Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

August 14, 2001

GSBCA 15583-RELO

In the Matter of FLOYD S. WIGINTON

Floyd S. Wiginton, Houston, TX, Claimant.

Deidre W. Gray, Chief, PCS & Appeals Branch, Defense Finance and Accounting Service, Columbus Center, Columbus, OH, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

Defense Contract Management Agency (DCMA) employee Floyd S. Wiginton contests his agency's denial of claimed temporary quarters subsistence expenses (TQSE) allegedly incurred after Mr. Wiginton was transferred from Rota, Spain, to Pasadena, Texas. We conclude that the agency does not have good cause for denying the claim and direct it to pay the employee virtually all of the contested amount.

Background

In accordance with orders issued to him, Mr. Wiginton arrived in Texas on June 30, 2000, to begin working at his new position. The orders authorized payment of TQSE for sixty days for the employee, his wife, and their ten-year-old son.

On August 3, Mr. Wiginton submitted to the Defense Finance and Accounting Service (DFAS) (acting as agent for DCMA) his first request for reimbursement of expenses of lodging and meals. The request covered a thirty-day period and was in the total amount of $5,730. It showed daily costs of $78.33 for lodging, between $22 and $38 for breakfast, between $22 and $47 for lunch, and between $42 and $68 for dinner. The request was limited to $191 per day, though each day's total was greater than this amount.

The DFAS representative who reviewed this request told the employee that the meal costs appeared "awfully high" and asked for information about where the family dined. Mr. Wiginton then resubmitted his request, with meal costs limited to $65 per day -- $15 for each breakfast, $15 for each lunch, and $35 for each dinner. He submitted an identical request for the second thirty-day period of TQSE as well. Each request states, "The cost of meals is based on best recollection of the actual cost for breakfast, lunch, and dinners we had in

Houston, a high cost area. [Pasadena, Texas, is a suburb of Houston.] Actual cost is equal to or greater than declared cost."

Upon receiving Mr. Wiginton's resubmittal, DFAS, thinking that the request might be fraudulent, asked DCMA to conduct a criminal investigation into the matter. DCMA agreed to do so. Its investigator interviewed Mr. Wiginton and four other individuals.

Mr. Wiginton gave the investigator a sworn statement which includes the following information. The meal expense entries on his first request for reimbursement were based on his memory of the cost of each meal and his understanding of his maximum entitlement per day for meal costs. After discussions with the DFAS representative, he reduced the amounts claimed to figures which were less than his actual costs. The amounts claimed are about $4 per meal per person, plus tax and tip, for breakfast and lunch, and $11 to $12 per meal per person [actually, less than $10], plus tax and tip, for dinner. The family lived in an apartment for the first sixty days in Texas. Although the apartment had cooking facilities, the family did not use them; instead, it took all meals in restaurants. On work days, Mr. Wiginton ate breakfast and lunch separate from his wife and son; he did not ask how much they spent for their meals, but he was aware of the approximate amounts involved. The Wigintons owned a house in Houston while they were overseas. The lease for the house expired on July 10, 2000. The house needed to be remodeled, and from July 10 until August 29, when their household goods were delivered to the residence, Mrs. Wiginton worked on the remodeling project and Mr. Wiginton joined her when he could. Because Mrs. Wiginton was busy with the house, she did not have time to prepare meals.

In asking the Board to review DFAS's determination, Mr. Wiginton has provided additional information regarding his claim. He has stated that the family did not eat in fast-food restaurants because his son has special dietary needs which are not met by those facilities. He has also explained that he "wasn't going to ask [his] wife to cook when eating out was covered in [his] orders."

The other individuals interviewed by the DCMA investigator provided the following information. Mr. Wiginton rented the apartment in which the family lived from June 30 to August 30 on a furnished basis, and they paid the amount claimed by the employee. Mr. Wiginton's son did indeed have special needs. The employee had been assigned overseas on at least one other occasion.

The investigator concluded that Mr. Wiginton had sought as reimbursement for meal costs amounts which were "predicated upon his maximum entitlements for meals, and were not the actual costs of meals that he and his family incurred." DFAS determined that "the amounts claimed for meals are not actual itemized expenses incurred, therefore they are considered falsely submitted and are denied in their entirety based on the 'Tainted Day Rule'. The tainted day rule states that a fraudulent claim for <u>any per diem item</u> (lodging, meals, laundry or dry cleaning) taints the entire per diem claim for that day as fraudulent."

