

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

April 13, 2001

GSBCA 15491-TRAV

In the Matter of PATRICK S. TWOHY

Patrick S. Twohy, Wasilla, AK, Claimant.

Dan Johnson, Chief, Branch of Field Surveys, Alaska State Office, Bureau of Land Management, Anchorage, AK, appearing for Department of the Interior.

DANIELS, Board Judge (Chairman).

While Patrick S. Twohy was on a long-term temporary duty assignment, his employer, the Bureau of Land Management, reduced his daily allowance for meals and incidental expenses. Mr. Twohy challenges the agency's action.

Background

Mr. Twohy's assignment was to perform surveys in the area around Ketchikan, Alaska, from May 31 to October 15, 2000. His travel orders state, "Day rate per dium [sic] authorized."

On June 6, 2000, a memorandum was issued to employees in Mr. Twohy's division regarding daily rates for meals and incidental expenses while on business away from one's permanent duty station. The memo states, in pertinent part:

There is an obligation on everyone's part to conduct our field survey operation as prudently and efficiently as possible and to stay within the confines of the Federal Travel Regulations [sic] when traveling on official business. These regulations (Sec. 301-11.200) permit agencies to establish a per diem rate when circumstances warrant. In order to effect some measure of fiscal responsibility and to correct inadequacies in certain situations, the following Meals and Incidental Expense (M&IE) rates will be used for Temporary Duty (TDY) during the 2000 field season.

Meals purchased at commercial facilities (for TDY 30 days or less)	Locality rate
Meals purchased at commercial facilities (for TDY greater than 30 days)	65% of locality rate after 30 days
Meals furnished by the employee (i.e. groceries)	\$22.00 per day

Section 301-11.200 of the Federal Travel Regulation (FTR), which is cited in the memorandum, states:

Under what circumstances may [an] agency prescribe a reduced per diem rate lower than the prescribed maximum?

Under the following circumstances:

- (a) When [the] agency can determine in advance that lodging and/or meal costs will be lower than the per diem rate; and
- (b) The lowest authorized per diem rate must be stated in [the employee's] travel authorization in advance of [the employee's] travel.

41 CFR 301-11.200 (1999).

Mr. Twohy objected that this provision of the FTR prevented the agency from reducing the per diem rate for his assignment to Ketchikan because the reduced rate was not the one stated in his travel orders. Alternatively, he maintained that even if the agency could have reduced the rate, the agency did not appear to have determined in advance that his meal costs would be lower than the standard rate.

In response, the agency acknowledged that Mr. Twohy's orders provided for a standard rate per diem allowance. It said that because the employee should have been aware of the memo no later than June 10, however, it would pay him at sixty-five percent of the standard rate for all days beginning thirty days after that date. With regard to a determination that meal costs for employees on long-term temporary duty would be lower than the standard rate, the agency offered this statement from the chief of the Alaska State Office's Branch of Field Surveys: "After having spent several field seasons in and around Ketchikan, I believe we could ascertain that a reduced rate would not cause any undue hardship to employees assigned temporary duty there for extended periods."

Discussion

Since enactment of the Subsistence Expense Act of 1926, 44 Stat. 688 (1926), agencies have been authorized to pay employees a per diem allowance, rather than reimbursing actual expenses, when those employees are traveling on Government business.

Dimitri & Eugenia Arensburger, GSBCA 14514-TRAV, 98-2 BCA ¶ 30,055. Originally, and for the next sixty years, the standard rate for this allowance was prescribed by statute. For example, the 1926 Act set rates of \$6 per day for travel within the continental United States and \$7 per day for travel outside that area. (These rates included costs of lodging as well as those of meals and incidental expenses!) 44 Stat. 688, 689 (§§ 4, 6). In setting these rates, Congress described them as maximums and allowed agencies to set lower amounts in appropriate circumstances. This authorization to agencies was necessary because the rates, which were established on nationwide and worldwide bases, were intended for "travel to be performed in metropolitan areas or other places where the cost of living is high." S. Rep. No. 81-428 (reprinted in 2 U.S. Code Congressional Service 1337 (1949)). Agencies were expected to "exercise diligent control" to set appropriate rates for areas in which costs were lower. Id. at 1338.

