

DECISION

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

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29258**FILE:** B-214482**DATE:** September 7, 1984

MATTER OF: Betty D. Gardner - Per Diem During
Period of Long-Term Training - Retroactive
Modification of Orders

DIGEST:

Civilian employee of the Defense Logistics Agency assigned to long-term training at the Armed Forces Staff College in Norfolk, Virginia, was authorized and paid a per diem rate that included a housing allowance for Government family quarters. Agency now seeks to limit the per diem housing allowance to the single occupancy rate thereby placing the employee in debt to the Government. There is no legal justification to revoke and retroactively modify the employee's per diem entitlement, which vested at the time the assignment was performed under competent travel orders, where employee's authorized per diem entitlement at family quarters rate incident to long-term training did not clearly conflict with law or regulation and agency's unwritten, unarticulated policy, which was not ascertainable by employee, is not "apparent error" to justify retroactive modification of travel order.

The Chief of the Accounting and Finance Division of the Defense Logistics Agency (DLA or the agency) has requested a decision on the propriety of per diem payments made to Mrs. Betty D. Gardner, an employee of that agency, for per diem in connection with long-term training. The DLA says that Mrs. Gardner was only entitled to a single Government quarters fee substantially below that which she received.

We find no law or regulation and no longstanding written agency policy which must be uniformly applied to Mrs. Gardner's per diem payments, and we find no apparent error in Mrs. Gardner's travel order which justifies retroactive modification. Thus, we hold that Mrs. Gardner was properly reimbursed for per diem in connection with her long-term training assignment.

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BACKGROUND

Mrs. Betty D. Gardner, an employee of the DLA, attended a long-term training program at the Armed Forces Staff College (AFSC) in Norfolk, Virginia, from August 6, 1979, through January 18, 1980 (165.5 days). Mrs. Gardner was paid a per diem rate that included actual charges billed at a monthly rate for Government family quarters offered by the AFSC and accepted by Mrs. Gardner.

The record shows that in accordance with her memorandum of authorization dated June 29, 1979, and DLA Travel Order No 3418-79, as amended, dated July 11, 1979, Mrs. Gardner was reimbursed at the rate of \$23.50 per day (one-half of the high cost area rate of \$47 prescribed by the Joint Travel Regulations (JTR) Vol. 2, Appendix E (Change No. 166, August 1, 1979), plus the actual charge billed by the AFSC at a monthly rate of \$311 for Government family quarters. Thus, Mrs. Gardner received a daily reimbursement of approximately \$33.73 for the period of her long-term training in Norfolk, Virginia.

The Government quarters which Mrs. Gardner was authorized and on which her per diem entitlement was computed were in a family housing unit. After the training period was completed and Mrs. Gardner's travel entitlements paid, the agency suspected that Mrs. Gardner's housing portion of her per diem entitlement should have been limited to the single Government quarters fee for the Norfolk area which was \$4 per day rather than the approximately \$10.37 daily stipend figured at 1/30th of the \$311 monthly charge for family quarters. As a result, the agency contends that Mrs. Gardner was erroneously overpaid \$1,030.98 for the period of her long-term training.

THE AGENCY'S REVIEW

The agency's position is that, since single quarters were available within the vicinity of the AFSC, Mrs. Gardner's use of family quarters was optional and voluntary and her reimbursement should be limited to a constructive single quarters allowance of \$4 per day. In requesting a decision of this Office the Defense Logistics Agency Administrative Support Center (DASC) provides the following review of their contentions on Mrs. Gardner's case:

"* * * The facts indicate that these family quarters were available and voluntarily accepted by Ms. Gardner in lieu of single quarters. A nonavailability certificate for single quarters was not obtained. Paragraph C4550-5, JTR, Volume II, states that 'the fact that an employee's dependents may accompany him at his own expense on temporary duty will not affect the per diem rate prescribed for the employee.' Admittedly paragraph 2i(3)(c)2 of paragraph C4552, JTR, Volume II, does not prescribe the exact type of quarters required to be furnished a traveler while on TDY. However, it is submitted that without a certificate of nonavailability, the intent of the JTR is to limit the traveler to those expenses authorized for the traveler alone. This interpretation appears to be validated by paragraph C7000, JTR, Volume II, which states: 'There is no entitlement to any additional transportation or per diem for dependents who accompany the employee on temporary duty assignments.' To our knowledge no regulatory basis exists for reimbursing a traveler additional expenses incurred for dependents accompanying the traveler on TDY."

