

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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June 5, 2006

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GSBCA 16836-RELO

In the Matter of FRANK J. SALBER

Frank J. Salber, Odell, OR, 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).

Although the Federal Travel Regulation (FTR) allows reimbursement of expenses an employee incurs when lodging temporarily upon his relocation to a new duty station, the regulation limits that reimbursement when the employee stays with friends or relatives.

## Background

Frank J. Salber was transferred to a new duty station by his employer, the Army Corps of Engineers, in April 2005. In ordering Mr. Salber to relocate, the Corps authorized reimbursement of temporary quarters subsistence expenses (TQSE) he might actually incur for a period of 120 days.

Mr. Salber's new duty station was near the home of his wife's sister, Amy Dunn. Ms. Dunn and her husband allowed the Salbers to stay in their guest room. The couples did not enter into a written lease agreement for the space,<sup>1</sup> but the Salbers paid their hosts \$1000 per

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<sup>1</sup> The Corps had asked for a copy of a lease agreement. In April 2006, after this  
(continued...)

month for each of the four months they resided there. A realtor in the area has opined, based on his knowledge of comparable properties, that this amount was fair and reasonable. The Dunns say that they “regularly have guests stay in our guest room. . . . The compensation received is negotiable, with a weekly value averaging \$300.”

Mr. Salber asked the Corps to reimburse him for the cost of renting the guest room. The agency declined to do so, on the ground that the employee had lodged with relatives. Mr. Salber has asked the Board to review this decision.

### Discussion

By statute, an agency may pay, to or on behalf of an employee who transfers in the interest of the Government to a new duty station within the United States, subsistence expenses the employee and his family actually incur for a period of up to 120 days while occupying temporary quarters. 5 U.S.C. § 5724a(c) (2000). Payment is subject to the rules prescribed in the FTR, which is promulgated by the Administrator of General Services. *Id.* §§ 5724a(c), 5738(a)(1).

The FTR contains a provision entitled “Lodging with friend(s) or relative(s) (with or without charge).” This provision states:

You [a transferred employee] may be reimbursed for additional costs your host incurs in accommodating you only if you are able to substantiate the costs and your agency determines them to be reasonable. You will not be reimbursed the cost of comparable conventional lodging in the area or a flat “token” amount.

41 CFR 301-11.12(c) (2004).

This provision appears in the chapter of the FTR which pertains to temporary duty travel allowances, rather than the chapter which pertains to relocation allowances. Nevertheless, for many years, the provision has been held to apply to claims for the relocation benefit of reimbursement of actually-incurred TQSE, as well as to claims for temporary duty lodging costs. *Robert H. Laghaie*, GSBCA 15498-RELO, 01-1 BCA ¶ 31,411 (citing *Donald Mixon*, GSBCA 14957-RELO, 00-1 BCA ¶ 30,606 (1999); *John*

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<sup>1</sup> (...continued)

case had been filed, Mr. Salber provided one which he and Mr. Dunn had just signed. According to Mr. Salber, the 2006 written agreement embodies the terms and conditions which he and Mr. Dunn had orally agreed to before the Salbers moved into the guest room.

*Wesley Summers*, GSBCA 14600-RELO, 98-2 BCA ¶ 29,975). The purpose of the rule is to ensure that while the Government reimburses costs of lodging which are incurred through a business relationship, it does not promote arrangements which are made between closely-aligned individuals for the purpose of enriching the employee, the host, or both. *Matthew D. Murphy*, GSBCA 16326-RELO, 04-1 BCA ¶ 32,572; *Guy E. Mercier*, GSBCA 13795-RELO, 97-1 BCA ¶ 28,925. This purpose applies with equal force to both temporary duty and relocation situations.

