



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 3, 2017

CBCA 5468-TRAV

In the Matter of APRIL L. SHEPHERD and RANDALL T. SOUHRADA

April L. Shepherd and Randall T. Souhrada, Wasilla, AK, Claimants.

Capt. Caleb J. Bowers, Assistant Counsel for Legislation, Fiscal and General Law, Office of the Chief Counsel, Headquarters, United States Army Corps of Engineers, Washington, DC, appearing for the Department of the Army.

SULLIVAN, Board Judge.

The U.S. Army Corps of Engineers (USACE) has presented the claims of two civilian employees, April L. Shepherd and Randall T. Souhrada, regarding the per diem amounts that they are entitled to be reimbursed for several trips to New Delhi, India. Pursuant to the applicable sections of the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR), Ms. Shepherd and Mr. Souhrada should be paid their daily actual lodging costs and the full per diem allowance for meals and incidental expenses (M&IE). The Board remands the matter to the agency so that it may determine those amounts.

Background

Ms. Shepherd and Mr. Souhrada are part of a team of USACE employees assigned to supervise the construction of a water development project in New Delhi, India. The project began in 2012 and is currently scheduled to finish in 2018. Ms. Shepherd and Mr. Souhrada are married to each other. The agency has submitted the travel authorizations and vouchers for travel undertaken by Ms. Shepherd and Mr. Souhrada since 2015.

At all times relevant to this matter, the per diem rate for New Delhi, India set by the State Department was \$400 (\$291 maximum lodging rate and \$109 M&IE rate). In each of the travel authorizations provided with the claim, the agency authorized the payment of a flat rate per diem of 75 percent of the daily locality rate, because the trips were greater than thirty days but less than 180 days in duration.

According to the response filed by Mr. Souhrada, the USACE team has been housed at several different types of facilities, but, in this inquiry, the Board only focuses upon two lodgings (1) the Imperial Hotel in New Delhi, where the agency contracted for five rooms beginning in 2015, and (2) the apartment Ms. Shepherd and Mr. Souhrada leased for their most recent trip (June-September 2016).

Ms. Shepherd and Mr. Souhrada stayed in the same room at the Imperial Hotel. The rate for this room was \$143 per day (\$110 basic room rate plus \$33 double occupancy charge). On their travel voucher, Ms. Shepherd and Mr. Souhrada took turns listing the basic room rate or the double occupancy rate as their lodging cost on their respective vouchers. The agency explains that they took turns paying for the full cost of the room on their respective credit cards.¹

For their most recent trip in June-September 2016, Ms. Shepherd and Mr. Souhrada each entered into a separate lease for the rental of an apartment. Pursuant to the terms of the leases, Ms. Shepherd agreed to pay \$6187 and Mr. Souhrada agreed to pay \$6188 for the lease term June 4 through September 9, 2016, a period of 97 days. In addition, they each agreed to pay a security deposit from which the electricity charges for the duration of the lease would be paid. The record is silent as to what these electricity charges were.

On the vouchers submitted for reimbursement, both those subject to repayment demands and those submitted for the recent trip, it appears that Ms. Shepherd and Mr. Souhrada both sought reimbursement of the flat rate per diem amount of \$300 per day, to cover both lodging and M&IE expenses. As noted above, the agency has issued five demands for repayment of various amounts, arising from audits of vouchers Ms. Shepherd and Mr. Souhrada submitted between May 8 and August 21, 2015. The demands for repayment total more than \$23,000.

¹ After the audits noted that “no lodging expense [was] incurred” by one of them because of this practice, Ms. Shepherd and Mr. Souhrada apparently exchanged checks for these periods so that they shared the expense for each period. As explained below, who actually paid for the room does not matter in the analysis.

Initially, when USACE filed the claim, it sought an advance decision pursuant to 31 U.S.C. § 3529 and Rule 502 (48 CFR 6105.502 (2015)), regarding its authority to pay and seek repayment of amounts sought on travel vouchers submitted by USACE civilian employees. Not sure that the Board had authority to settle all of the issues presented, the Board asked USACE to clarify which of the vouchers that were open and awaiting payment. The Board also explained that USACE could, on behalf of Ms. Shepherd and Ms. Souhrada, seek review of the agency's demands for repayment of amounts previously paid on travel vouchers.

In response to the Board's inquiry, USACE submitted letters from both Ms. Shepherd and Mr. Souhrada requesting that USACE submit on their behalf the matters to the Board for decision. USACE provided the travel vouchers submitted by Ms. Shepherd and Mr. Souhrada for their most recent trip to India. USACE described these vouchers as open and unpaid.² USACE also provided the demands for repayment described above as well as the calculation of other overpayments for which the agency has not yet demanded repayment.

