

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

August 2, 2006

GSBCA 16919-RELO

In the Matter of ANDREW W. FRANK

Andrew W. Frank, Grapevine, TX, Claimant.

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

DANIELS, Board Judge (Chairman).

Under 31 U.S.C. § 3529 (2000), a disbursing or certifying official of an agency, or the head of an agency, may request a decision from the Board regarding a claim which involves expenses incurred by a federal civilian employee for official travel and transportation, or for relocation expenses incident to a transfer of official duty station. A decision rendered in response to such a request is sometimes called an “advance decision.”

The Army Corps of Engineers Finance Center has asked the Board for an “advance decision” with regard to a claim submitted by Corps employee Andrew W. Frank. The Finance Center is not really interested in hearing our views before it makes a determination on Mr. Frank’s claim, however. The center has already decided that the claim should be rejected; it says that making payment to the employee would be “capricious, . . . irresponsible and unduly expensive.” Asking for an “advance decision” in these circumstances is inappropriate.

As to the merits of the case, the Finance Center’s views are dead wrong. The commander of the facility where Mr. Frank works has reasonably concluded that the employee is entitled to the benefit he seeks, and the Finance Center has no license to revoke that authorization.

Background

Mr. Frank was transferred to a new permanent duty station in September 2005. His travel orders authorized him to receive actually-incurred temporary quarters subsistence expenses (TQSE) for a period of sixty days.

Mr. Frank and his family moved into a hotel on September 4 and immediately began looking for a permanent residence. On September 28, he and his wife signed a contract for the purchase of a house in which to live. The contract provided for closing on or before November 4.

A week later, the owner of the house told the Franks that unless they would allow him to remain there until he had purchased another residence or January 1, 2006, whichever occurred earlier, he would refuse to comply with the contract. Mr. Frank was upset by this extra-contractual demand, but he decided that to avoid expending additional time and emotional energy in looking for a home, he would reluctantly accept the seller's condition. He negotiated with the seller a lease under which the seller would remain in the house and pay rent to the Franks during the period between November 4 and January 1.

Mr. Frank immediately informed his supervisor of what had transpired. He noted that his sixty days of TQSE would expire on November 4 and said that "[i]t would be nice if the TQSE could be extended until 4 Jan [06] but I would understand if it could not." In so doing, he explained that if he had rejected the seller's demand and begun to look for another dwelling, he and his family would probably have had to wait until December or January to complete a purchase and move into permanent quarters. Thus, he said, his acceptance of the demand would likely have little or no impact on the length of their stay in a hotel.

Mr. Frank's supervisor was sympathetic to his predicament and supported an extension of the duration of his eligibility for TQSE. The commander of their facility approved two extensions of thirty days each. Thus, Mr. Frank was authorized to receive TQSE for a period of up to 120 days.

After he moved into his new residence, Mr. Frank asked the Corps to reimburse him for TQSE he had incurred between September 4, 2005, and January 1, 2006. Upon review of his voucher, the agency's Finance Center became suspicious that the employee had surreptitiously entered into the rental agreement for the purpose of defrauding the Government into paying TQSE for a period of time during which he could have moved into his newly-purchased house. The Finance Center triggered a formal investigation of Mr. Frank's actions. The investigation concluded that the employee had informed his supervisor of the arrangement promptly after entering into it; that he had been fully forthcoming with the center's personnel; that he had no intention of defrauding the Government; and that he

should be “exonerated from all charges.” The investigator recommended that Mr. Frank’s TQSE be reduced, however, during the time that he was renting his house back to its former owner. For this period, the investigator urged, Mr. Frank should be paid the difference between (a) his temporary housing costs and his mortgage costs and (b) the amount of rental payments he received.

Discussion

As prescribed by the Federal Travel Regulation, an agency may authorize a transferred employee to receive actually-incurred TQSE for a period not to exceed sixty days, and it may extend that period for up to an additional sixty days “if [it] determines that there is a compelling reason for [the employee] to continue occupying temporary quarters after 60 consecutive days.” 41 CFR 302-6.104 (2005). A “compelling reason” “is an event that is beyond [the employee’s] control and is acceptable to [the] agency.” *Id.* 302-6.105.

The Corps’ Finance Center believes that because Mr. Frank signed the lease with the seller nearly a month before the date on which he settled on the sale of the house, and because the lease was the product of negotiations, “[t]he whole of the rental agreement, even its existence, was in Mr. Frank’s control.” Consequently, the center concludes, this event – which caused the employee to reside in a hotel for almost two additional months – was not beyond his control, so it may not serve as a “compelling reason” for his continued occupancy of temporary quarters. Additionally, the Finance Center believes that permitting Mr. Frank to receive TQSE for the period of time in which he was receiving rent on his newly-purchased home would be unjust – or, in the center’s words, making payment to him would be “capricious, . . . irresponsible and unduly expensive.”