If the friend or relative is in the business of renting on a regular basis the quarters involved – for example, if that individual is operating a hotel or apartment house – the “friends or relatives” provision of the FTR does not apply. *Murphy*; *Michael S. Knezevich*, GSBCA 14398-TRAV, 98-1 BCA ¶ 29,607; *Mercier*. Mr. Salber urges us to find that this exception covers his claim. He calls to our attention the Dunns’ statement that they “regularly have guests stay in our guest room” and that compensation for the lodging “is negotiable.” This statement, by itself, is insufficient for us to accept the argument. It is not supported by corroborating evidence, such as a succession of lease agreements, which would demonstrate with specificity that compensation has actually been charged. The fact that a room has a particular rental value, which is attested to by a realtor, is by the terms of the “friends or relatives” provision not an appropriate measure of reimbursement.

The provision permits Mr. Salber to be reimbursed for his lodging with the Dunns only to the extent that the Dunns incurred additional costs in accommodating him, and only if he can substantiate those costs and the Corps determines them to be reasonable. Mr. Salber has presented no evidence that the Dunns incurred any additional costs as a consequence of the Salbers having stayed with them. Therefore, he is entitled to no reimbursement.

We make an additional comment regarding this case, one which applies to both a position taken by Mr. Salber and a position taken by the Corps. Mr. Salber points out that an information package the agency provided to him before he moved states, “Temporary quarters refers to any lodging obtained from private or commercial sources to be occupied temporarily by the employee and/or his dependents who have vacated the residence quarters in which they were residing at the time the transfer was authorized.” He contends, “The omission of at least a reference to family relationship causing additional requirements is unfair and misleading to employees and claimant requests some latitude from the Board Judge in view of this.” The Corps says that it denied the claim on the basis of two provisions of the Defense Department’s Joint Travel Regulations (JTR), C4555-B.3 and C13215-B (note). Paragraph C4555-B addresses allowable lodging expenses for temporary duty travelers. Subparagraph 3 of that paragraph provides, “Lodging with Friends or Relatives. *When an employee lodges with friends or relatives (including members of the immediate family) with or without charge, the allowable cost for lodging, for computing per diem is*

*zero.*” Paragraph C13215-B addresses reimbursement for actually-incurred TQSE. The note to this paragraph states, “*The provisions of par. C4555-B3 apply when an employee and/or dependents obtain lodgings from friends or relatives.*”

What the parties’ positions have in common is that they are implicitly based on a theory that an agency’s explanation of the controlling law may alter the prescripts established in the FTR. This theory is not valid. 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 it is demonstrated to be arbitrary, capricious, or manifestly contrary to statute. No such defect plagues the “friends and relatives” provision. The JTR, to the extent that it addresses matters determined in the FTR, is an “interpretative rule” which may simply explain and supplement the FTR. It does not have the force of law and cannot alter an FTR determination. *Vera A. Wood*, GSBCA 15637-TRAV, et al., 02-1 BCA ¶ 31,693 (2001). The JTR provisions at paragraphs C4555-B.3 and C13215-B (note) are inconsistent with the FTR’s “friends and relatives” provision in that they preclude some reimbursement which the FTR provision permits. They must therefore give way to the FTR provision.<sup>2</sup> *Brian T. Walsh*, GSBCA 15703-TRAV, 02-1 BCA ¶ 31,818. Similarly, even if the statement in the Corps’ information package which Mr. Salber cites could be viewed as modifying the FTR’s rule regarding lodging with friends or relatives, we could not give it any effect.<sup>3</sup> *Kimberly A. Smith*, GSBCA 16615-RELO, 05-2 BCA ¶ 33,039; *Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001).

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<sup>2</sup> This is not to say that the JTR rule is less meritorious than the one established in the FTR. The JTR rule may, as a matter of policy, be preferable in that it leaves no room for administrative evaluation of subjects which, if our cases are a guide, rarely arise. But as long as the FTR rule remains in effect, the writers of the JTR have no license to impose a different standard.

<sup>3</sup> We do not think it can fairly be read that way. The statement merely defines the term “temporary quarters”; it does not establish that the cost of lodging in any particular temporary quarters is or is not reimbursable.

Decision

The claim is denied.

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STEPHEN M. DANIELS  
Board Judge