construction, Inc., 329 F.3d 848, 852 n. 2 (Fed. Cir. 2003) (same).

Dr. Semm reported to his new duty station in Alaska on December 8, 1999, and began living in temporary quarters nearby. Mrs. Semm took a house-hunting trip to Alaska from December 12 to 21. She then returned to Oregon and did not move to Alaska until January 17, 2000, when she joined her husband in his temporary quarters. The couple remained in temporary quarters until February 24, 2000.

Dr. Semm maintains that in accordance with his travel orders, he is entitled to receive the fixed amount of TQSE for both himself and his wife for a period of thirty days. The agency insists that the period of his eligibility for TQSE must begin on December 8, when the employee began his service in Alaska. The agency says that Dr. Semm's thirty-day period of eligibility for TQSE consequently expired before his wife began occupying temporary quarters, and that he may receive the fixed amount only for himself.

## Discussion

The FSIS's position is based on a 1990 agency directive entitled "Employee Relocation Allowances." The directive contains a provision defining an employee's "Eligible Period" for TQSE. The provision states:

> 1. The time period allowed for temporary quarters shall start when either the employee or any member of the immediate family begins use of the temporary quarters for which a claim for reimbursement is made.
>
> 2. The period of eligibility for temporary quarters shall run at the same time for the employee and all members of the immediate family.

FSIS Directive 3820.1 Rev. 2, pt. 7.V.B (Feb. 27, 1990).

There are at least three problems with reliance on this provision. First, as Dr. Semm points out, the provision is in conflict with the one which immediately precedes it in the directive. The preceding provision says that the eligibility period can begin "not later than 30 days from the date the family vacated the residence at the old official station," a date which may occur "within the 2-year time limit for beginning allowable travel and transportation." FSIS Directive 3820.1 Rev. 2, pt. 7.V.A. Requiring that the eligibility period start when the employee begins use of the temporary quarters for which a claim for reimbursement is made is clearly inconsistent with allowing the period to start with reference to the family's actions rather than the employee's, and at a date as late as two years after travel can commence. The two provisions of the directive, taken together, are incompatible, so relying on one to the exclusion of the other would make no sense.

Second, the first directive provision cited is inconsistent with the 1999 version of the FTR, in effect when Dr. Semm transferred, relating to the actual TQSE method of reimbursement. That version allows the period of eligibility for actual TQSE reimbursement to start at any time "before the maximum time for beginning allowable travel and transportation under § 302-1.6 of this chapter expires." 41 CFR 302-5.103 (1999). The maximum time for beginning allowable travel and transportation is generally "2 years from the effective date of the employee's transfer." Id. 302-1.6. We have expressly held that another agency's policy, which was very much like the one contained in the FSIS directive

provision in question, became outdated and invalid as inconsistent with the FTR, once the relevant FTR provisions were amended to read as they did in 1999. The FTR, as a "legislative rule," is entitled to controlling weight, so agency rules which do not conform to it must give way. Phyllis J. Nasados, GSBCA 15996-RELO (Aug. 15, 2003); see also National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365, 1375 (Fed. Cir. 2001); Rite Aid Corp. v. United States, 255 F.3d 1357, 1359 (Fed. Cir. 2001); Splane v. West, 216 F.3d 1058, 1063 (Fed. Cir. 2000); Parul Patel, GSBCA 14953-RELO, 99-2 BCA ¶ 30,535. The FSIS directive provision must yield to the FTR provision which gives the employee great flexibility in deciding when to start the period of eligibility for actual TQSE reimbursement.

Third – and of most importance to this case – the rules regarding fixed amount TQSE afford transferred employees who select this method of TQSE reimbursement even more flexibility than is available to employees who select actual TQSE reimbursement in choosing when to begin a period of eligibility. While the 1999 version of the FTR contains fairly extensive rules for actual TQSE, it includes only three short provisions regarding fixed amount TQSE. These are 41 CFR 302-5.200 (an employee who chooses fixed amount TQSE is "paid a fixed amount for up to 30 days"), -5.201 (describing the calculations used to determine the amount of payment), and -5.202 (stating that if an employee who elected fixed amount TQSE finds that the benefit is not adequate to cover living expenses, he may not receive additional TQSE reimbursement). These brief provisions contain no limitation whatsoever on when the time period for fixed amount TQSE may begin. We therefore consider inconsistent with the FTR any efforts by the agency to impose such a limitation.

## Decision

We conclude that Dr. Semm is entitled to receive the full measure of fixed amount TQSE benefits authorized in his travel orders for both himself and his wife.

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STEPHEN M. DANIELS
Board Judge