

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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August 17, 2005

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GSBCA 16699-TRAV

In the Matter of HARRIETTE TRELOAR

Harriette Treloar, Arlington, VA, Claimant.

Mary C. Lanham, Chief, Travel Payment Section, Program Support Center, Department of Health and Human Services, Rockville, MD, appearing for Department of Health and Human Services.

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

The Department of Health and Human Services (HHS) requests our opinion pursuant to section 3529 of title 31, United States Code, regarding a claim for reimbursement of lodging expenses incurred by an employee while on a temporary duty assignment.

The employee, Harriette Treloar, began this assignment in October 2003. The temporary duty was originally planned to be for a two-month "trial period," and if it was satisfactory to the HHS assistant secretary for whom Ms. Treloar worked, would be continued until September 2004. The assistant secretary not only approved the arrangement for the entire one-year term, but also extended it at least through April 2005. Whether Ms. Treloar is still on this assignment is unknown to us.

Ms. Treloar lived in a hotel for the first three months of her temporary duty assignment. After the assistant secretary decided to continue the arrangement beyond the trial period, however, she decided to purchase a house at this location. She identified a house and rented it from the seller for virtually all of January 2004 before buying it at the end of the month.

HHS reimbursed Ms. Treloar for the lodging costs she incurred while living in a hotel. The agency has questions about reimbursement of the costs she incurred thereafter, however. The questions may be stated as follows:

1. In December 2003, Ms. Treloar sold the home she owned and in which she had lived at her permanent duty station. During the entire time that she owned and lived in the house at her temporary duty station, this house was consequently her only residence. Does this fact preclude reimbursement of lodging expenses associated with ownership of the house?
2. May the agency reimburse Ms. Treloar for the rent she paid for the house in which she lived at the temporary duty station prior to the date on which she purchased that house? If so, may the reimbursement be made even if the house had not previously been rented?
3. The assistant secretary agreed that if Ms. Treloar chose to have some of her furniture shipped to the house at the temporary duty station, rather than renting furniture for that house, HHS would reimburse her for the cost of the shipment, limited to the cost she would have incurred if she had rented furniture. Ms. Treloar did have some of her furniture shipped to the temporary duty station (keeping some in storage at her permanent duty station). May the agency honor the assistant secretary's commitment by paying a monthly "furniture allowance" to the employee?

The first two questions, as Ms. Treloar maintains, may be answered with reference to decisions issued by both this Board and its predecessor in settling travel claims by federal civilian employees, the General Accounting Office (GAO – now the Government Accountability Office).

1. In *Bornhoft v. United States*, 137 Ct. Cl. 134 (1956), the Court of Claims explained, "A subsistence allowance is intended to reimburse a traveler for having to eat in hotels and restaurants, and for having to rent a room in another city while still maintaining his own table and his own permanent place of abode. It is supposed to cover the *extra* expenses incident to traveling." Nearly thirty years ago, GAO decided in applying this principle that if a federal employee on temporary duty spends his nights in a residence he owns at the temporary duty location, the costs he incurs in staying in the house – mortgage interest, property taxes, and utility charges – are reimbursable if the house was purchased as a place to live during the temporary duty, but not if the house was purchased earlier for other reasons. *Robert E. Larrabee*, 57 Comp. Gen. 147 (1977); *Sanford O. Silver*, 56 Comp. Gen. 223 (1977). The Board adopted this approach in *Donald C. Smaltz*, GSBCA 14328-TRAV,

97-2 BCA ¶ 29,311, in which we said that maintenance expenses, like the other costs mentioned by GAO, are reimbursable if the house was purchased as a place to live during the temporary duty. We have applied the holding of *Smaltz* in other cases. *Lawrence A. Mahoney*, GSBCA 15600-TRAV, 02-1 BCA ¶ 31,824; *Dimitri & Eugenia Arensburger*, GSBCA 14514-TRAV, 98-2 BCA ¶ 30,055; *Thomas J. Dresler*, GSBCA 13985-RELO, 98-1 BCA ¶ 29,434 (1997).

HHS recognizes that because Ms. Treloar purchased the house in which she lived at her temporary duty station as a place to live during her temporary duty, the costs she incurred in staying in the house would generally be reimbursable. (The agency also recognizes that there is a cap on reimbursement – the monthly expenses incurred can be repaid only to the extent that they do not exceed the maximum monthly lodging costs which would be reimbursable if Ms. Treloar stayed in a commercial facility such as a hotel.) HHS is concerned, however, that reimbursement may not be permissible in this case because at the time Ms. Treloar lived in the house at her temporary duty station, she did not own one at her permanent duty station and therefore was not incurring any *extra* living expenses due to ownership of the house. This is not an unreasonable reading of the Court of Claims' decision in *Bornhoft*, but it is also not a reading that has ever been followed by the Board or GAO. Costs of ownership and operation of a house purchased at a temporary duty station for the purpose of living while on temporary duty have been considered reimbursable whether the employee kept his home at his permanent duty station as a family residence, as in *Smaltz* and *Arensburger*, or kept such a home and rented it to others, as in *Larrabee*, or had no permanent residence at all while on temporary duty, as in *Gary R. Carini*, B-203440 (Feb. 26, 1982); B-201478 (Aug. 7, 1981); *James H. Quiggle*, B-192435 (June 7, 1979); and *Nicholas G. Economy*, B-188515 (Aug. 18, 1977). If the regulation writers wished to establish a different rule, consistent with the precepts of *Bornhoft*, they could have done so.<sup>1</sup> But they have not, despite many years in which a change could have been made. This

