5364

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189221 DATE: February 14, 1978

MATTER OF: Larry Burstein et al. - Per Diem - Statutory Increase in Maximum Rate

DIGEST: DEA employees on TDY September - December 1969 under travel authorizations prescribing $16 per diem, maximum at time of issuance, claim $25 per diem from November 10, 1969, date maximum was increased by Public Law 91-114 and SCTR. Claims are disallowed under 31 U.S.C. 71a since not filed with the GAO within 6 years after the date they accrued. Moreover, law and regulation merely established new higher limit and did not make increase mandatory or automatic. Agency took no administrative action to authorize higher rate. Therefore, there is no lawful basis for paying more than $16. 49 Comp. Gen. 493, 50 id. 179 distinguished.

By letter dated May 27, 1977, and received in the General Accounting Office on May 31, 1977, Mr. Edwin J. Post, Chief, Accounting Section, Drug Enforcement Administration (DEA), Department of Justice, requests a decision as to whether the 6-year statute of limitations, 31 U.S.C. 71a, bars the claims of Messrs. Larry Burstein, Thomas H. Chown, Jerel P. Ferguson, and Patrick J. Shea for additional per diem incident to temporary duty for training in November and December 1969. Documents were also submitted relating to a similar claim of Mr. Arthur C. Wilson and it is indicated that additional claims are anticipated.

These employees, whose permanent duty stations were located in various parts of the United States, were sent to the Washington, D.C., area for 12 weeks of training, beginning in September and ending in December 1969. Their travel authorizations specified a per diem rate of $16 per day, which at the time of issuance was the maximum allowable under the governing statute, 5 U.S.C. 5702(a) and section 6.2b(1) of the implementing Standardized Government Travel Regulations (SGTR), Bureau of the Budget Circular No. A-7, as revised January 28, 1965, effective March 1, 1965.

Effective November 10, 1969, section 5702(a) was amended by Public Law 91-114, 83 Stat. 190, which increased the maximum rate allowable to $25 per day, and section 6.2b(1) of the SGTR was

similarly amended, effective the same date, by Transmittal Memorandum No. 9, Bureau of the Budget Circular No. A-7, revised. It is the contention of these claimants that this statutory increase in the maximum rate automatically and mandatorily increased their per diem entitlement to $25 effective November 10, 1969. They further contend that filing their claims with DEA within 6 years satisfied the requirements of the statute of limitation. None of these claims had been received in the General Accounting Office prior to the receipt of DEA's submission on May 31, 1977.

While the record is not entirely clear in the case of Mr. Burstein, it appears that he claimed $25 per day for 25-3/4 days from November 10 to December 5, 1969, on his original travel voucher, dated December 9, 1969, but was allowed only $16 per day. On July 26, 1976, he reclaimed for this period the difference between the two rates, $9 per day, for 26 days, a total of $234. This claim has not been paid because DEA determined it was barred by 31 U.S.C. 71a.

Mr. Chown claimed an additional $9 per day for 40 days, November 10 to December 19, 1969, or $360 dollars on December 23, 1969. This was disallowed by memorandum dated March 17, 1970, because "The new per diem rate of $25 per day does not apply." On February 9, 1976, Mr. Chown reclaimed the $360 and this amount was paid on May 3, 1976, because DEA construed a Comptroller General's decision as holding that the new maximum per diem rate authorized by the Act of November 10, 1969, Public Law 91-114, 83 Stat. 190, superseded the rate authorized by the outstanding travel authorizations here involved. Subsequently, DEA concluded that Mr. Chown's claim was barred by 31 U.S.C. 71a and action to effect recovery of the amount paid is pending.

Mr. Ferguson claimed an additional $9 per day for 39 days, November 10 to December 19, 1969, or $351 on his original travel voucher in December 1969 which was disallowed. He reclaimed the $351 on January 22, 1976, and this amount was paid on April 26, 1976, for the same reason that Mr. Chown's claim was paid. DEA later determined that Mr. Ferguson's claim was also barred by 31 U.S.C. 71a and action to effect recovery of the amount paid is pending.

Mr. Shea claimed $25 per day for 25-3/4 days from November 10 to December 5, 1969, on his original travel voucher submitted in December 1969, but was allowed only $16 per day. On July 22, 1976,

he reclaimed for this period the difference between the two rates, $9 per day, for 26 days, a total of $234. This claim was determined by DEA to be barred by 31 U.S.C. 71a and disallowed. Mr. Shea again submitted his claim on January 24, 1977, but it has not been paid.

Mr. Wilson claimed $25 per day for 26 days from November 10 to December 5, 1969, on his original travel vouchers, dated December 10, 1969, but was allowed only $16 per day. On November 23, 1976, he reclaimed the difference between the two rates, $9 per day, for the 26 days, a total of $234. This claim has not been paid because DEA determined it was barred by 31 U.S.C. 71a.

