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DECISION

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

[Claim for Per Diem]

FILE: B-200642 DATE: April 7, 1981

MATTER OF: Civilian Employee of the Department of the Air Force - Per Diem Claim

DIGEST: 1. Since acquittal on criminal charges may merely involve a finding of lack of requisite intent or failure to meet the higher standard of proof beyond reasonable doubt, doctrine of res judicata does not bar the Government from claiming in later civil or administrative proceeding that certain items on employee's voucher were fraudulent.

2. In 57 Comp. Gen. 664 (1978), we held, for purposes of reimbursement where fraud is involved, that each day of subsistence expenses is a separate item of pay and allowances. That rule is applicable to present claim which has not been finally decided on merits and is pending on appeal. Due to discrepancies in record, we remand claim to Air Force for calculation of amount of per diem allowable under that rule.

Does a jury verdict of not guilty on criminal fraud charges against an employee preclude the Government from recovering funds paid to the employee on the basis of an allegedly fraudulent travel voucher? Secondly, does the rule of 57 Comp. Gen. 664 (1978) that, for purposes of reimbursement where fraud is involved, each day of subsistence expenses is a separate item of pay and allowances apply to an appeal of a claim based on a travel voucher submitted before that decision was announced? These are the principal issues involved in this case.

This decision is in response to an appeal by a civilian employee of the Department of the Air Force ("Employee") at McClellan Air Force Base, California

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from our Claims Division's action of November 15, 1979, Z-2815083, which denied his claim for per diem.

From our examination of the present state of the record, the following facts emerge. Since 1969 Employee has been a sheet metal worker. From approximately May 28, 1974, to September 30, 1974, he was on temporary duty (TDY) at Jacksonville, Florida, and from approximately October 1, 1974, to March 10, 1975, he was on TDY at Otis AFB, Massachusetts. He returned to McClellan AFB, and on March 19, 1975, submitted travel voucher No. T-23115, in which he claimed total lodging costs of $3,465 for the entire period of temporary duty. Employee had been advanced $7,350, and the voucher indicated a total amount of expenses of $7,185.75 which included $597.75 for transportation and $6,588 for per diem. The per diem expenses included $3,123 for meals and incidental expenses and $3,465 for lodging. The then maximum per diem rate was $25, consisting of $11.80 for meals and miscellaneous, and $13.20 for lodging. The difference between the advancement and his actual TDY expenses allowed amounted to $164.25 which was apparently paid back to the United States.

At some later date, a suspicion arose that Employee's claim for lodging was false in part. The Air Force Office of Special Investigations (AFOSI) and the FBI concluded that he had defrauded the Government by approximately $1,000. On April 12, 1978, he was indicted by a Federal Grand Jury for filing a fraudulent claim for lodging for the period May 28, 1974, to March 10, 1975, and for making a false statement under oath about his lodging expenses while he was on temporary duty in Florida. After a jury trial in the U.S. District Court for the Eastern District of California in August 1978, he was found not guilty of the charges.

In the meantime, on June 30, 1978, the Air Force Accounting and Finance Officer (AFO) determined the travel claim to be false, and administratively initiated a recoupment action for $6,588, the entire per diem

portion of the voucher. Since that date $25 per pay period has been and is being deducted from Employee's check. He has appealed that determination to the GAO.

Our Claims Division, on November 15, 1979, decided to deny Employee's claim for per diem on the ground that it was of doubtful validity and could not be paid. He filed an appeal of the denial on September 19, 1980.

In its present state, the record in this case presents several legal and factual disputes. Focusing our attention first on the legal issues, we are presented with the argument that Employee's acquittal is res judicata as to any disputed factual matters, and, therefore, that the Government is now estopped from contending in any civil or administrative proceeding that he submitted a false claim for lodging.

It is clear that, as to matters in issue or points controverted upon which a finding or verdict was rendered, the findings in a prior criminal proceeding may estop a party, even the United States, in a subsequent civil action. Kennedy v. Mendoza - Martinez, 372 U.S. 144, 157 (1963). An acquittal on a criminal charge, however, may merely involve a finding that an act was not done with the requisite criminal intent. One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 234-235 (1972). Furthermore, the acquittal on criminal charges may have only represented "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." Id. at 235, quoting Helvering v. Mitchell, 303 U.S. 391, 397 (1938). Thus, as to the issues raised, an acquittal on a criminal indictment does not constitute an adjudication on the lesser standard of evidence applicable in civil proceedings. For the applicable civil standard adopted by the Comptroller General, see 57 Comp. Gen. 664, 668 (1978) which states that fraud must be proved by evidence sufficient to overcome the presumption in favor of honesty and fair dealing.