The agency goes on to review the "fact sheet" used as a handout for students proceeding on long-term training and provided to Mrs. Gardner prior to her assignment. The agency emphasizes that it has been "the longstanding policy of the DLA Administrative Support Center that reimbursement for TDY on long-term training will be limited to that for a single occupancy," and that since members of the agency's travel offices are aware of this policy, "we can only assume that Ms. Gardner misinterpreted the information given at the briefing mentioned in her letter. At that time the briefer was completely unaware that family type housing was being offered as an option at AFSC to students desiring to bring their dependents and therefore was no doubt addressing reimbursement in light of single occupancy."

As a result, the agency would retroactively rescind the allegedly erroneous travel authorization of June 29, 1979, and retroactively modify the allegedly incorrect travel order of July 11, 1979, in order to recoup \$1,030.98 from Mrs. Gardner.

MRS. GARDNER'S EXPERIENCE

Mrs. Gardner's position is that she was properly reimbursed under the circumstances of her long-term training assignment and therefore the agency should not be allowed during post-travel audit to modify her travel order based on unwritten and unarticulated agency policies.

The record shows that in June 1979 Mrs. Gardner received two letters from the AFSC relative to the training program for which she had been selected. The first letter, from the Dean of Student Affairs, stated that: "The AFSC tour is designed to be a total experience in working and living in a joint service environment. I strongly recommend that you plan for your family to accompany you and occupy family quarters." The second letter, from the Adjutant General, stated: "Again, you are encouraged to have your family accompany you and take advantage of the ready availability of housing." The information packet accompanying this second letter listed 5 categories under the heading of "student housing" of which Mrs. Gardner selected the least expensive at \$311 per month.

Mrs. Gardner further states that prior to reserving quarters at the AFSC she discussed the matter with her agency's Finance Office and was informed that she was entitled to reimbursement for the cost of housing at \$311 per month. At that time the subject of single versus family housing did not arise. On June 29, 1979, the Acting Chief of her agency's Resources Management Office issued a memorandum authorizing per diem for Mrs. Gardner based on 50 percent of the Norfolk high rate plus \$311 per month for quarters. Attached to this memorandum was a copy of an agency "fact sheet" covering authorized expenses for long-term training. The fact sheet, which the agency has noted above purported to embody the "longstanding policy" limiting per diem entitlements for long-term training to single occupancy housing, contains no reference to single versus family quarters. This same fact sheet, contrary to the requirements of 2 JTR para. C4552-2i(3)(c) (Change No. 166, August 1, 1979) authorized per diem at 55 percent of the high rate for the area without the required qualifying references pertaining to the availability of Government housing found in the regulation. However, the unreliability of the fact sheet was alluded to in the agency's personal memorandum of authorization to Mrs. Gardner dated June 29, 1979, which stated that the fact sheet should be considered guidance only as applicable and that reimbursement should be processed on an individual basis because of the many variables involved. On July 11, 1979, the agency issued

Travel Order No. 3418-79, personally and individually to Mrs. Gardner, which reflected the agency's authorization for per diem at 50 percent of the high rate for Norfolk plus \$311 per month for housing.

Thus, as Mrs. Gardner contends, she was never presented the option of voluntarily selecting between single and family quarters and never intended to take on extra living expenses by consciously choosing family quarters "in lieu of" single quarters as the agency contends. Moreover, if there was a "longstanding agency policy" on single occupancy in the circumstances of her long-term training, it was neither reduced to writing nor communicated orally to her nor was such a policy in any way made available for her comprehension. In these circumstances, Mrs. Gardner argues, her individual travel authorization and travel order should control her per diem entitlements and the agency should not be allowed to retroactively modify those orders for the purpose of placing her in debt.

RETROACTIVE MODIFICATION OF TRAVEL ORDERS
PROVIDING PER DIEM FOR LONG-TERM TRAINING

The authority for paying expenses of training is found in 5 U.S.C. § 4109, (1976), which provides in pertinent part that the head of an agency may authorize payment of necessary costs of travel and per diem to persons undergoing training. While travel on Government business is to be performed at Government expense, there are situations in which an employee may be authorized to travel at his or her own expense when the travel involves work or training of mutual interest to the employee and the Government. See for example, Donald F. X. McIntyre, B-192636, December 15, 1978.

