



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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September 28, 2016

CBCA 5383-TRAV

In the Matter of JONATHAN TOY

Jonathan Toy, Phoenix, AZ, Claimant.

Dana Moore, Office of Inspector General, Department of Veterans Affairs, Washington, DC, appearing for Department of Veterans Affairs.

**CHADWICK**, Board Judge.

Jonathan Toy works for the Department of Veterans Affairs. In 2015, he traveled four times to perform temporary duty (TDY) in Atlanta, Georgia. Mr. Toy booked all four trips before starting the first one. He made his hotel arrangements outside the Concur.gov travel portal and, as a result, booked lodging in a city (Norcross, Georgia) that neither he nor his supervisor realized was slightly outside the Atlanta TDY area and had lower per diem rates. Although the agency paid less overall for Mr. Toy to lodge in Norcross than it would have paid for him to lodge at government rates in Atlanta, the agency later determined that it overpaid him for both lodging expenses and meals and incidental expenses (M&IE), exceeding the maximum per diem rates for Norcross. Mr. Toy seeks review of the agency's demand that he repay \$1558. We deny his claim.

The relevant provisions of the Federal Travel Regulation (FTR) are, to be sure, inartfully drafted, and must be read carefully and together. They provide:

**§301-11.7 What determines my maximum per diem reimbursement rate?**

Your TDY location determines your maximum per diem reimbursement rate. If you arrive at your lodging facility after 12 midnight, you claim lodging

cost for the preceding calendar day. If no lodging is required, the applicable M&IE reimbursement rate is the rate for the TDY location. (See §301-11.102)

**§301-11.8 What is the maximum per diem rate I will receive if lodging is not available at my TDY location?**

If lodging is not available at your TDY location, your agency may authorize or approve the maximum per diem rate for the location where lodging is obtained.

41 CFR 301-11.7, -11.8 (2014).

Mr. Toy focuses on the seemingly categorical statement in FTR 301-11.7 (which his agency echoed in guidance to him) that a traveler's TDY location determines the traveler's per diem rate. In context, however, this sentence cannot mean what it says, since FTR 301-11.8 plainly describes a situation (when lodging is unavailable at the TDY location) in which the maximum per diem rate is determined by the lodging location.

Oddly enough, as originally published in the Federal Register, the first sentence of FTR 301-11.7 said the opposite of what it says today: "Where you obtain lodging determines your maximum per diem reimbursement rate." 63 Fed. Reg. 15954, 15962 (1998). That sentence was not categorically true, either. The third sentence of the answer in FTR 301-11.7, after all, said (and still says) that when there is no lodging expense, the per diem rate depends solely on the TDY location. Shortly after finalizing the FTR in 1998, the General Services Administration (GSA) issued an unexplained "correction" to the first sentence of FTR 301-11.7, changing the words "Where you obtain lodging" to "Your TDY location," as it now reads. 63 Fed. Reg. 35537, 35537 (1998). Because this reversal was made as an editorial "correction," rather than as a substantive change to the FTR—and because it simply traded one overstatement for another—we learn nothing from the FTR's drafting history except that the first sentence of FTR 301-11.7 does not literally mean what it says. Rather, the TDY location determines the per diem rate *unless* FTR 301-11.8 applies.

The Board once cited FTR 301-11.7 for the general proposition that "per diem reimbursement rates will be determined by the TDY location." *Ken S. Stoner*, CBCA 945-TRAV, 08-1 BCA ¶ 33,818, at 167,397. While this statement is generally true, it does not reflect the qualification set forth in FTR 301-11.8. In any event, the issue presented in *Stoner* was that the claimant's travel orders misstated the TDY location, not that the lodging location differed from the actual TDY location.

Mr. Toy's claim implicates FTR 301-11.8. He argues that "reputable" hotels suitable for his assignment "were not available in the immediate [TDY] area," and we would probably assume that anyway, in the absence of evidence that he had another reason to book lodging in Norcross. Because "lodging [wa]s not available at [the] TDY location, [the] agency [could] authorize or approve [only] the maximum per diem rate for [Norcross,] where lodging [wa]s obtained." FTR 301-11.8. Travel orders that erroneously incorporated a higher maximum reimbursement level provide no basis for relief. *E.g., Todd E. Johanesen*, CBCA 3124-TRAV, 14-1 BCA ¶ 35,539, at 174,163.

Mr. Toy argues, with some justification, that he received misleading and inconsistent guidance from his agency—including in official policy statements—about which per diem rates would apply. Such guidance is irrelevant here, however, as only the FTR has the force of law. *See, e.g., Kevin D. Reynolds*, CBCA 2201-RELO, 11-1 BCA ¶ 34,756, at 171,061. While lacking legal force, the guidance provided on GSA's per diem rate website, which Mr. Toy cites, is consistent with the FTR. The website correctly says that "reimbursement is based on the location of the work activities . . . unless lodging is not available at the work activity, then the agency may authorize the rate where lodging is obtained."

Mr. Toy also argues that because the agency centrally paid his government credit card issuer for his lodging charges and did not directly reimburse him, he is unfairly "being billed out of pocket . . . for lodging pertaining to official duty travel." This argument is unavailing because central credit card billing is simply one method of reimbursing employees' incurred travel expenses, and excessive reimbursements are unauthorized whether they are direct or indirect. *See Larry E. Hamilton*, CBCA 468-TRAV, 07-2 BCA ¶ 33,606.

Mr. Toy further argues that the agency could have retroactively approved reimbursement of his actual travel expenses under FTR 301-11.302. This is true, but because after-the-fact approval is authorized but not required by the FTR, it is at the agency's discretion, and we have no basis to order it. *See Stoner*, 08-1 BCA at 167,397.

In his final submission to the Board, Mr. Toy "request[s] a waiver" of the repayment demand because the agency recently clarified its travel policies in a manner he suggests should avoid situations like this in the future. We lack authority to act on a waiver request. *See 5 U.S.C. § 5584(a) (2012); Brian R. Wybrecht*, CBCA 5475-TRAV (Sept. 21, 2016).

Decision

The claim is denied. The request for a waiver is dismissed for lack of authority.

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KYLE CHADWICK  
Board Judge