Discussion

The Board's Authority To Settle The Claims

The Board is authorized to settle claims for federal employee travel and relocation expenses under two separate statutes. First, an agency may seek an advance decision from the Board concerning an employee claim for expenses upon which the agency has not yet acted. Pursuant to statute,

(a) A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General on a question involving—

(1) a payment the disbursing official or head of the agency will make;
or

(2) a voucher presented to a certifying official for certification.

31 U.S.C. § 3529 (2012); *Mark J. Lumer*, CBCA 1079-TRAV, 08-1 BCA ¶ 33,819, at 167,398. The Board has been delegated the authority pursuant to this statute to render advance decisions on travel and relocation claims. *Bianca Moebius-Clune*, CBCA

² Mr. Souhrada states that, on November 15, 2016, the agency made a payment on the outstanding vouchers, although the payment was not for the full amount sought.

5352-TRAV, 16-1 BCA ¶ 36,506, at 177,863. Second, an employee or agency on the employee's behalf may ask the Board to settle a claim which the agency has denied regarding travel and relocation expenses. 31 U.S.C. § 3702(a)(3).

Regulatory Requirements for Reimbursement of Travel Expenses

The agency is authorized by statute to pay an employee's expenses incurred while on official travel:

(1) Under regulations prescribed [by the Administrator of General Services], an employee, when traveling on official business away from the employee's designated post of duty, or away from the employee's home or regular place of business . . . is entitled to any one of the following:

(A) a per diem allowance at a rate not to exceed that established by the Administrator of General Services for travel within the continental United States, and by the President or his designee for travel outside the continental United States;

(B) reimbursement for the actual and necessary expenses of official travel not to exceed an amount established by the Administrator for travel within the continental United States or an amount established by the President or his designee for travel outside the continental United States; or

(C) a combination of payments described in subparagraphs (A) and (B) of this paragraph.

(2) Any per diem allowance or maximum amount of reimbursement shall be established, to the extent feasible, by locality.

5 U.S.C. § 5702(a).

The FTR contains the regulations promulgated by the Administrator pursuant to this statutory directive. As a "legislative rule," these regulations are entitled to special weight. *Jimmy D. Graves*, CBCA 963-TRAV, 08-1 BCA ¶ 33,805, at 167,343; *Renea A. Webb*, GSBGA 15220-TRAV, 00-1 BCA ¶ 30,889, at 152,458. The JTR are the regulations implementing the FTR for the agencies of the Department of Defense. *Jimmy D. Graves*, 08-1 BCA at 167,343. Ms. Shepherd and Mr. Souhrada, as civilian employees of the Department of Defense, are subject to the requirements of both the FTR and the JTR. *Id.*

To the extent that the requirements set forth in these regulations conflict, the requirements of the FTR will prevail, unless the conflicting JTR provision is implementing a specific statutory directive. *Id.* “Any agency rule which is inconsistent with an FTR provision is consequently trumped by the FTR and must give way.” *Kevin D. Reynolds*, CBCA 2201-RELO, 11-1 BCA ¶ 34,756, at 171,061. While the FTR and JTR provisions in place at the time the costs were incurred control the determination of the matter, *Mark J. Lumer*, CBCA 2169-TRAV, 11-2 BCA ¶ 34,780, at 171,165, the Board discerns no change in the relevant regulatory provisions between 2015 and 2016, the period of time during which the costs were incurred.

Pursuant to the FTR, employees may be reimbursed per diem expenses in one of three ways: “lodgings-plus per diem method; reduced per diem method; or actual expenses method.” 41 CFR 301-11.5 (FTR 301-11.5). Pursuant to the “lodging-plus per diem” method, an employee may receive the actual cost of the lodging expenses incurred up to a prescribed maximum plus the specified per diem amount for M&IE for that location. *Id.* 301-11.100. The “lodging-plus per diem” method was adopted to address the problem of travelers receiving more or less than the actual cost of their lodging when a flat rate per diem was authorized. *Russell E. Yates*, GSBCA 15109-TRAV, 00-1 BCA ¶ 30,705, at 151,692 (1999); see *Jim Sasser, United States Senate*, B-198536 (Jan. 19, 1981).

An agency may prescribe a reduced per diem rate lower than the prescribed maximum when the agency “can determine in advance that lodging and/or meal costs will be lower than the per diem rate.” FTR 301-11.200. The lowest authorized per diem rate must be stated in the travel authorization in advance of the travel. *Id.*; *Michael J. Romansky*, CBCA 2594-TRAV, 12-1 BCA ¶ 35,016, at 172,060; *Patrick S. Twohy*, GSBCA 15491-TRAV, 01-1 BCA ¶ 31,408, at 155,136.

