DECISION

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

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FILE: B-185618

DATE: JUN 1 1976

MATTER OF: H. Jack Bluestein - Per diem while on annual leave

DIGEST:

Claimant, who took annual leave on a workday to observe a Jewish holiday while on temporary duty assignment away from his official duty station, is not entitled to per diem for that day. See FTR 1-7.5(a)(1).

An authorized certifying officer for the United States Department of the Interior has requested an advance decision regarding payment on a reclaim travel voucher representing a claim for per diem in lieu of subsistence for a workday in which annual leave was taken while the employee was on temporary duty assignment away from his official duty station.

According to the submission from the certifying officer, Mr. H. Jack Bluestein was on a temporary duty assignment in connection with which per diem of $50 a day was authorized while he was in Anchorage, Alaska, from September 7, 1975, through September 27, 1975. Prior to returning to his official duty station in Washington, D.C., he was authorized and took annual leave on September 15, 1975, for the purpose of attending synagogue service on the Jewish holiday of Yom Kippur. He claimed $50 per diem in lieu of subsistence for this day, but this amount was administratively disallowed by Interior and payment was made on the remainder.

On October 31, 1975, Mr. Bluestein submitted a reclaim travel voucher to obtain per diem for the day that annual leave was taken. In requesting that his claim be reconsidered, he contends that the applicable regulation, disallowing the payment of per diem, is illegal and discriminates against him in interfering with the free exercise of his religion.

The law regarding payments for per diem when an employee takes leave of absence while he is in travel status away from his official station is well settled and is governed in general by Federal Travel Regulations (FPMR 101-7) para. 1-7.5(a)(1) (May 1973) which states:

"1-7.5. Interruptions of per diem entitlement.

"a. Leave and nonworkdays.

"(1) General. Except as provided in (2) and (3), below, if the time that leave of absence begins or terminates is within the traveler's prescribed hours of duty, per diem in lieu of subsistence expenses shall terminate at the beginning of the next quarter day or shall begin with the quarter day during which the leave of absence terminates. If leave of absence does not begin or terminate within the traveler's prescribed hours of duty, the traveler shall be entitled to per diem in lieu of subsistence expenses until midnight of the last day preceding the leave of absence and from 12:01 a.m. of the day following the leave of absence."

We have consistently applied the above regulation prohibiting the payment of per diem when a leave of absence is taken on a workday while the employee is away from his official duty station on temporary duty assignment. See B-166420, April 28, 1969, and B-168053, November 10, 1969.

In regard to Mr. Bluestein's contention that FTR para. 1-7.5(a)(1) is illegal in its application by discriminating against him in the free exercise of his religion, we can only defer to the dictates of the Supreme Court concerning the legality of such laws and regulations which by their operation indirectly affect the adherents of one or more religions.

In Braunfeld v. Brown, 366 U.S. 599 (1961), the Court upheld Pennsylvania's Sunday closing laws against attack by Jewish businessmen claiming that such laws created an indirect burden on their religious observances. The Court indicated that the freedom to act, even when the action is in accord with one's religious conviction, is not totally free from governmental regulation. When the Government, within its power, regulates conduct by enacting a general law or regulation, the purpose and effect of which is to

regulate a secular activity, then such law or regulation is valid despite the fact that its application would operate to make the practice of a particular religion more expensive to the individual.

In Braunfeld the Supreme Court recognized the breadth of secular activities subject to governmental regulations and the inevitability that certain religious practices will be indirectly affected by such regulation. The following is an excerpt from that decision:

> "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.
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> "Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257 et seq. Consequently,

> it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.
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> "Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. See Cantwell v. Connecticut, supra, at pp. 304-305."

See also Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961).

The purpose of FTR para. 1-7.5(a)(1) can only be viewed as secular. It is part of an orderly and uniform system for determining the per diem entitlement of Federal employees on official travel. It does not prohibit or impede the observance by the employee of his religion or discriminate invidiously between religions. While the regulation's operation incidentally makes

the practice of Mr. Bluestein's chosen religion more expensive, under the applicable line of Supreme Court decisions, it does not appear to unfairly discriminate against members of the Jewish faith in interfering with the free practice of their religion.

Accordingly, the deduction of $50 per diem as determined by the certifying officer is correct, and the reclaim travel voucher may not be certified for payment.

R.F. KELLER

Deputy Comptroller General
of the United States