

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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April 6, 2006

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GSBCA 16798-RELO

In the Matter of CHARLES A. NALLEY III

Charles A. Nalley III, Tampa, FL, Claimant.

Rick Miller, Civilian Travel and Overseas Allowances Policy Manager, Force Sustainment Division, Office of the Chief of Staff, Department of the Air Force, Washington, DC, appearing for Department of the Air Force.

**BORWICK**, Board Judge.

Mr. Charles A. Nalley III, claimant, challenges the Department of the Air Force's (agency's) denial of claimant's request for a sixty-day extension of his period to incur temporary quarters subsistence expenses (TQSE). We deny the claim as the agency's decision was not arbitrary or capricious.

## Background

On or about June 29, 2005, the agency authorized claimant a permanent change of station from Andrews Air Force Base (AFB), Maryland, to MacDill AFB, Florida, and granted claimant, among other benefits, a sixty-day period of actual expense TQSE. Claimant's eligibility period to incur TQSE ran from August 9 to October 7, 2005.

MacDill AFB is located near Tampa, Florida. Claimant transferred on or about August 10, 2005, and before that searched for a residence in the Tampa area. The agency states that, according to the Florida Association of Realtors housing data, in the Tampa-Saint Petersburg-Clearwater, Florida, area, 13,973 homes were on the market during July to September 2005, and 3735 homes were on the market in October. Claimant generally agrees with that statement.

Despite the plethora of houses on the market when claimant transferred, on June 25, 2005, he purchased a house under construction. According to the purchase contract, the seller's normal construction time was six to ten months from the date on which the house's foundation was poured, depending on the size and complexity of the house. Additionally, the contract stated that the construction time might be longer depending on unexpected conditions such as additional options selected by the purchaser, weather conditions, or other factors related to home construction. The contract also stated that claimant would be notified of a projected closing date by the housing company's closing department approximately six weeks from the date of the expected completion of the new house.

In the case of claimant's new house, its foundation had been poured on February 21, 2005. Claimant states that when he purchased the house, it was framed-in and roofed, with the windows and staircase installed. Since claimant had purchased the house about six months after the foundation pour, the housing company considered the house to be one in "inventory" and had expected the house to be completed in September 2005. The lending profile document anticipated a closing date of September 15, 2005.

Nevertheless, circumstances delayed the completion of the house beyond October 7, 2005, the end of claimant's sixty-day eligibility period. On July 21, the housing company advised claimant that the completion date for the house would be at the end of November. On September 20, the housing company advised that due to workload conditions in the Tampa Bay real estate market, claimant's home would not be finished until late 2005. In November 2005, the housing company explained that completion of claimant's house was delayed because of (1) the installation of a beam to one side of the house for additional support, (2) vendor changes necessitating relocation of the wiring after installation of the beam, and (3) diversion of construction workers and materials elsewhere to aid in recovery from natural disasters.

Claimant sought from the agency a sixty-day extension of his TQSE eligibility period, arguing that the delays were unforeseen circumstances beyond his control. By memorandum of November 30, 2005, the agency denied the request. Citing Joint Travel Regulations (JTR) C13120, the agency found that the delay of approximately eighty days did not constitute the unanticipated short-term delay contemplated by the JTR. The agency also concluded that given the adequate available housing in the Tampa area, claimant's decision to purchase new construction was a personal choice.

### Discussion

The decision to authorize TQSE to a transferring employee is wholly within the discretion of the agency. 5 U.S.C. § 5724a(c)(1) (2000); 41 CFR 302-6.6 (2005); JTR C13105, C13200, C13300.

When the employee selects the actual expense method of TQSE reimbursement, whether the agency extends the period of eligibility for reimbursement beyond sixty days is also a decision within the discretion of the agency. In this regard, the JTR in effect at the time of claimant's transfer provided as follows:

AOs [Authorizing Officials] may authorize TQSE (AE [actual expense]) for the necessary number of days not to exceed 60 consecutive days (i.e. no more than a total of 120 days, including the initial TQSE (AE) may be authorized). Each of the following factors must be considered when authorizing an additional period of TQSE (AE):

1. The AO must determine there are compelling reasons (due to circumstances beyond the employee's control) for the continued temporary quarters occupancy. Examples of circumstances that might be considered as being beyond the employee's control include:

- a. Delayed shipment and/or delivery of HHG [Household Goods] to the new residence due to extended transit time incident to ocean transportation, strikes, customs, clearance, hazardous weather, fires, floods or other acts of God;
- b. Delayed occupancy of new permanent quarters because of unanticipated problems (e.g. unforeseen delays in settlement for new quarters, unforeseen short-term delay in new dwelling construction);
- c. Inability to locate permanent quarters adequate for family needs because of housing conditions at the new PDS [Permanent Duty Station];
- d. Sudden illness, injury, or death of [the] employee or immediate family member; and
- e. Similar factors.

JTR C13210-B.

We have consistently held that we will not disturb the agency's discretionary determination to approve an extension of the TQSE eligibility period, unless we find the determination to be arbitrary and capricious. *J.D. Jamar, Jr.*, GSBCA 16646-RELO, 05-2 BCA ¶ 33,053; *John D. Stringfellow*, GSBCA 16266-RELO, 04-1 BCA ¶ 32,616.

The agency's determination not to extend claimant's eligibility period for incurring TQSE was neither arbitrary nor capricious, to the contrary, it was reasonably based. In this case, the second and third considerations set forth in the above quoted section of the JTR are relevant. Claimant argues that he signed the purchase contract in good faith with a reasonable expectation that the house would be completed in September, given the state of construction of the house and the language of the purchase contract.

Here the agency reasonably concluded that there was no unforeseen short-term delay in new dwelling construction that would justify extension of the TQSE period. Contrary to claimant's view, the purchase contract did not set a day in September--within claimant's original sixty-day TQSE period--as the occupancy date. Rather, the contract provided a window of six to ten months from the date of foundation pour for anticipated completion of the house and explicitly warned claimant that there might be further delays. The outside date of that window was mid-December 2005, well beyond claimant's sixty-day period of TQSE. Furthermore, the housing company would only give a closing date no earlier than six weeks from expected completion of the house. While the relatively advanced state of construction of the house in June 2005 when claimant signed the purchase contract might have given claimant grounds to be optimistic about an early closing date, claimant was put on notice of the possibility of delays. The agency's determination that there were no unforeseen short-term delays was reasonable.

The agency also determined that the third factor did not justify claimant's requested extension of the TQSE period. The agency concluded that claimant could have purchased a suitable existing house within the original sixty-day period of claimant's TQSE eligibility. The agency's determination was reasonable based upon the un-rebutted housing data provided by the Florida Association of Realtors. *Stringfellow*. For the above reasons, the Board denies the claim.

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ANTHONY S. BORWICK  
Board Judge