An agency may use the actual expense reimbursement method when circumstances warrant its use. FTR 301.11-300. Such circumstances include prearranged hotel accommodations, escalating costs due to emergencies or special events, mission requirements, or any other agency-approved reason. *Id.* If actual expense reimbursement is authorized, the actual expenses may be reimbursed up to 300 percent of the applicable maximum per diem rate, *id.* 301-11.303, but, if the actual expenses incurred are less than the applicable per diem rate or the authorized rate, reimbursement is limited to the expenses incurred. *Id.* 301-11.304.

The JTR contains similar provisions regarding per diem reimbursement. Pursuant to the “lodging plus computation,” an employee may receive “per diem for each travel day [that] is the actual amount the traveler pays for lodging NTE [not to exceed] the locality

lodging ceiling, plus MI&E; the total of which may not exceed the applicable maximum per diem rate for the TDY location.” JTR 4130-B(1)(b).

The JTR directs that “[p]er diem for all official TDY travel must be computed under the Lodging Plus method” unless there is an applicable exception. *Id.* 4130-B(2). One of the authorized exceptions is a reduced per diem rate authorized pursuant to JTR 4095. *Id.* The reduced rate per diem may be prescribed “when a per diem rate is more than what is needed for a particular duty assignment because of known lodging and/or meal cost reductions due to prearrangement, special discounts or other reasons.” *Id.* 4095-A(1). Finally, the JTR advises that “[t]he amount allowed for lodging is the expense actually incurred or the maximum TDY [temporary duty] locality lodging ceiling, whichever is less.” JTR 4130-A(2) (emphasis in original).

Regulations for Reimbursing Long-Term Travel Expenses

Both the FTR and JTR contain specific provisions for reimbursement for long-term travel. The FTR provisions focus upon the lodging costs:

How is my daily lodging rate computed when I rent lodging on a long-term basis?

When you obtain lodging on a long-term basis (e.g. weekly or monthly), your daily lodging rate is computed by dividing the total lodging cost by the number of days of occupancy for which you are entitled to per diem, provided the cost does not exceed the daily rate of conventional lodging. Otherwise the daily lodging cost is computed by dividing the total lodging cost by the number of days in the rental period. Reimbursement, including an appropriate amount for M&IE, may not exceed the maximum daily per diem rate for the TDY location.

FTR 301-11.14. The purpose of this calculation is to determine whether the total lodging cost is within the authorized per diem limits. *See Catherine Grace Bowles*, CBCA 4035-TRAV, 15-1 BCA ¶ 35,912, at 175,539.

The JTR also contains a provision regarding travel expenses which simply reduces the per diem amounts for travel longer than 30 days in duration:

1. A reduced flat-rate per diem applies when a traveler is assigned long-term TDY (more than 30 days at one location) except as indicated in par. 4250-B.

a. Long-term TDY for a duration of 31-180 days at a single location is authorized at a flat rate of 75% of the locality rate (rounded up to the next highest dollar), payable for each full day of TDY at that location.

JTR 4250-A(2)(a). This provision for a flat-rate per diem is not among the listed exceptions for the “lodging plus” computation method. *See id.* 4130-B(2). This provision further provides that:

5. Lodging receipts are not required, but proof that lodging costs were incurred shall be required. The fixed rate per diem may not be reduced further even if the actual lodging costs incurred are less than the lodging portion of the reduced per diem.

Id. 4250-B(5).³ This provision was promulgated on October 1, 2014, and became effective for any travel beginning after November 1, 2014. Memorandum from Per Diem, Travel and Transportation Allowance Committee, UTD/CTD for MAP 118-13/CAP 118-13 - Flat Rate Per Diem for Long Term TDY, October 1, 2014. There is no indication that this provision was promulgated pursuant to statutory directive. *Id.*⁴

The Board discerns two problems with this provision mandating a flat-rate per diem for all travel that is greater than 30 days in duration. One, its mandate for an across-the-board reduction in the per diem rate is overly broad and does not comply with the FTR requirement that per diem amounts may only be reduced with a determination that the expenses for a particular trip may be met at lower rates. FTR 300-11.200. While it preserves the determination of the locality rate that is applicable, the provision does not allow for a determination by the agency based upon the facts of the particular employee’s travel. *See Michael J. Romansky*, 12-1 BCA at 172,060; *Patrick S. Twohy*, 01-1 BCA at 155,136.

³ Through subsequent revisions of this section, subparagraph five became subparagraph six and then subparagraph seven.

⁴ While the Board has settled claims since this provision was promulgated in which agencies have authorized a flat-rate per diem pursuant to JTR 4250, none of those cases have required us to decide the issues presented here. *Katrina A. Semick*, CBCA 5202-TRAV, 16-1 BCA ¶ 36,347; *Richard E. Smith*, CBCA 4737-TRAV, 15-1 BCA ¶ 36,180; *Daniel L. Kieffer*, CBCA 4705-TRAV, 15-1 BCA ¶ 36,050.