We have held that under this discretionary authority in 5 U.S.C. § 4109 the head of an agency may set specific per diem rates for employee training programs and determine what part, if any, of the training expenses will be paid. In fact, we have recognized that agencies may require employees to pay some of the indirect costs of training. See Ms. Lynn C. Willis, et al., 59 Comp. Gen. 619 (1980), and cases cited therein. There is no legal requirement to pay the same per diem rates for different training programs, and in our decision Dr. Elynore Cucinell, B-187453, September 30, 1977, we held that under 5 U.S.C. § 4109 executive agencies have the authority to invoke a policy of not paying per diem during a period of training.

As a result, when an agency prescribes particular per diem rates incident to long-term training assignments, the determinations are to be based on the circumstances attending the particular assignments or prevailing at the particular installations. However, as with all per diem entitlements, the rate is authorized in advance and shown on the travel order and the entitlement of the employee is known and fixed accordingly. We have stated that written travel order procedures assist in fund control and meeting requirements of recording obligations at the time they are incurred. Moreover, they also serve to provide a notice and record of the employee's instructions and entitlements. See for example Robert Gray, B-203820, October 19, 1981, and decisions cited therein. It follows that retroactive modification of a travel order must be legally justified.

Decisions of this Office on the matter of retroactive modification of travel orders formulate a general rule holding that a travel order may not be retroactively modified in such a manner as to increase or decrease the rights of the employee that vest when and as the travel is performed. And orders may not be revoked or modified retroactively so as to increase or decrease the rights which have become fixed under the travel entitlement statutes and regulations. An exception may be made only when an error is apparent on the face of the orders and all facts and circumstances clearly demonstrate that some particular provision previously determined and definitely intended has been omitted through error or inadvertence in preparing the orders. See 23 Comp. Gen. 713 (1944), 47 Comp. Gen. 127 (1967); and Dr. Sigmund Fritz, 55 Comp. Gen. 1241 (1976).

We have also held that the general rule against retroactive modification of orders applies only to competent orders. Thus, where a travel order is clearly in conflict with a law or regulation it may be modified to make it consistent with the applicable law or regulation. Ms. Lynn C. Willis, et al., 59 Comp. Gen. at 621. Thus, clear administrative error in the preparation of a travel order which sets a per diem rate clearly contrary to a rate established by an agency regulation need not be enforced and that travel order may be retroactively modified. See Albert Armendariz, B-212401, April 3, 1984, and Constantine Bolaris, B-206546, April 3, 1984.

ANALYSIS AND CONCLUSION

At the time of Mrs. Gardner's training assignment, 2 JTR para. C4552-2i(3)(c), provided that per diem for long-term programs located within high-cost areas in the

continental United States designated in Appendix E (including Norfolk, Virginia) would be 55 percent of the applicable maximum daily amount prescribed in Appendix E for the high-cost area concerned, rounded to the next higher dollar. However, if Government quarters were available, per diem payable would be 50 percent of the applicable maximum amount prescribed in Appendix E for the high-cost area concerned, increased by the amount paid for Government quarters.

The record shows that in accordance with her memorandum of authorization and travel order, Mrs. Gardner was authorized per diem during her attendance at the Armed Forces Staff College in Norfolk at the rate of 50 percent of the \$41 high-cost area per diem rate prescribed in 2 JTR, Appendix E, for Norfolk, plus one-thirtieth of the \$311 monthly charge for the Government quarters she occupied.^{1/}

While the method of computing Mrs. Gardner's per diem entitlement was clearly correct, the agency now questions the monthly charge for Government quarters contending that while Mrs. Gardner was authorized and reimbursed for family-type quarters she should have been limited to a single occupancy rate. However, as we have demonstrated above, the remaining question upon which Mrs. Gardner's entitlement turns is not simply which housing allowance rate the agency could have or should have originally authorized; but whether, at this point in the proceedings, the agency has a legal basis for retroactively modifying Mrs. Gardner's travel order to decrease the housing portion of her per diem thereby placing her in debt to the Government in the amount of \$1,030.98. To justify this revocation and retroactive modification of Mrs. Gardner's authorization and travel order the agency must clearly demonstrate that her right to the \$311 per month housing allowance under the travel order which otherwise vested when the assignment was performed,

