

DECISION

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

FILE: B-217852**DATE:** September 30, 1985**MATTER OF:** Mary Lou Young

DIGEST: Employee of Department of Health and Human Services received travel orders which prescribed a per diem rate of \$41 per day, but indicated a "final rate" would be established after performance of a survey, which was required by an agreement established between employee's union and the agency. The survey was not completed until after the travel was performed. Under the circumstances of this case, the general rule prohibiting retroactive increase of benefits is not applicable, since the final per diem rate had not been established at the time of travel.

This action is in response to a request for an advance decision from the Department of Health and Human Services regarding the claim of Mary Lou Young for travel expenses.^{1/} In October 1983, Ms. Young attended a training course away from her permanent duty station. Her travel orders indicate that a per diem rate of \$41 was established in accordance with the Federal Travel Regulations and agency policy. However, the travel order also provided that a final per diem rate would be established after completion of a survey of subsistence costs. Such a survey is required by a memorandum of understanding agreed upon by the agency and the employees' union. The survey was not conducted prior to the performance of the travel in question, but when it was later conducted, it showed that a higher rate of per diem; in fact, actual subsistence not to exceed \$60 per day, was justified. The issue presented is whether, in view of the statement on the travel order, the per diem rate was properly raised to \$50 by an amendment issued after the travel had been performed. We find that the increased per diem may be paid.

^{1/} The request was presented to this Office at the request of Ms. Young, by Robert A. Carlisle, Certifying Officer, Department of Health and Human Services, Region 10, Seattle, Washington.

033321

Ms. Young, an employee of the Social Security Administration, in Idaho, participated in training classes for approximately one month in Portland, Oregon, in October 1983. As indicated, her original travel order fixed per diem at \$41, but also contains the statement, "Final per diem rate will be established after the necessary survey of Portland area subsistence costs is completed."

The survey mentioned on the order refers to the memorandum of understanding between the agency and the American Federation of Government Employees, Social Security Administration, General Committee (the Union), to establish terms and conditions of the Health and Human Services Travel Manual. A copy of the agreement was provided by the agency in its submission. The agreement requires the agency to notify the Union if employees will be in a travel status for training for periods in excess of 30 days. The Union is to appoint a representative who, in conjunction with an agency representative and at the agency's expense, conducts a survey of subsistence costs in the area where the training is to be held. On the basis of this survey a per diem or actual subsistence rate is to be set prior to the performance of the employee's travel.

In the present case, it appears that the agency did notify the Union and indicate its willingness to perform the necessary survey. However, for some reason the survey was not conducted until after the performance of Ms. Young's travel. When the survey was completed in November 1983, the appropriate rate for the Portland area was determined to be \$60 per day actual subsistence expenses. Subsequently, the authorizing travel officer issued an amendment to the original order, increasing Ms. Young's per diem entitlement to the maximum of \$50 per day. The maximum per diem rate was apparently specified because it would not have been possible for the traveler to establish her entitlement to actual subsistence reimbursement after the travel had been performed. The certifying officer, aware of the restrictions against amendment of travel orders, submitted a request for a decision.

The agency points out that the per diem rate was fixed in the travel order in accordance with applicable Federal regulations, agency policy and regulations and, insofar as was possible, the memorandum of understanding with the

Union. Therefore, the agency believes that an amendment to increase that per diem after completion of travel may not be allowed under the longstanding rule that travel orders may not be retroactively modified so as to increase or decrease the rights and entitlements of a traveler unless an error is apparent on the face of the orders or that which was previously intended has been omitted through error or inadvertence.

The authority for payment of per diem to an employee traveling on official business away from his designated post of duty is contained in 5 U.S.C. § 5702 (1982). The agency is responsible for establishing rates and for authorizing per diem justified by the circumstances of the travel. See Federal Travel Regulations, para. 1-7.3 (Supp. 1, September 28, 1981).

It is well established that legal rights and liabilities with regard to travel allowances vest when travel is performed under competent orders. Dr. Sigmund Fritz, 55 Comp. Gen. 1241 (1976). As noted by the agency, the general rule regarding travel orders is that they may not be retroactively modified so as to increase or decrease the rights and entitlements of a traveler unless an error is apparent on the face of the order. H. D. Anderson, 57 Comp. Gen. 367 (1978).

However, the question presented by this case is whether the additional payment may be made since the travel order provided specifically for changing the per diem rate stated after the necessary survey had been made. Because of that provision we do not find that the orders fixed a per diem rate which became vested upon performance of travel. Rather, the orders provided for the fixing of per diem in accordance with a survey that had not been performed at the time the orders were issued. Due to the agreement made by the agency with the Union and the provision in the travel order, the per diem rate was not established prior to travel. Thus, the amendment to the travel order did not increase a vested benefit, but established the final per diem rate which was not fixed when travel was performed.

B-217852

Thus, we find that under these limited circumstances, the final rate of \$50, established pursuant to the agreed upon survey, may be paid to the employee.

for *Milton J. Fowler*
Comptroller General
of the United States