Two, subparagraph five of JTR 4250-B violates the requirement found in both the JTR and the FTR that lodging expenses be reimbursed on an actual expense basis. FTR 301-11.5; JTR 4130-A(2). Rather than reimbursing employees for their actual expenses, employees are permitted to keep any amounts between their actual expenses and the flat-rate per diem amount. In operation, this provision allows the possibility for employees to receive a windfall, over and above their actual expenses, a problem that led to the institution of the actual expense reimbursement requirement. *Russell E. Yates*, 00-1 BCA at 151,692. Because this provision is in conflict with the FTR, it cannot stand. *Steven P. Lyons*, CBCA 4375-RELO, 15-1 BCA ¶ 36,072, at 176,147.

Without the flat-rate per diem provision in operation, the provisions of the FTR and JTR quoted above control the determination of the amounts to be reimbursed. Because the agency did not make a determination that a reduced per diem was appropriate, Ms. Shepherd and Mr. Souhrada are entitled to be reimbursed pursuant to the lodging plus method, which would be their actual lodging expenses plus the full per diem amount for M&IE. FTR 301-11.5; JTR 4130-B(1)(b).

Both Employees Incurred Lodging Costs During the Stay at the Hotel

We turn next to the issue that prompted the agency's demands for repayment. The agency sought refund of all lodging reimbursements paid to either Ms. Shepherd or Mr. Souhrada during their trips for the days when the agency believed that one of them had not incurred lodging expenses.

The JTR and FTR both contain direction regarding the reimbursement of expenses when two Government employees share a room:

How does sharing a room with another person affect my per diem reimbursement?

Your reimbursement is limited to one-half of the double occupancy rate if the person sharing the room is another Government employee on official travel. If the person sharing the room is not a Government employee on official travel, your reimbursement is limited to the single occupancy rate.

FTR 301-11.13.

2. Official Travelers Share a Room

a. Each official traveler is responsible for their portion of the room rate.

Example: Two official travelers share a room – each is responsible for 50% of the room cost[.]”

JTR 4130-F(2)(a).

The FTR also directs that, when staying with relatives, an employee may only be reimbursed any additional costs incurred by the host as the result of the employee’s presence:

Lodging with friend(s) or relative(s) (with or without charge). You may be reimbursed for additional costs your host incurs in accommodating you only if you are able to substantiate the costs and your agency determines them to be reasonable. You will not be reimbursed the cost of comparable conventional lodging in the area or a flat “token” amount.

FTR 301-11.12(a)(3); JTR 4130-G(2)(a)(same prohibition when staying at a friend or relative’s residence).

The provisions regarding reimbursement when staying with relatives do not apply to this situation because Ms. Shepherd and Mr. Souhrada are both Government employees, traveling on official business. Instead, they shared a hotel room, and each is entitled to be reimbursed one half of the total room charge incurred as long as that room charge does not exceed twice the per diem rate.

The maximum lodging cost that Ms. Shepherd and Mr. Souhrada could have incurred together was \$582 (\$291 x 2). The cost of that hotel room was \$143 per day (\$110 single occupancy rate + \$33 double occupancy charge). They are each entitled to be reimbursed one half of this total charge (\$71.50) for each night that they stayed in the hotel room.

Both Employees Should Be Reimbursed Their Actual Lease Expenses

Finally, we determine the amount that Ms. Shepherd and Mr. Souhrada are owed for the apartment that they leased during their most recent trip. Both the FTR and JTR provide that employees may be reimbursed for the cost of leasing an apartment in connection with authorized travel:

What expenses may be considered part of the daily lodging cost when I rent on a long-term basis?

When you rent a room, apartment, house, or other lodging on a long-term basis (e.g. weekly, monthly), the following expenses may be considered part of the lodging cost:

- (a) The rental cost for a furnished dwelling . . .
- (b) Cost of connecting/disconnecting and using utilities;

FTR 301-11.15; JTR 4130-H (provisions for multiple lessees). In addition, as detailed above, the FTR provides a method by which to calculate whether the total lease cost is within the authorized per diem.

Ms. Shepherd and Mr. Souhrada both incurred lease expenses that were documented. The term of the leases was 97 days at a total cost of \$12,375 (\$6187 + \$6188). This amount is well within the \$56,454 (97 x daily rate of \$291/day x 2) authorized. For the reimbursement of the most recent trip, Ms. Shepherd and Mr. Souhrada are each entitled to receive their lease expense of \$6187 and \$6188, respectively, plus any electricity charges that were deducted from the security deposit.

Decision

Ms. Shepherd and Mr. Souhrada are entitled to be reimbursed their actual lodging costs plus the per diem rate for MI&E of \$109. The Board remands the matter back to the agency for a determination of the amount Ms. Shepherd and Mr. Souhrada should have received and the amount that should be repaid in excess of that amount.

MARIAN E. SULLIVAN
Board Judge