

Matter of: Robert A. O'Connell - Per Diem -
Intergovernmental Personnel Act Assignment

File: B-249923

Date: January 11, 1994

DIGEST

A federal employee was detailed to a 1-year assignment at his request to a state government under an Intergovernmental Personnel Act assignment which made no provision for the agency to pay per diem while the employee was at the assignment location, the employee specifically was advised in advance that the agency would not pay such per diem, and no authorization for such per diem was given by the agency. The employee resided in his personally owned condominium during the assignment. Subsequently, he claimed partial per diem for meals and incidentals which the agency denied. In the circumstances, the agency did not abuse its discretion in not authorizing per diem. The denial of the claim is sustained.

DECISION

This decision is in response to Mr. Robert A. O'Connell's appeal of the settlement action, Z-2867745, June 19, 1992, issued by our Claims Group. In that action, the Claims Group denied Mr. O'Connell's claim for per diem for meals and incidental expenses for the approximately 1-year period he worked in Providence, Rhode Island, during July 1990 to August 1991, on a detail from the U.S. Marshals Service (USMS) to the State of Rhode Island under the Intergovernmental Personnel Act (IPA). As explained below, we sustain the disallowance.

BACKGROUND

Under the provisions of the IPA, 5 U.S.C. §§ 3371-3375, a federal employee, with his consent, may be assigned to a state or local government for work of mutual concern to his agency and the state or local government for a period of up to 2 years with a possible extension of up to an additional 2 years. 5 U.S.C. § 3372(a). A federal employee on such an assignment may be on detail or on leave without pay from his federal position, but in either case he remains an employee

of his agency. 5 U.S.C. § 3373(a). Such an assignment may be made with or without reimbursement by the state or local government for the employee's travel and transportation to or from the place of assignment and for all or part of the employee's pay. 5 U.S.C. § 3373(b). The federal agency's appropriations are available to pay the employee, in accordance with 5 U.S.C. chapter 57, subchapter I, for the expenses of travel, including a per diem allowance, to and from the assignment; a per diem allowance while at the assignment location; and under certain conditions while traveling on official business away from the post of duty during the assignment. 5 U.S.C. § 3375(a). Regulations and guidance implementing these provisions pursuant to section 3376 are issued by the Office of Personnel Management (OPM).

OPM regulations require that before such an assignment is made, the federal agency, the state or local government, and the assigned employee enter into a written agreement which records the obligation and responsibilities of the parties as specified by the IPA and in the Federal Personnel Manual (FPM) Chapter 334. 5 C.F.R. § 334.106(a). FPM chapter 334 provides that agencies are authorized to pay for either relocation expenses to and from the assignment location or a per diem allowance at the assignment location during the period of the assignment, but such travel and relocation expenses are limited to those authorized by the IPA and Federal Travel Regulations. FPM, Chapt. 334, paras. 1-7b and 1-7e, Dec. 1, 1983.

The circumstances leading to Mr. O'Connell's IPA assignment in Rhode Island, as reported to us by the USMS, are that this assignment was suggested by Mr. O'Connell since the position the USMS then had available for him in Washington was unacceptable to him. The USMS reports that he was nearing retirement eligibility and that he indicated he wished to retire in Rhode Island and this assignment would be helpful to him in making post-retirement arrangements. The USMS advises that it considered the assignment of some benefit to the USMS, but that it agreed to the assignment only on the basis that the USMS would bear only the cost of Mr. O'Connell's salary, and any travel and other costs at the assignment location would be the expense of the state or at Mr. O'Connell's personal expense. The USMS reports that this was made absolutely clear to Mr. O'Connell prior to the assignment, and at no time was he told that he would be paid per diem during the assignment. The USMS points out that in recognition of this arrangement, the IPA Assignment Agreement between the State of Rhode Island and the USMS, and signed by Mr. O'Connell, states that the USMS was to pay only his basic salary and that all expenses and travel expenses associated with the assignment would be paid by the

State of Rhode Island.¹ The USMS notes that Mr. O'Connell never sought written approval for per diem during the assignment and such approval, required by agency regulations if payment were to be made, was never provided. Apparently the State of Rhode Island also did not contemplate that Mr. O'Connell would receive per diem for the period of his assignment since it neither paid per diem to him nor reimbursed the USMS for such per diem.

