UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 26, 2011

CBCA 2149-RELO

In the Matter of CHARLES A. HOUSER

Charles A. Houser, Edmonton, AB (Canada), Claimant.

Michael D. Rogers, Office of Assistant Chief Counsel, Customs and Border Protection, Department of Homeland Security, Washington, DC, appearing for Department of Homeland Security.

POLLACK, Board Judge.

Claimant, Charles Houser, an employee of United States Customs and Border Protection (CBP), seeks reimbursement for temporary quarters subsistence allowance (TQSA), related to his transfer to Edmonton, Alberta, Canada. Specifically, he disputes CBP's refusal to grant him an extension for TQSA costs beyond the initial sixty days granted.

He also disputes CBP's contention that his claim is a grievance that is covered under a collective bargaining agreement (CBA) between CBP and the National Treasury Employees Union (NTE) and as such, rejects CBP's contention that the Board lacks jurisdiction to hear the matter. Relevant to the CBA issue is the fact that although Mr. Houser began his transfer on April 18, 2010, he made the disputed request for an extension in June 2010. This was after CBP and NTEU had entered into a May 2010 CBA, which succeeded the prior agreement. The May 2010 CBA changed the language dealing with rights of employees to seek relief in appropriate circumstances and added a right to proceed outside the CBA, where a regulatory or statutory tribunal offering relief existed. CBP acknowledges that in considering the issue as to the CBA, we should look to the CBA language in the May 2010 agreement.

In initially defending its denial of Mr. Houser's claim, CBP cited provisions of 41 CFR 302-6.6, a Federal Travel Regulation (FTR) dealing with allowances for temporary quarters subsistence expenses (TQSE) involving domestic relocation, rather than regulations dealing with TQSA associated with international relocation. Because CBP's filing cited to the wrong authority, the Board held a telephone conference with the parties and there clarified that the law to be applied in this claim was 5 U.S.C. § 5923 (2006), as well as Department of State Standardized Regulations (DSSR) implementing that statute. The DSSR have been made applicable to civilian employees of all agencies through Executive Order 10,903, 3 CFR 433 (1959-1963). At the close of the conference, CBP was directed to review its position on the claim in light of the cited law and provide a response. CBP responded that it had reviewed the matter and continued to deny the claim.

The facts in this claim are straightforward. CBP transferred Mr. Houser to a post in Canada, and as part of the transfer granted him sixty days for temporary quarters, with that expiring on June 18, 2010. Mr. Houser had difficulty in securing permanent housing, he was not able to secure a residence by the initial date and sought an extension. He ultimately secured a residence as of July 2, 2010. CBP has denied his request for an extension from June 18 to July 2, 2010, stating as its basis that the agency was applying an August 2008 standard operating procedure (SOP) for relocation allowances and under that SOP, the agency did not allow more than sixty days for temporary quarters. Additionally, CBP, as a matter of policy (again reflected in the SOP), asserted that it uniformly denied requests for extensions beyond the initial base period, except in cases involving non-delivery of household goods transported by ship, and for compelling reasons beyond the employee's control, such as strikes, customs, clearance, hazardous weather, fire, flood, or other Acts of God.

Congress at 5 U.S.C. § 5923 provides for payment of TQSA for an employee transferred to a foreign area. The statute reads in pertinent part as follows:

> (a) When Government owned or rented quarters are not provided without charge for an employee in a foreign area, one or more of the following quarters allowances may be granted when applicable:
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> > (1) A temporary subsistence allowance for the reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and his family-
> >
> > > (A) for a period not in excess of 90 days after first arrival at a new post of assignment in a foreign area or a period ending

> with the occupation of residence quarters, whichever is shorter; and,
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> (B) for a period of not more than 30 days immediately before final departure from the post after the necessary evacuation of residence quarters.

The statute further addresses extensions under (b) as follows:

> (b) The 90-day period under subsection (a)(1)(A) and the 30–day period under subsection (a)(1)(B) may each be extended for not more than 60 additional days if the head of the agency concerned or his designee determines that there are compelling reasons beyond the control of the employee for the continued occupancy of temporary quarters.

As stated earlier, the statute is implemented through the DSSR, at section 120. Those regulations essentially track the statutory language as to the time to be allowed for temporary quarters allowances and do not add any definitions or examples defining "compelling reasons," thus leaving that to the discretion of the agency. In challenging the denial of his claim, Mr. Houser has charged that the agency policy, limiting "compelling" circumstances to only the category stated in the SOP, constitutes an arbitrary and capricious action on the part of CBP and is contrary to law. He has stated that he understands that under the above regulations, the agency has discretion in whether or not to grant him the extension. His challenge here is that the agency has simply failed to consider the matter and exercise discretion.

In addition to defending this claim on the merits, CBP also contends that Mr. Houser was covered under a CBA between CBP and NTEU, and that the procedures specified under that agreement provide the exclusive remedy for Mr. Houser on a matter subject to employee grievance, such as the one in issue. We have consistently held that where a matter is covered in a CBA, we cannot exercise jurisdiction. *Warren Newell*, CBCA 2132-RELO, 10-2 BCA ¶ 34,601. However, in this instance, there is language which addresses remedies available to Mr. Houser outside the CBA. Article 27, section 3 of the CBA identifies matters exempted from the grievance procedures as follows:

> Any matter in which the affected employee has elected to appeal through a statutory or regulatory process, e.g., the EEOC (by filing a formal complaint), MSPB (by filing an appeal to MSPB), FLRA (by filing a FLRA charge or OSC (by filing a complaint with OSC).