Discussion

Congress has provided that under regulations prescribed by the Administrator of General Services, "an agency may pay to or on behalf of an employee who transfers in the

interest of the Government actual subsistence expenses of the employee and the employee's immediate family for a period of up to 60 days while the employee or family is occupying temporary quarters when the new official station is located within the United States." 5 U.S.C. § 5724a(c)(1)(A) (Supp. V 1999). The Administrator has promulgated part 302-5 of title 41, Code of Federal Regulations -- a portion of the Federal Travel Regulation (FTR) -- in implementation of this statute. The regulation labels the benefits in question "temporary quarters subsistence expenses," or "TQSE." 41 CFR 302-5.2 (2000).

How to apply the pertinent portion of the FTR in Mr. Wiginton's situation is a difficult problem because neither side appears to us to be entirely in the right.

Some of the employee's assertions appear to merit serious scrutiny. Does a family which stays in an apartment with cooking facilities really eat three meals a day, for sixty consecutive days -- 180 meals in a row -- in restaurants? In particular, does a couple which is actively engaged in home remodeling take time out of their busy days to eat lunch in restaurants? How much did the family really spend for their meals -- were the alleged actual expenses listed on the first request for reimbursement genuine, or were they invented to create a claim for the maximum amount the employee thought obtainable? And how much did the employee's wife and son truly spend for their meals when the employee was at work? Was the ten-year-old at the construction site with his mother all day, or did he eat lunch at a different place? Additionally, as a matter of equity, should a transferred employee and his family who have access to a kitchen while in temporary quarters be permitted to receive reimbursement for meals consumed in restaurants as a matter of choice?

On the other hand, does the agency have justification for throwing around highly charged words like "criminal," "false," and "fraudulent"? What proof do DCMA and DFAS have that these adjectives apply here? Why should the expenses claimed for lodging be disallowed when DCMA's own investigator found that those expenses were actually incurred? And might the applicable agency regulations -- the Joint Travel Regulations (JTR), which supplement the FTR for application to Defense Department civilian employees -- have had some role in engendering the problematic nature of the claim by requiring that receipts for meal costs be provided only "for any single expense of $75 or more"? See JTR C13220-A.2.b.

In the final analysis, we essentially hold for the employee in this case. By not requiring receipts for all but very expensive meals, the JTR place the agency in a position of accepting employee assertions as to meal costs unless it can demonstrate that those assertions are not true. Cf. Okyon Kim Ybarra, GSBCA 15407-RELO, 01-1 BCA ¶ 31,334 (as to claim for temporary quarters subsistence allowance). In apparent recognition of this predicament, DFAS had DCMA send an investigator to gather facts relevant to Mr. Wiginton's claim. The investigator failed to ask basic questions about the matter, however; all he learned was that the employee was telling the truth about his lodging expenses and his son's concerns. Thus, although we may have doubts about this claim, there is nothing in the record on which to conclude that Mr. Wiginton's statements about the money he and his family spent for meals while living in temporary quarters are inaccurate. We find absolutely no basis, given the evidence before us, on which to conclude that the employee's statements are false, fraudulent, deserving of criminal inquiry, or even simply wrong.

We pause for a moment to address four specific concerns raised by DFAS.

(1) Although Mr. Wiginton may have completed his first request for reimbursement with an eye toward the maximum possible recovery, there is no evidence that the claim now before us -- for $65 per day for meals for the three family members -- is anything other than what the employee says it is: a request for payment of less than was actually spent for the meals. Although the statute speaks of "actual subsistence expenses," it does not preclude payment for less than actual expenses where that is all an employee seeks.

(2) The fact that Mr. Wiginton submitted his first request for reimbursement on August 3, 2000, and showed expenses as having been incurred from "7-30" through "8-29," does not make the claim fraudulent. The employee's explanation that he merely erred in writing "7" for June, and following through with "8" for July, is credible, particularly in light of the mistakes in the remainder of his filings as to numbers and spelling.