^{1/} This per diem entitlement was increased in accordance with Change No. 167, September 1, 1979, to 2 JTR, which raised the Norfolk rate to \$47 effective July 1, 1979. We also note that Mrs. Gardner was reimbursed on the basis of this increased authorization with a slight variation caused by prorating the cost of quarters by the actual number of days in each month.

and was paid on that basis, was clearly in conflict with a law or regulation or that an error is apparent on the face of the orders. We find that the agency has failed to adequately substantiate either of these contentions.

In determining that Mrs. Gardner may have been erroneously reimbursed for per diem based on the cost of family housing, the agency cites 2 JTR para. C4550-5 which states that the fact that an employee's dependents may accompany him at his own expense on temporary duty will not affect the per diem prescribed for the employee. The agency also points out that DLA Regulation No. 5000.1 (May 31, 1979, superseded May 12, 1982) provides that employees will not be directed to perform official travel at rates of allowances and amounts of reimbursement inconsistent with the provisions of the Joint Travel Regulations. And as the agency points out, 2 JTR para. C7000 states that there is no entitlement to any additional transportation or per diem for dependents who accompany the employee on temporary duty assignments. In addition, the agency states that it has been the longstanding policy of the DASC to limit reimbursement for lodging under long-term training to the cost of single occupancy, and that Mrs. Gardner, in believing otherwise, must have misinterpreted information provided by agency personnel.

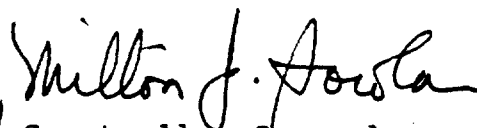
However, the question in Mrs. Gardner's case does not involve additional per diem for her dependents; it is whether or not she was erroneously reimbursed for occupying a family housing unit. In the face of this contention the agency admits that its DLA Regulation 5000.1 did not (and does not) address the use of family quarters or single quarters incident to long-term training. Nor has the DASC's longstanding policy ever been formalized into written operating procedures. In the absence of a statute or a definitive regulation limiting Mrs. Gardner's housing portion of her per diem to a single occupancy rate, we do not find that as a matter of law Mrs. Gardner's travel order clearly conflicted with a law or regulation so as to support retroactive modification of that order.

Moreover, Mrs. Gardner had no reason to question her entitlement to reimbursement for the housing unit she occupied as recommended by the sponsoring activity and authorized by her agency. Mrs. Gardner states that at no time prior to completion of her training assignment and final payment on all of her vouchers was any agency policy on single versus family housing units mentioned to her by

agency personnel. All correspondence from the Armed Forces Staff College urged family participation in the AFSC training experience and the utilization of readily available onsite family housing units. Mrs. Gardner carefully verified her entitlement to reimbursement on the basis of the cost of quarters from the list furnished by AFSC and her selection of the recommended least expensive family housing unit. Her agency provided both a personal authorization memorandum and a personal travel order specifically addressing her individual training assignment and providing per diem including the specific family quarters housing allowance, and all of her travel vouchers were certified and paid on that basis. The "fact sheet", a standard form copy provided by the agency and attached to Mrs. Gardner's original authorization, did not alert the traveler to any limitations on housing allowances, but did emphasize that reimbursement should be processed on an individual basis because of the many variables involved. This is, of course, consistent with the discretion provided under 5 U.S.C. § 4109 to individualize per diem entitlements in connection with long-term training assignments.

Given the totality of the circumstances in Mrs. Gardner's case, we fail to find that the agency's use of family quarters for the housing portion of the per diem entitlement constituted a clear error on the face of Mrs. Gardner's travel order. Further, we do not believe that all the facts and circumstances clearly demonstrate that a limitation as to the single occupancy rate for Mrs. Gardner's per diem had been previously determined, definitely intended, and merely omitted through inadvertent oversight in the preparation of her travel order.

Accordingly, there is no legal justification on the record before us to revoke and retroactively modify Mrs. Gardner's travel order to decrease the per diem amounts she has been properly paid incident to her long-term training assignment.

for 
Comptroller General
of the United States