Upon completion of the IPA assignment, Mr. O'Connell returned to USMS headquarters for a few months until his retirement in October 1991. Shortly thereafter, he filed the claim in question with the USMS for \$9,542 in per diem based on the maximum rate prescribed by the FTR for meals and incidental expenses, \$26 per day, for the period of the assignment in Rhode Island. He did not claim lodging allowances, and we understand that is because he resided in his personally owned condominium while in Rhode Island.

The USMS denied the claim, advising Mr. O'Connell, in effect, that per diem had not been approved for the assignment and that if he wished to claim such expenses he could file a claim with the state. Our Claims Group sustained the USMS's denial.

It is Mr. O'Connell's position that since he was an employee of the USMS which detailed him on this IPA assignment to the state, the USMS is responsible for paying him per diem to cover his temporary duty expenses. He asserts that whether the USMS can recover those costs from the state should be a matter between the USMS and the state, and should not be a matter of his concern.

Analysis

Entitlement to per diem while on an IPA assignment is determined under the statutory provisions of 5 U.S.C. Chapter 57, subchapter I, and the implementing provisions of the Federal Travel Regulations (FTR), as in other travel situations. See 53 Comp. Gen. 81 (1973). We have long recognized that although per diem is authorized by statute under prescribed regulations, it is not a statutory right but is within the discretion of the agency to pay only where it is necessary to cover increased expenses incurred arising from the performance of official duty. See 31 Comp. Gen. 264 (1954). In this regard, the FTR provides that it is the agency's responsibility to authorize only those per diem allowances

¹We understand that the USMS paid Mr. O'Connell's travel expenses to and from Rhode Island at the beginning and end of the assignment. The record does not show whether the State reimbursed the USMS for these expenses.

that are justified by the circumstances affecting the travel, and travel authorizations ordinarily are to be issued prior to incurrence of the expense. FTR, 41 C.F.R. §§ 301-7.2(b), and 301-1.101. While we have held that it is unreasonable to deny payment of a per diem allowance where the employee has incurred additional expenses over those he would normally have incurred had he remained at his designated post of duty, we have also denied payment of per diem where the employee incurred no additional living expenses. See Jack C. Smith, et al., 63 Comp. Gen. 594, 598 (1984), and cases cited therein; and 31 Comp. Gen. 264, supra. See also Bornhoff v. U.S., 137 Ct. Cl. 134 (1954).

In Mr. O'Connell's case, during his IPA assignment he resided in his condominium (for which he has not claimed lodging expenses), and in these circumstances it is not apparent what additional expenses for meals and incidentals he would have incurred as a result of the assignment that would be additional to what he would normally incur while living at his official duty station. Also, while he indicates that he preferred not to accept the alternative position the USMS had available for him at his official duty station, acceptance of the IPA assignment was voluntary on his part and, in fact, he apparently suggested it as being helpful to him in preparing for his planned retirement. In addition, although contrary to his wishes, he was advised in advance that the USMS would not pay per diem for the period of the assignment and no travel order or other document was issued authorizing or approving any such per diem. In another case involving similar circumstances, we upheld the denial of an employee's claim for travel expenses, including per diem, incident to a 3-month detail to a position requested by the employee as being in his interest as well as the government's. In that case, also, there was an oral understanding that the government would not pay travel expenses and no travel orders were issued authorizing or approving any reimbursement. Lewis J. Kraft, B-198937, Apr. 15, 1981. Likewise in the circumstances of Mr. O'Connell's case we do not find that the USMS abused their discretion in not authorizing per diem, and we therefore find insufficient basis for us to overrule their determination and allow Mr. O'Connell's claim.

Accordingly, the disallowance of the claim is sustained.

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Acting General Counsel