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<sup>1</sup> As Ms. Treloar points out, an alternative formulation would need to address a number of situations and might entail a complex comparative cost analysis. An employee who buys a house in which to live at a temporary duty station might be reimbursed differently for the expenses associated with that house if he (a) has no residence at his permanent duty station, but incurs costs of storing household goods at that location (as Ms. Treloar did); (b) continues to maintain that his residence at the permanent duty station is the home of his friends or family which he occupied at no cost while working at that station; (c) retains his residence at his permanent duty station, but rents that residence at a financial loss; or (d) retains his residence at his permanent duty station and gains financially by doing so. The difficulty in formulating a rule governing these situations and others may be a reason why the regulation writers have not altered the existing rule.

inaction constitutes a tacit acceptance of the rule. We consequently adhere to established precedent by stating that the kinds of costs claimed by Ms. Treloar as lodging expenses at her house at her temporary duty station are reimbursable.

2. The answer to the agency's second question, regarding reimbursability of the payment Ms. Treloar made to the previous owner of the house as rent for the portion of January 2004 before ownership was transferred, is simpler. Expenses of staying at a temporary duty station in a "room, apartment, house, or other lodging on a long-term basis" are expressly made reimbursable as costs of lodging by the Federal Travel Regulation (FTR). 41 CFR 301-11.15 (2003 & 2004). Where an employee on temporary duty first rents such a place in which to live and then purchases one, the agency is obliged to reimburse the employee for the reasonable cost of the documented rental. *Quiggle*. Where the employee represents that the house was rented as a business proposition, with the rental arrived at by two parties having an arm's length relationship, the rental rate is considered to be reasonable unless the agency can show that it is excessive. While the reasonableness of the rate is best shown by reference to previous rentals of a property, a previous rental is not essential to such a showing. *Matthew D. Murphy*, GSBCA 16326-RELO, 04-1 BCA ¶ 32,572; *Michael S. Knezevich*, GSBCA 14398-TRAV, 98-1 BCA ¶ 29,607; *Guy E. Mercier*, GSBCA 13795-RELO, 97-1 BCA ¶ 28,925. Therefore, even if the house Ms. Treloar purchased was not rented before she bought – a matter which is in dispute between the employee and the agency – she should be reimbursed for the rent she paid unless the agency can demonstrate that that rent was excessive.

3. The FTR provides that if an employee on temporary duty rents an unfurnished dwelling, the reimbursable cost of lodging includes "the rental cost . . . of appropriate and necessary furniture and appliances." 41 CFR 301-11.15(a). Ms. Treloar did not rent furniture for the house she purchased; instead, she had some of her furniture shipped from her previous residence. The cost of shipment is not reimbursable.

The FTR addresses temporary duty travel allowances in chapter 301 of title 41, Code of Federal Regulations. Chapter 301 does not establish an allowance for shipping furniture to a temporary duty location. The regulation's only mention of an allowance for shipment of household goods is contained in a separate chapter, chapter 302. There, part 302-7 provides for shipment of such goods for employees who are moving to, from, or between permanent duty stations. 41 CFR 302-7.1. The regulation faithfully follows applicable statute: subchapter I of chapter 57 of title 5, United States Code, regarding travel and subsistence expenses, does not mention shipment of household goods; subchapter II of that chapter, regarding expenses of transferred employees, does. *See* 5 U.S.C. §§ 5722(a)(1), 5723(a)(2), 5724(a)(2) (2000).

By agreeing to a “furniture allowance” to compensate Ms. Treloar for costs she incurred in lieu of the reimbursable expense of furniture rental, the assistant secretary for whom she works may have been acting both creatively and equitably. He was also acting, however, without authority. Because no statute or regulation allows for payment of a “furniture allowance” in Ms. Treloar’s situation, HHS may not make such payment. *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 law prevents an agency from honoring commitments made in its name by officials who do not have the power to make them); *cf. Panfilo Marquez*, GSBCA 15890-TRAV, 03-2 BCA ¶ 32,394 (no authority to reimburse employee for purchase of furniture needed for unfurnished temporary duty lodgings, even if purchase was less expensive than rental would have been).

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STEPHEN M. DANIELS  
Board Judge