

DECISION



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

12083

FILE: B-206105

DATE: December 8, 1982

MATTER OF: Frederick C. Welch - Per diem
entitlement - Barring Act

DIGEST:

1. Employee of Forest Service claims per diem in connection with transfer to seasonal work-site every 6 months for period from May 7, 1973, through November 19, 1976. Claim was subject of grievance proceeding in agency and was not received in General Accounting Office until January 18, 1982. Portion of claim arising before January 18, 1976, may not be considered since Act of October 9, 1940, as amended, 31 U.S.C. § 71a, bars claims presented to GAO more than 6 years after date claim accrued. Filing with administrative office concerned does not meet requirement of Barring Act.
2. Employee of Forest Service grieved entitlement to per diem in connection with assignment to seasonal worksite every 6 months. We agree with the Grievance Examiner's factual determination that the employee was in a temporary duty status and therefore entitled to per diem as provided for in the Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employees maintained their permanent homes at their official duty station while living in Government quarters at the seasonal worksite.

ISSUE

We have been asked to decide whether the Department of Agriculture may implement a Grievance Examiner's award requiring the retroactive payment of per diem to an employee during a 6 month tour of duty at a seasonal worksite. Pursuant to the following analysis the grievance award may be implemented in a modified amount only with respect to that period of the claim which is not barred by operation of 31 U.S.C. § 71a (1976).

HISTORY OF CASE

Anita R. Smith, an Authorized Certifying Officer with the National Finance Center of the United States Department of Agriculture, has petitioned this Office, under 31 U.S.C. § 82d (1976), for a review of a Grievance Examiner's recommended award--accepted by the final decision of the Acting Director of Personnel--in an agency grievance filed by Mr. Frederick C. Welch. The essential facts will only be summarized here as a composite of materials submitted by the certifying officer, Mr. Welch, and the Acting Director of Personnel's final decision.

Mr. Welch, now a former employee of the Forest Service, Department of Agriculture (agency), filed an informal grievance with the agency on October 12, 1976, claiming per diem and mileage entitlements for the period May 7, 1973, through November 19, 1976. During this period Mr. Welch was an employee of the Idaho Panhandle National Forest, St. Maries, Idaho, Ranger District. Mr. Welch had a permanent residence in St. Maries, Idaho, and from October to May he worked in St. Maries. From May to October of the years in question, Mr. Welch was assigned to the Red Ives Ranger District (RIRD) which was about 90 miles away from St. Maries. The agency authorized official travel for one trip in and out of the RIRD each season. The record shows that for the years 1971 and 1972 the agency processed personnel actions at the beginning and end of each season

changing Mr. Welch's official station from St. Maries to the RIRD and back again. However, for the years 1973 through 1976 the agency required Mr. Welch to move from St. Maries to the RIRD every summer and back to St. Maries in the winter, but did not process any personnel actions as had been done in the previous years. During this time Mr. Welch received living quarters and utilities free from the Government at RIRD.

Mr. Welch's grievance alleged that the move every summer from St. Maries to the RIRD placed a hardship and extra expenses on him and he contended that since all of his personnel documents during the period of his claim showed St. Maries as his official duty station he should have been considered in a travel status while at the RIRD. As a result he grieved an entitlement to per diem while at the RIRD including travel from and to St. Maries during these periods. The Forest Service took the position that Mr. Welch had "dual official stations"; and as a result, he was not entitled to per diem at either St. Maries or RIRD because paragraph 1-7.6a of the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR) precludes reimbursement expenses at an employee's official duty station.

On December 13, 1976, the Forest Supervisor denied Mr. Welch's informal grievance. Mr. Welch then filed a formal grievance with the head of the Forest Service on February 22, 1977. On December 12, 1979, the Grievance Examiner issued his findings and recommended decision on Mr. Welch's grievance, concluding that Mr. Welch was in a temporary duty status while he was at the RIRD and thus, he was entitled to per diem. In this regard the Grievance Examiner found that Mr. Welch was entitled to a per diem rate figured on the lodgings plus \$16, not to exceed \$55 per day; and, since the lodging was furnished at no cost to Mr. Welch, his per diem rate would be \$16 per day less \$4 for each meal furnished at no cost to him. The grievance Examiner's recommended decision was that Mr. Welch file vouchers for those periods he was assigned to RIRD and that the agency process the vouchers.