In the Federal Civilian Employee and Contractor Travel Expenses Act of 1985 (enacted in 1986), Congress made two significant changes to the law regarding per diem rates for Government employees traveling on official business. These two changes remain in effect today. First, Congress relinquished responsibility for setting the rates to the Administrator of General Services (for travel within the continental United States) and the President or his designee (for travel outside that area). Second, rates are to be established by locality, rather than on nationwide and worldwide bases. Pub. L. No. 99-234, § 102, 99 Stat. 1756, 1756 (1986); 5 U.S.C. § 5702(a)(1)(A), (a)(2) (1994).

Even under the old system of statutorily-mandated nationwide and worldwide per diem rates, Congress was concerned that in setting rates for particular trips at less than the maximum allowed, agencies keep firmly in mind "that Federal employees should be protected against being required to pay out of their own pockets the necessary expenses incident to their official travel for the Government." H. R. Rep. No. 84-604 (reprinted in 2 U.S.C.C.A.N. 2547 (1955)). And the Comptroller General held that agencies could not limit payments to employees for subsistence expenses while traveling to levels below the standard per diem amounts solely to reduce administrative costs. David K. Leonard, GSBCA 14334-TRAV, 98-2 BCA ¶ 29,882 (citing Frank C. Sanders, 64 Comp. Gen. 825 (1985)).

Clearly, by moving to a system of administratively-established, locality-based per diem allowances, Congress eliminated the principal reason for setting rates at less than the standard prescribed in law. Because the standard rate is set for particular localities, there is no need to reduce a rate to less than the maximum in order to avoid overpayment to an individual traveling to a low-cost area. Additionally, because the locality rates are to represent "currently prevailing average costs, as determined by expert surveys," and "more accurately reflect[] the true cost of away-from-home duty," 131 Cong. Rec. 38,346, 38,347 (1985) (remarks of Reps. Collins (House floor manager), Brooks (principal sponsor of bill)), the need for agency reductions was further reduced. Members of Congress reiterated the need to ensure that in applying the law, agencies not force employees to subsidize the cost of official Government travel. Id. at 38,346-47, 38,492 (remarks of Sen. Stevens (Senate floor manager), Reps. Wolf, McCandless).

Nevertheless, the regulations issued under the 1986 statute recognized that in specific circumstances, the standard rate might be inappropriately high. The regulations included these examples of such circumstances:

- (1) Known arrangements or established cost experience at temporary duty locations showing that lodging and/or meals can be obtained without cost or at reduced cost to the employee;
- (2) Situations in which special rates for accommodations have been made available for a particular meeting, conference, training or other temporary duty assignment;
- (3) Traveler's familiarity with establishments providing lodging and meals at a lower cost in certain localities, particularly where repetitive travel or extended stays are involved;
- (4) Modes of transportation where accommodations are provided as part of the transportation cost; and
- (5) Situations in which the Government furnishes lodging, such as Government quarters or other lodging procured for the employee by means of an agency purchase order.

51 Fed. Reg. 19660, 19662 (May 30, 1986). These examples remained in the FTR until 1998, when the regulation was thoroughly revised. 41 CFR 301-7.2(b) (1997); 63 Fed. Reg. 15949 (Apr. 1, 1998). We considered that in light of the examples, agencies acted reasonably in reducing per diem rates to fifty-five percent of standard for employees who were sent on temporary duty assignments of such length that the employees could reasonably have been expected to rent quarters on a monthly basis and prepare their own meals. Timothy P. Twigg, GSBCA 14379-TRAV, 98-1 BCA ¶ 29,522 (1997); Sally N. Willett, GSBCA 14033-TRAV, 97-2 BCA ¶ 29,144.

In revising the FTR, the General Services Administration did not explain why it was truncating the provision which authorizes reduction of per diem rates by deleting these examples of justification for reduction. 63 Fed. Reg. 15,949, 15,950. The new rule does not make any of the examples inconsistent with the purpose of authorizing the reduction, however, and we consider them to remain appropriate circumstances in which to limit the rate.