We have already decided a case very much like this one. *Scott E. English*, GSBCA 15650-RELO, 02-1 BCA ¶ 31,821, also involved a Corps employee who bought a home at the permanent duty station to which he had been transferred. A condition of the purchase of Mr. English’s house was that the seller, who was building a new home, could remain in the house, rent-free, until her new home was available for occupancy. Mr. English asserted that this was the best deal he could make, given the market situation. The appropriate official within his district of the Corps authorized TQSE for an extended period, and the Finance Center questioned the propriety of this determination.

The Board explained:

[T]he authorizing official has considerable and broad discretion to determine what constitutes a ‘compelling reason’ to support an extension, whether those conditions are present, and whether to extend TQSE benefits for periods beyond the initial sixty days. The Board will not overturn an agency’s

determination whether to approve or deny a request for an extension of TQSE unless we find it to have been arbitrary, capricious, or contrary to law.

We found that in that case, the authorizing official had made his determination after a careful examination of the reasons underlying the claimant's request. "Regardless of the views of the Tennessee finance office, nothing in the record suggests that the authorizing official's decision was arbitrary, capricious, or contrary to law. As such, the extension of TQSE was properly granted and claimant is entitled to be paid."

Our decision in *English* was consistent with those in other cases. In *Floyd S. Wiginton*, GSBCA 15583-RELO, 01-2 BCA ¶ 31,605, for example, an employee was transferred to a city in which he already owned a house, but moved into a hotel upon his arrival. He stayed in the hotel not only while tenants occupied his house, but also after that, while extensive renovations to the residence were taking place. We held that authorizing him to receive TQSE for the entire amount of time he lived in temporary quarters was permissible because his house was not available to him while tenants were living there and then was not habitable until the renovations were complete. In *David S. Reinhold*, GSBCA 16334-RELO, 04-1 BCA ¶ 32,576, the transferred employee purchased a house which was in such poor condition that the agency acknowledged it to be uninhabitable. We concluded that the agency "can reimburse [the employee] for TQSE until his uninhabitable house was made habitable." In *Steven F. Bushey*, GSBCA 15289-RELO, 01-1 BCA ¶ 31,291, the employee bought a dilapidated house and immediately had it demolished so that construction of a new one could begin on its site. The Board held that the demolition was not an impediment to his claim for TQSE.

These cases demonstrate that when a transferred employee remains in temporary quarters because the house he intends to occupy permanently is not habitable by him, a "compelling reason" permitting authorization of additional eligibility for TQSE is present. Mr. Frank's new home was not habitable by him during the period from November 4, 2005, to January 1, 2006, because it was being rented to the previous owner as a condition of the sale. His supervisor and his commanding officer both carefully considered his request for additional TQSE, given this circumstance, and they granted the request. Their determinations were not arbitrary, capricious, or contrary to law, so we will not upset them.

We also note, as stated in *Reinhold* and several cases cited there, that an agency may not exercise its discretion to authorize a transferred employee to incur reimbursable expenses and then, after the expenses are incurred, deny the authorized reimbursement. The Finance Center's attempt to evade this equitable rule failed in *English*, and it must fail here as well.

The Finance Center questions the viability of the investigator's recommendation that the amount of Mr. Frank's TQSE be reduced during the time that he was renting his new

house back to its former owner. Here, we agree with the center. As a practical matter, calculating the amount of the reduction would be extremely difficult, for one factor to be considered is the costs an employee incurs as owner, and those costs are problematical. They include not only mortgage payments (which vary in amount depending in part on the size of the employee's down payment), but also insurance, taxes, maintenance, and repairs. Even if a calculation could be fairly made, however, a more fundamental problem is that the regulations which govern TQSE do not permit a reduction. As we have explained, the Federal Travel Regulation provides that one is either in temporary quarters, and therefore permitted to receive full reimbursement for TQSE incurred, or in permanent quarters, and therefore permitted to receive no reimbursement at all. "No half-way station exists." *Donald D. Fithian, Jr.*, GSBCA 16712-RELO, 06-1 BCA ¶ 33,204 (citing *Charles F. Ruerup*, GSBCA 15955-RELO, 03-1 BCA ¶ 32,227).

The parties in this case have focused only on Mr. Frank's entitlement to TQSE for the entire period of time in question. They have not addressed the specific amounts claimed. For that reason, we have considered only the employee's entitlement.

STEPHEN M. DANIELS
Board Judge