Since an acquittal may merely involve a finding of lack of requisite intent or a failure to meet the higher standard of proof beyond a reasonable doubt, it follows that the doctrine of res judicata is not applicable in Employee's case, and the Government is not estopped from finding that certain lodging items on his voucher were fraudulent.

The second issue involves what effect, if any, our decision at 57 Comp. Gen. 664 (1978) has on the instant case. We held there that, where an employee submits a voucher for subsistence expenses, each day's subsistence expenses constitute a separate item for this purpose and that fraud for any subsistence item taints the entire per diem or actual expense claim for that day. However, claims for subsistence expenses on other days which are not based on fraud may be paid. In so ruling, we modified B-172915, September 27, 1971, where we had held that a claim for per diem on a voucher was an indivisible item of pay and allowances. In 59 Comp. Gen. 99, B-189072, November 27, 1979, we held the severability rule applicable also to military members and non-Government employees traveling pursuant to invitational travel orders.

The Air Force contends that, while 57 Comp. Gen. 664, decided August 11, 1978, is the current law, it should be given prospective application only. Thus, it would not affect the instant case where the agency seeks to recoup the entire per diem of $6,588 for the full period covered by Employee's travel voucher submitted on March 19, 1975.

While several previous decisions have held that a change in construction of the law need not be given retroactive application, 54 Comp. Gen. 890 (1975) and 56 Comp. Gen. 561 (1977), the question of retroactivity must be analyzed in light of the particular circumstances of each case and the potential impact on Federal agencies and employees. Here, the basic rule involved was established in 1961 in 41 Comp. Gen. 285 (1961), namely that each separate

item of pay and allowances is to be viewed as a separate claim even though several such items are included in a single voucher. The 1978 decision merely modified our 1971 ruling as to what constitutes a separate item of subsistence expenses for this purpose. As such we do not believe it requires "prospective only" treatment. Instead we shall apply the rule followed by the courts where a case has not been finally decided on the merits, and is still on appeal, namely that "a court is to apply the law in effect at the time it renders its decisions, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Cort v. Ash, 422 U.S. 66, 76-77 (1975), quoting Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). The Supreme Court thus reaffirmed the principle first announced by Chief Justice Marshall in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

Moreover, the courts have long recognized that procedural rules apply to pending actions, absent any showing of hardships or injustice in particular cases. United Wall Paper Factories, Inc. v. Hodges, 70 F.2d 243, 244 (2d Cir. 1934). The severability rule announced in 57 Comp. Gen. 664 is in the nature of a procedural rule since it concerns the method of disposing of vouchers involving fraudulent claims.

Hence, the severability principles announced in 57 Comp. Gen. 664 (1978), and now in effect, are applicable to the present case. See Ben L. Zane, B-194159, October 30, 1979, where we applied the rule of 57 Comp. Gen. 664 to a case involving an employee of the Department of Health, Education and Welfare whose travel voucher had been submitted on August 18, 1976.

At this juncture, having ascertained the applicable principles of law, we would usually apply them to the facts of the instant case. We are hindered in this effort by the fact that the record submitted by the Air Force, contains three different estimates of the amount of fraud varying between $823 and $1,000, and merely states conclusions as to the various items allowed or

disallowed without sufficiently explaining the reasons therefor. We also note further unexplained discrepancies, e.g., it is not clear whether the Air Force considered certain rent receipts from June 1974 through August 1974 in the amounts of $346.40 as fraudulent or valid, or whether it considered utilities expenses during Employee's TDY at Jacksonville. We note there is no indication in the record of any fraud in connection with his TDY in Massachusetts from October 1974 to March 1975.

In light of the above state of the record, Employee's per diem claim is remanded to the Air Force for a recalculation of the amount of the suspected fraud and a determination of the number of days for which fraudulent information was submitted. In performing this task it should be borne in mind that the regulations at the time these events occurred did not require lodging receipts. Then, in accordance with this opinion he should be allowed per diem for the days for which no fraud is involved.

Milton J. Socolar

Acting Comptroller General
of the United States