(3) The fact that the family could have moved into its house earlier than it did does not invalidate the claim for TQSE beyond the date on which the house became vacant. Although tenants left the house on July 10, and the family did not move in until August 30, the house could not have been fully habitable in the interim, for it was undergoing renovation which included the flooring. Because the house lacked appropriate surfaces on which to place furniture, it was reasonable for the Wigintons not to have their household goods delivered until August 29 and not to move in themselves until August 30. Cf. Shane C. Jones, GSBCA 15462-RELO, 01-1 BCA ¶ 31,405 (citing Thomas R. Montgomery, GSBCA 14888-RELO, 99-2 BCA ¶ 30,427; Gordon D. Giffin, GSBCA 14425-RELO, 98-2 BCA ¶ 30,200); Gerald Taylor, GSBCA 15251-RELO, 00-2 BCA ¶ 31,016 (same) (former residence not considered permanent quarters after household goods, including cooking implements, have been taken by movers).

(4) The "tainted day rule" is less expansive than the agency believes. We recently discussed this rule in detail in Kenneth R. Gould, GSBCA 15527-RELO (Aug. 6, 2001). We explained there that under the rule, which was first articulated by the General Accounting Office, "a fraudulent claim for reimbursement for any part of a single day's subsistence expenses is said to taint with fraud the entire day's subsistence expenses." Gould, slip op. at 6. We also explained, however, that this rule applies only where "there is reasonable suspicion of fraud supported by evidence 'sufficient to overcome the usual presumption of honesty and fair dealing on the part of the claimant.'" Id., slip op. at 7 (quoting Department of the Air Force, 57 Comp. Gen. 664, 668 (1978)). The rule does not apply in cases where the claimant is merely unable to provide supporting documentation for portions of his TQSE claim. In those cases, we have allowed reimbursement for parts of the claim for which supporting documentation does exist. Id. (citing Michael L. Morgan, GSBCA 13646-RELO, 97-2 BCA ¶ 29,018; Luther R. Dixon, GSBCA 13694-RELO, 97-1 BCA ¶ 28,947). Because DFAS has not presented any evidence of fraud in Mr. Wiginton's claim, the "tainted day rule" is inapplicable here.

Although Mr. Wiginton's claim survives, we do make a reduction to it. Under the FTR, the maximum daily amount which may be paid for TQSE is a specified percentage of the "applicable per diem rate" for each family member. That percentage is one hundred percent for the employee, seventy-five percent for the spouse, and fifty percent for a child

under age twelve during the first thirty days in temporary quarters, and seventy-five percent for the employee, fifty percent for the spouse, and forty percent for a child under age twelve during any additional days in temporary quarters. 41 CFR 302-5.100. The "applicable per diem" rate for temporary quarters located in the continental United States (CONUS) is the standard CONUS rate. Id. 302-5.102. That rate was $55 for lodging and $30 for meals during the months of July and August 2000, the period of time relevant to this case. Multiplying the percentages noted above by $30 per day results in a maximum daily amount for meals for the Wiginton family of $67.50 during each of the first thirty days in temporary quarters and $49.50 during each of the additional thirty days. The claimed amount of $65 is within the permissible limit for each of the first thirty days, but $15.50 above that limit for each of the second thirty days.

Mr. Wiginton is entitled to reimbursement of all that he claims for lodging costs, $4,699.80, because the agency agrees that that amount is documented and the cost is within the maximum allowable amount for this family of three for each and every one of the sixty days during which they lived in temporary quarters. The employee is entitled to reimbursement of his claimed meal costs during the first thirty days in temporary quarters, $1,950; that cost ($65 per day) is also within the maximum allowable amount ($67.50 per day). The employee is entitled to reimbursement of $1,485 for meal costs during the thirty additional days his family spent in temporary quarters; the claimed $65 per day is reduced to the maximum allowable amount of $49.50 for each of these thirty days.

We settle this claim by determining that the Defense Department must pay to Mr. Wiginton, as TQSE incurred during his relocation to Texas in 2000, the sum of $8,134.80. The agency gave the employee an advance payment of $3,443 on July 15, 2000. It now owes him $4,691.80 -- the difference between $8,134.80 and the amount of that advance payment.

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STEPHEN M. DANIELS
Board Judge