The agency challenged the recommended decision on the grounds that Mr. Welch was not in a travel status; the RIRD was not considered a temporary duty location for Mr. Welch but rather his permanent duty site for an assigned period of time; and that if the recommended decision was to be followed, the agency would be paying per diem at the employee's official station which would not be proper. In bringing the grievance at the next stage to the Director, Office of Personnel, Department of Agriculture, for a final decision, the agency again emphasized that the RIRD seasonal worksite was not considered a temporary duty location for Mr. Welch. The agency admitted that Mr. Welch was directed to and from the RIRD each year and that they did not process personnel actions at the beginning and end of each season changing Mr. Welch's official station. However, citing our decision in 32 Comp. Gen. 87 (1951), the agency argued that an employee's permanent duty location is a matter of fact and not necessarily one of administrative designation, thus, as a matter of fact, the RIRD was Mr. Welch's official duty station while he was there.

On February 11, 1981, the Acting Director of the Office of Personnel, Department of Agriculture, issued his final decision concurring with the Grievance Examiner's recommendation that Mr. Welch was in temporary duty status while assigned in the RIRD and, therefore, entitled to per diem. In so concluding the Acting Director addressed the agency's argument concerning Mr. Welch's official duty station as follows:

"In the case cited by the Agency the Comptroller General held that an employee in Washington, who maintained a residence in Philadelphia to which he traveled for personal reasons but who performed all his work in Washington, has an official duty station at the latter place and was not entitled to per diem in lieu of subsistence at either

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place. In the case at hand the employee is asked by the Agency to move every summer and fall.

"Other than stating in its rebuttal to the recommended decision that 'Red Ives Ranger Station seasonal worksite was not considered a temporary duty location for Mr. Welch, but rather his permanent duty site for an assigned period each year,' the Agency has submitted no evidence to substantiate this claim. It must be pointed out the Agency has not reconciled this statement with the one made in its Request for Remote Duty Location memorandum quoted above. [That memorandum stated '* * * Living quarters and utilities are furnished in lieu of per diem for those employees whose official duty station is shown as St. Maries, Idaho.'] The Agency has admitted that it did not process AD-350's showing the change in duty station and the AD-350's in the file show that St. Maries was Mr. Welch's official duty station, it follows, therefore, that Mr. Welch's official duty station was St. Maries throughout the year from 1973 onwards."

The Acting Director decided that Mr. Welch was entitled to per diem as stated in the Grievance Examiner's recommended decision.

BARRING ACT

The Act of October 9, 1940, Chapter 788 §§ 1, 2, 54 Stat. 1061, as amended by section 801 of Public Law 93-604, 88 Stat. 1965, approved January 2, 1975, 31 U.S.C. § 71a, provides that every claim or demand

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against the United States cognizable by the General Accounting Office must be received in this Office within 6 years from the date it first accrued or be forever barred.

Under that provision of law, as a condition precedent to a claimant's right to have his claim considered by the General Accounting Office, his claim must have been received in this Office within the 6-year period. Filing a claim with any other Government agency does not satisfy the requirements of the Act. Nancy E. Howell B-203344 August 3, 1981, and Russel T. Burgess B-195564 September 10, 1979. Nor does this Office have any authority to waive any of the provisions of the Act or make any exceptions to the time limitations it imposes. Nancy E. Howell and Russel T. Burgess above.

This is so even though the delay at the agency level was the fault of the agency and not that of the employee. Jerry L. Courson, B-200699 March 2, 1981. After the enactment of Public Law 93-604, which was effective July 2, 1975, reducing the limitation period from 10 years to 6 years, the director of our Claims Division, by letter dated March 14, 1975, instructed the heads of all agencies that claims received by them 4 years after the date of their accrual should be forwarded to our Claims Division. This instruction was later incorporated in an amended section 7.1, title 4, GAO Policy and Procedures Manual for Guidance of Federal Agencies. If, however, this instruction is not complied with, we are without authority to waive or modify the application of 31 U.S.C. § 71a. Jerry L. Courson, above.

Since Mr. Welch's claim was received in this Office on January 18, 1982, that portion of his claim arising before January 18, 1976, is barred by the above-cited Act and may not be considered by this Office.

OPINION

Regarding that portion of Mr. Welch's claim accruing after January 18, 1976, the certifying officer indicates that the Forest Service remains opposed to the final decision of the agency grievance process. Again citing our decision in 32 Comp. Gen. 87 (1952) the agency maintains that Mr. Welch's official duty station is a matter of fact, and not necessarily one of administrative designation. We agree that Mr. Welch's official duty station is a matter of fact but we do not disagree with the judgment made in the agency grievance process that St. Maries was Mr. Welch's official duty station during the period of his claim.

