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

July 6, 2005

GSBCA 16615-RELO

In the Matter of KIMBERLY A. SMITH

Kimberly A. Smith, Dallas, TX, Claimant.

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

DANIELS, Board Judge (Chairman).

The Department of Agriculture's Food Safety and Inspection Service (FSIS) hired Kimberly A. Smith to work in its Dallas, Texas, office, beginning in February 2005. At the time, Ms. Smith was employed by the Department of Commerce in Denver, Colorado. FSIS agreed to pay relocation benefits in connection with her move from Denver to Dallas. The agency has refused to make two payments which Ms. Smith seeks, however – first, temporary quarters subsistence expenses (TQSE) for the number of days in excess of thirty that Ms. Smith spent in temporary quarters, and second, overdraft charges on dishonored checks she wrote on the assumption that a travel advance had been deposited in her bank account. In this decision, we hold that the agency acted correctly in not making these payments.

An agency may authorize TQSE for a transferred employee. 5 U.S.C. § 5724a(c) (2000). This benefit may be paid in accordance with either the fixed amount method or the actual expense method, with the choice of method left to the employee. 41 CFR 302-6.11 (2004). The Federal Travel Regulation (FTR) provides, "If [an] agency offers and [the employee] select[s] the fixed amount TQSE reimbursement method, [the employee is] paid a fixed amount for up to 30 days. *No extensions are allowed under the fixed amount method*." *Id.* 302-6.200 (emphasis added).

FSIS offered Ms. Smith a choice of methods for reimbursement of TQSE. In so doing, it provided her with a side-by-side comparison of the features of the two methods. One of the features of the fixed amount method, the comparison recited, is "Limited to 30 days – no extensions." Armed with this information, Ms. Smith elected the fixed amount method. In accordance with the governing regulation (as well as her own knowing election), the agency may not now pay her this benefit for the time in excess of than thirty days that she spent in temporary quarters. *Joel Williams*, GSBCA 16437-RELO, 04-2 BCA ¶ 32,769; *Samuel E. Jones*, GSBCA 15770-RELO, 02-2 BCA ¶ 31,897.

Ms. Smith urges us to follow not the FTR, but rather, FSIS Directive 3820.1, "Employee Relocation Allowances." A provision of this directive states, "An additional 30 days [of TQSE] may be authorized by the program official if due to unforeseen circumstances." *Id.* 7. III.B(1) (Rev. 2 (Feb. 27, 1990)). FSIS sent the directive to her in the package of materials describing relocation benefits, and she says "one person" at the agency told her that in accordance with the cited provision, she could apply for an extension.

As a matter of law, we must reject Ms. Smith's suggestion. The FTR is a "legislative rule," promulgated at the direction of Congress and after following the Administrative Procedure Act's notice and comment provisions, to fill gaps left by statute. It is therefore entitled to controlling weight, and agency rules which do not conform to it must give way. *Larry A. Semm*, GSBCA 16267-RELO, 04-1 BCA ¶ 32,527 (2003); *Edward Queair*, GSBCA 15714-RELO, 02-1 BCA ¶ 31,757. The FSIS directive cited by Ms. Smith is outdated. In the fifteen years since it was issued, the FTR has changed. After Congress amended the relevant statute in 1996 to permit agencies to offer the fixed method of TQSE reimbursement, the FTR was amended to provide this alternative to the actual expense method. 62 Fed. Reg. 13,756 (Mar. 21, 1997); *see also* Pub. L. No. 104-201, § 1712, 110 Stat. 2422, 2753 (1996). Since this change occurred, the provision of the directive on which Ms. Smith relies has been rendered applicable only to actual expense TQSE.

The fact that the agency gave the directive, not the FTR, to the employee prior to her move cannot vary this conclusion. Even where an employee has relied to his detriment on an agency's promise – and we are not convinced that happened here – the employee may not be reimbursed because the law prevents the agency from honoring commitments made in its name by officials who do not have the power to make them. *Louise C. Mâsse*, GSBCA 15684-RELO, 02-1 BCA ¶ 31,694 (2000) (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)).

The matter of overdraft charges on dishonored checks is simply resolved as well. FSIS acknowledges that it deposited Ms. Smith's travel advance electronically into a bank account to which it believed the Department of Commerce regularly deposited her paychecks, but which had actually been closed for more than two years. When, two weeks later, Ms. Smith discovered the error, FSIS corrected it. In the interim, it is possible – though the employee has provided no evidence as to this matter – that Ms. Smith wrote checks against funds which she assumed the agency had deposited in her current account. Nevertheless, as we have already held:

> Statutes and regulations pertaining to reimbursement of travel expenses do not provide that an agency is responsible for paying for an overdraft charge assessed by a bank against an employee. An agency may reimburse an employee only for those expenses essential to the transaction of official business. An overdraft charge imposed by a bank is not essential to the transaction of official business, even if the lack of funds in the employee's bank account is caused by the agency's mistake in making a deposit.

Antonio G. Gonzalez, GSBCA 14292-TRAV, 98-1 BCA ¶ 29,418 (1997). Similarly, Ms. Smith has cited no statute or regulation, and we have found none, pertaining to reimbursement of relocation expenses which makes an agency responsible for paying an overdraft charge incurred by an employee.

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STEPHEN M. DANIELS
Board Judge