Under 31 U.S.C. 71a as amended, effective July 2, 1975, by Public Law 93-604, approved January 2, 1975, 88 Stat. 1965, claims cognizable by the General Accounting Office are forever barred unless they are received in the General Accounting Office within 6 years after the date they first accrue. It is well established that filing such claims with the administrative agency out of whose activities they arose does not satisfy the requirements of this statute. 53 Comp. Gen. 148, 155 (1973); 42 id. 337, 339 (1963); 32 id. 267 (1952). Messrs. Ferguson's and Chown's claims for additional per diem for duty performed in November and December of 1969, were paid by DEA in April and May of 1976, more than 6 years after the date they accrued. Since they had not been filed with this Office within the requisite 6-year period they were barred at that time and hence were erroneously paid by DEA. Therefore, the pending action to recover the $351 and $360 amounts improperly paid to Messrs. Ferguson and Chown is correct. Likewise, the claims of Messrs. Burstein, Shea, and Wilson were not filed with the General Accounting Office within 6 years after the date they first accrued and those claims are also barred and were properly denied by DEA.

In the interest of clarification, it is appropriate to point out that the claims of these five individuals would not be payable even if they were not barred by 31 U.S.C. 71a. A per diem increase authorized by statute is not automatic but requires administrative action before a higher rate is effective and there is no authority for retroactively increasing specific rates authorized by travel orders issued prior to the date of the statute. 55 Comp. Gen. 179, 181 (1975); 49 id. 493, 494 (1970); 35 id. 148 (1955); 28 id. 732 (1949).

In the instant case the travel authorizations prescribed a fixed per diem rate of $16 with no provision for adjustment and no administrative action was taken to authorize any increase when the maximum allowable rate was raised to $25 on November 10, 1969, by Public Law 91-114 and the amendment to the SGTR. Indeed, a contrary intent on the part of DEA is indicated by the initial disallowance of these claims and a statement in a memorandum to one of these employees that the new $25 rate did not apply. Most important, neither the law nor the amendment to the regulations made the new rate mandatory. They merely prescribed a new maximum - not in excess of $25 - and continued the responsibility and discretion of the administrative agencies to authorize such per diem allowances as they deem justified by the circumstances, within this limitation. See Transmittal Memorandum No. 9, supra. Therefore, there is no authority for paying these employees per diem in excess of $16 for the period November 10, 1969, through the end of the temporary duty for training here involved. Consequently their claims would not be payable even if they were not barred by the statute of limitations. Moreover there is no authority to waive the amounts improperly paid to Messrs. Chown and Ferguson since per diem is a travel allowance which is expressly excluded from the coverage of the waiver statute, 5 U.S.C. 5584. Matter of James B. Corey, B-189170, July 5, 1977.

We have been informally advised that the decision upon which DEA relied to pay the claims of Messrs. Chown and Ferguson is Matter of David Martin, B-184789, October 30, 1975, which follows the holding in 55 Comp. Gen. 179, supra (B-184344, August 28, 1975). However, these cases are distinguishable from the instant case. They involved a more recent amendment to 5 U.S.C. 5702(a), effective May 19, 1975, by Public Law 94-22, 89 Stat. 84, which increased the maximum allowable per diem rate to $35, and the implementing amendment to sections 1-7.2 and 1-7.3c of the Federal Travel Regulations, FPMR 101-7, May 1973 (which superseded the SGTR) by FPMR Temporary Regulation A-11, effective May 19, 1975. In these cases per diem in excess of the amount specified in the travel orders (average cost of lodgings plus $10 or $12, not to exceed $25) was allowed because the regulations, as amended, made it mandatory that per diem be fixed at the average cost of lodgings plus $14, not to exceed $33, and, unlike the situation in the instant case, left agencies no discretion in the matter unless an appropriate official determined in writing that the lodgings - plus method was inappropriate.

Also distinguishable from the instant case, but perhaps more to the point, is 49 Comp. Gen. 493, supra, which involved the application of the November 10, 1969, increase in the maximum allowable rate of per diem from $16 to $25 to employees of the Defense Contract Audit Agency. However, per diem for these employees was governed by paragraph C8101-2 of Volume 2 of the Joint Travel Regulations (JTR) which further implement the SGTR as applicable to civilian employees of the Department of Defense (DOD). Their travel orders authorized per diem "in accordance with the JTR" - not at a fixed rate as in the instant case. Consequently, when the JTRs were amended, effective November 10, 1969, to prescribe a mandatory rate of $25, with certain exceptions not here applicable, these employees were allowed that rate on and after that date. The increase did not occur automatically upon the amendment of the law or the SGTR, or by virtue of any retroactive amendment of travel orders. It resulted from the administrative action by DOD changing its internal governing regulations.

In accordance with the foregoing, the claims of Messrs. Burstein, Chown, Ferguson, Shea and Wilson for additional per diem are disallowed and amounts improperly paid to Messrs. Chown and Ferguson that remain outstanding should be collected.

R.F. Kvitka

Deputy Comptroller General
of the United States