The authority for the payment of a per diem allowance to employees traveling on official business away from their designated post of duty is contained in 5 U.S.C. § 5702 (1976) and the implementing regulations contained in Part 7, Chapter 1, of the FTR. The purpose of per diem is to reimburse an employee for meals and lodging while on temporary duty while he also maintains a residence at his permanent duty station. B-185932 May 27, 1976. Per diem is payable only for periods during which an employee is on official business away from his designated post of duty, and, therefore, an "itinerant" employee must have some place designated as his headquarters or official station. 23 Comp. Gen. 162 (1943).

While the applicable regulation (FTR para. 1-7.1a) states that per diem allowances shall be paid for official travel (except where reimbursement is made for actual subsistence expenses), our decisions have long held that per diem is not a statutory right and that it is within the discretion of the agency to pay per diem only where it is necessary to cover the increased expenses incurred arising from the performance of official duty. 55 Comp. Gen. 1323 (1976); 31 Comp. Gen. 264 (1952).

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Under the provisions of FTR para. 1-7.6a, an employee may not be paid per diem at his permanent duty station nor at his place of abode from which he commutes daily to his official duty station. The determination of what constitutes an employee's permanent duty station or headquarters involves a question of fact and is not limited by administrative determination. 31 Comp. Gen. 289 (1952) and decisions cited therein. An employee's headquarters has been construed to be the place where the employee expects and is expected to spend the greater part of his time. 32 Comp. Gen. 87 (1952) and 31 Id. 289 (1952). Such a determination is made based upon the employee's orders, the nature and duration of his assignment, and the duty performed. B-172207 July 21, 1971; 33 Comp. Gen. 98 (1933).

In Mr. Welch's case, he was moved to a site 90 miles away from his permanent abode in St. Maries to a site in the RIRD. The distance from RIRD to St. Maries, was so far as to preclude commuting. While at the RIRD Mr. Welch and the other permanent employees so assigned resided in seasonal facilities while maintaining their permanent residences in St. Maries. The record also shows that the Government provided housing facilities at RIRD was rudimentary.

Under the circumstances we find that the final grievance decision was correct to conclude that Mr. Welch did not change his official station from St. Maries when he went to RIRD in the summer. Even though Mr. Welch spent 6 months of the year at RIRD, his assignment there was in the nature of a long term temporary assignment away from his official duty headquarters. See generally, 57 Comp. Gen. 147 (1977) allowing per diem for 15 months and 26 months assignments which ran consecutively. It is plain that both the agency and the employees treated the assignment as temporary and treated St. Maries, where the employees' permanent houses were, as the real official duty station. Accordingly, we will not object to the

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establishment of a per diem entitlement for Mr. Welch in connection with his transfer to the RIRD after January 18, 1976.

We are, nevertheless, required to reduce the amount of the daily per diem entitlement in accordance with the agency's controlling regulation. The final decision in Mr. Welch's case allowed a \$16 daily per diem rate predicated on the lodgings plus method set out in an advisory opinion from the agency's fiscal management division. However, paragraph 6543.04a(a) of the Forest Service Manual provides the following per diem rate effective April 15, 1976:

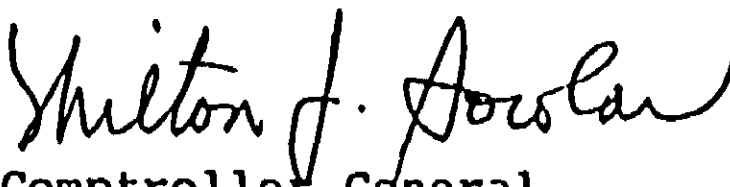
"a. A rate of \$8.00 for trips within the Idaho Panhandle National Forests when in travel status at points where *-Government-owned cooking and sleeping ('batching') facilities are available for use by the employee.*"

Since Mr. Welch was in a travel status while at the RIRD and since he was provided with housing and utilities, his per diem entitlement for the period he was stationed at the RIRD after January 18, 1976, is limited to \$8 in accordance with the agency's regulation.

Finally, in a separate submission to this Office dated February 12, 1982, Mr. Welch claims miscellaneous expenses associated with the documented changes in his official duty station in 1971 and 1972 and interest due on any amounts determined to be allowed in connection with the adjudication of his claim. Mr. Welch's claim for miscellaneous expenses must be denied because this claim was filed here more than 6 years after its accrual. 31 U.S.C. § 71.a (1976). As for his interest claim, it is well settled that interest may be assessed against the Government only under express statutory or contractual authority. Fitzgerald v. Staats, 578 F.2d

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435 (D.C. Cir. 1978). The authority to pay per diem and reimburse travel expenses incurred by an employee while traveling on official business found in Chapter 57 of title 5, United States Code (1976) does not include express statutory authority by which interest may be paid on employee travel claims. This aspect of Mr. Welch's claim must be denied.

for 
Comptroller General
of the United States