It is on that basis that Mr. Houser claims we have jurisdiction.

Discussion

Jurisdiction

The claimant is covered by a CBA. However, that agreement carves out an exception to the grievance procedure in instances where an employee elects to appeal the agency action through a statutory or regulatory process. The language in the CBA is broad, and while examples are provided, they do not limit the operative word in the provision, which is "any." The process at this Board is established by statute at 31 U.S.C. § 3702(a)(3). It consequently falls under the plain meaning of the CBA provision. Accordingly, we have jurisdiction. This distinguishes this case from a number of earlier decisions, where different language was in issue. *See Daniel T. Garcia*, CBCA 2007-RELO, 10-2 BCA ¶ 34,468.

Merits

The statute, authorizing the provision of TQSA to employees who are transferred to a foreign station, provides that when Government owned or rented quarters are not provided without charge for an employee in a foreign area, quarters allowances may be granted. In describing what may be granted, the statute allows for a temporary subsistence allowance for a period not in excess of ninety days after first arrival at a new post in a foreign area or a period ending with the occupation of residence quarters, whichever is shorter. Accordingly, it was the stated intent of Congress that if the occupancy took ninety days or longer, an employee was to be granted ninety days. If an employee could be settled more quickly, then the shorter time frame was to be used. As to extensions, the clear Congressional intent was to allow extensions of up to sixty days, where the agency found that there were compelling reasons for the delays.

In denying payment, CBP relied on provisions of its SOP, which specified that the basic period for quarters allowances would be limited to sixty days. In its SOP, CBP has established a policy that is inconsistent with the statute allowing TQSA payments for foreign relocations. The statute clearly allows for ninety days, absent a shorter time being needed because of occupancy. In this case, Mr. Houser completed his relocation in less than ninety days.

As this Board recently stated in *Kevin D. Reynolds*, CBCA 2201-RELO (May 10, 2011), in the context of similar but not identical rules under the FTR for domestic

relocation, an agency cannot issue rules or regulations which run afoul of the express purpose stated by Congress or as implemented through regulation by the properly charged agency. In *Reynolds*, the Board said:

> As we have explained many times, the FTR is a "legislative rule" – a regulation issued under express authority from Congress, for the purpose of affecting individual rights and obligations by filling gaps left by a statute, after following the Administrative Procedure Act's notice and comment provisions. It therefore has controlling weight – the force of law – unless the provision in question is arbitrary, capricious, or manifestly contrary to statute. Any agency rule which is inconsistent with an FTR provision is consequently trumped by the FTR and must give way. *E.g.*, *Bryan Trout*, CBCA 2138-RELO (Mar. 18, 2011); *Jimmy D. Graves*, CBCA 963-TRAV, 08-1 BCA ¶ 33,805; *Michael Bilodeau*, CBCA 686-TRAV, 07-2 BCA ¶ 33,716 ("the FWS [Fish and Wildlife Service] rules, as interpretative agency rules, are trumped by the FTR, which is a legislative rule"); *Katharine C. Hetts*, CBCA 786-RELO, 07-2 BCA ¶ 33,714; *Edward Queair*, GSBCA 15714-RELO, 02-1 BCA ¶ 31,757.
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> Here, the FWS manual provision in question falls afoul of this principle. The FTR, implementing the statute, allows an agency to authorize as many as 120 days of eligibility for reimbursement of actually-incurred TQSE, with the last sixty contingent on a determination that a compelling reason for continued occupation of temporary quarters exists. The FWS manual precludes authorization of those last sixty days. It is therefore inconsistent with the FTR and may not survive.

Reynolds, slip op. at 3.

Just as was the case in *Reynolds*, CBP's SOP, if left to stand, would trump the clear mandate set out in the law, as the statute allowed for ninety days and not the sixty set out in the CBP SOP. Here, once the agency decided to allow for payment of quarters to Mr. Houser, he was entitled to reimbursement if needed for ninety days, absent his settling his living situation in a shorter time frame. In this instance, Mr. Houser completed his relocation in less than ninety days, moving to his new residence on July 2, 2010. Accordingly, we direct the agency to pay for the additional days of basic time, up until July 2, 2010.

One further point warrants clarification. There is no question that once the basic time is exhausted, the matter of extension would properly be a question for agency discretion. However, that discretion would not be unfettered and would still have to be

applied in a manner that was not arbitrary and capricious and not in violation of the law. As correctly pointed out by CBP, in addressing matters of discretion, we generally give an agency broad breath and do not lightly overturn an agency's application of discretion. However, we point out to CBP that the law links the granting of extensions to an agency assessment of whether or not there are compelling reasons. In complying with the law, so as to make the required judgment, an agency must make its decision based on the assessment of specific facts and not on the basis of a pre-decided policy.

Accordingly, we find the claimant entitled to TQSA up until July 2, 2010.

Decision

The claim is granted. The appropriate dollars shall be determined by the agency.

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HOWARD A. POLLACK
Board Judge