We now return to Mr. Twohy's predicament. The employee maintains that the Bureau of Land Management may not reduce the per diem rate for his long-term temporary duty assignment because the reduction came after he had begun the assignment and justification for the reduction is lacking.

As to the first argument, Mr. Twohy is correct in observing that the FTR permits a lower-than-standard rate only if that rate is "stated in [the employee's] travel authorization in advance of [the employee's] travel," and the orders issued in advance of his travel stated that the standard rate would be paid. Nevertheless, we consider that the agency's action is permissible on timeliness grounds. The agency did not impose the reduced rate until after

the employee had (or should have had) knowledge of the change. In effect, the agency constructively rescinded the original travel orders and replaced them with new ones. The same result could have been obtained by bringing Mr. Twohy back to his permanent duty station and immediately sending him out again on temporary duty under new orders. It would be foolish to require an agency to take this sort of action simply to amend a provision in a travel order.

The more difficult question is whether the agency's imposition of a reduced per diem rate was based on an advance determination that meal costs Mr. Twohy would incur would be lower than the standard rate. The agency has offered two justifications for the reduction. The first justification is "to effect some measure of fiscal responsibility." The second is a statement of the chief of the Alaska State Office's Branch of Field Surveys: "After having spent several field seasons in and around Ketchikan, I believe we could ascertain that a reduced rate would not cause any undue hardship to employees assigned temporary duty there for extended periods."

The first justification does not pass muster. An agency may not reduce the daily allowances paid to employees to cover costs of meals and incidental expenses for the sole purpose of saving the agency's money. This sort of action is inconsistent with Congress's longstanding intention, in allowing payment of daily allowances to traveling employees, that the rates be set high enough to allow the employees to complete their travel without having to spend their own funds. The Comptroller General said as much in Sanders, and we endorsed his position in Leonard.

The second justification advanced by the agency is more problematical. Evidently, the branch chief has personal experience in the area to which Mr. Twohy was sent, and he applied that experience in setting the reduced per diem rate. When the statement is examined carefully, however, it proves to contain insufficient basis for making the reduction. The branch chief "believe[s] that [the agency] could ascertain" something, but this amounts to a concession that nothing had actually been ascertained at the time the statement was made. In other words, no advance determination had been made, as required by the FTR. Further, what could purportedly be ascertained is that "a reduced rate would not cause any undue hardship to employees assigned temporary duty [in the Ketchikan area] for extended periods." Evidently, according to the statement, reducing the per diem rate would cause some hardship -- but not an undue amount -- for employees. Imposing on employees a degree of financial hardship that is tolerable to a supervisor is an unacceptable basis for reducing a rate. To reiterate, the legislature's design in establishing the current system for paying the costs of official Government travel is that if employees lodge and eat in moderate quality establishments, they will not have any financial hardship imposed on them.

The agency maintains that the second justification fits within the third example given by the former FTR provision regarding reduction of per diem rates -- "Traveler's familiarity with establishments providing lodging and meals at a lower cost in certain localities, particularly where repetitive travel or extended stays are involved." It may be that the branch chief has such familiarity, and that Mr. Twohy could reasonably be expected to have gained it himself after a month in Ketchikan. If this is so, however, the agency has not explained why. It has instead cast doubt on such a conclusion by selecting for this employee a per diem rate which is based on eating meals in commercial establishments, rather than a rate which

is based on eating meals the employee prepares himself. This action appears to confirm that Mr. Twohy was not expected to stay in quarters where he could fix his own meals. Because preparing meals from groceries one has purchased himself is less expensive than eating in restaurants, a reduction in the per diem allowance is readily justified for an employee who rents quarters with kitchen facilities. But it is far less evident that an employee who eats in restaurants while on a long-term assignment can save thirty-five percent from the amount he would spend if he ate in restaurants while on a short-term assignment. If it is true in this case, the agency has not given any substantiation.

Decision

The claim is granted. The Bureau of Land Management shall pay to Mr. Twohy thirty-five percent of the standard per diem rate for Ketchikan, Alaska, for each day during the summer and early fall of 2000 for which it previously paid him only sixty-five percent of that rate.

STEPHEN M. DANIELS
Board Judge