

KEYWORDS: military member travel claim; per diem

DIGEST: 1. The Secretary Concerned may authorize a contingency operation flat rate per diem allowance for a member assigned TDY (Temporary Duty) to a contingency operation for more than 180 consecutive days at one location. See 1 JFTR (Joint Federal Travel Regulations) U4105-I4. When a flat rate per diem rate is set (currently at 55% unless otherwise designated), lodging receipts are not required. 2. The Army's Lodging Success Program does not meet the JFTR definition of Government quarters.

CASENO: 2009-CL-080602.2

DATE: 7/07/2010

DATE: July 7, 2010

In Re:)
 [REDACTED]) Claims Case No. 2009-CL-080602.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

1. The Secretary Concerned may authorize a contingency operation flat rate per diem allowance for a member assigned TDY (Temporary Duty) to a contingency operation for more than 180 consecutive days at one location. See 1 JFTR (Joint Federal Travel Regulations) U4105-I4. When a flat rate per diem rate is set (currently at 55% unless otherwise designated), lodging receipts are not required.

2. The Army's Lodging Success Program does not meet the JFTR definition of Government quarters.

DECISION

A member of the United States Army Reserve requests reconsideration of the September 16, 2009, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims Case No. 09080602. In that decision, DOHA disallowed the member's claim for temporary duty (TDY) lodging reimbursement in the amount of \$16,897.65.

Background

The record shows that a member of the United States Army Reserve (USAR) was ordered to active duty at the Pentagon starting April 28, 2008, and ending April 27, 2009. The purpose of these orders was contingency operational support for Operation Enduring Freedom.¹ The member performed the duty, but questions the validity of Army restrictions on payment for TDY as explained below. The member claims 147 days of lodging from December 1, 2008, through April 27, 2009, at a rate of \$114.95 per day, or 55% of the \$209.00 per day maximum rate allowed for the locality, without a miscellaneous claim for lodging tax, for a total of \$16,897.65.

The member was initially denied the lodging costs through IMCOM (U.S. Army Installation Management Command). By email dated June 25, 2009, he was told that he was not entitled to lodging per diem because contract quarters were available and they were not utilized by the member. Additionally, the member was informed he needed to support his claim with a statement of non-availability (SNA) to reside off post in non-contracted quarters, and a lease for the quarters in which he was residing.

The member appealed this decision to the Defense Finance and Accounting Service (DFAS), in correspondence dated June 29, 2009. The member alleged that the All Army Activities (ALARACT) Message, dated March 4, 2008 [hereinafter Army Message], violated the Joint Federal Travel Regulations (JFTR). Specifically, paragraph 10.C. of the Army Message states, "When a soldier is authorized to draw per diem beyond 180 days in a TCS[Temporary Change of Station]/TDY status, the order issuing authority will include the following statements in the additional instructions of the order: 'No later than 48 hours of receiving these orders, the soldier must check with the supporting installation housing office before securing temporary lodging at the duty location. If lodging is not available or the soldier is not assigned to an installation, the soldier must, no later than 48 hours after receiving these orders, use Army Lodging Success to obtain housing or a statement of non-availability (SNA).'" The member asserts this is contrary to 1 JFTR U1045-A which concerns quarters availability. 1 JFTR U1045-

¹The member's orders authorized 55% per diem of the locality rate during the active duty period (i.e., 55% of the maximum for lodging plus MI&E). The orders stated that if lodging was not available or if the member was not assigned to an installation, the member should call Lodging Success to obtain housing or a statement of non-availability (SNA) to reside on the economy.

A states:

A member ordered to a U.S. Installation (as opposed to a geographic location like a town or a city) is required to check Government quarters availability (e.g., through their CTOs) at the U.S. Installation to which they are assigned TDY. The AO may direct adequate (based on DOD and Service Standards) available Government quarters use for a uniformed member on a U.S. Installation only if the uniformed member is TDY to that U.S. installation. Availability/non-availability must be documented as indicated in par. U1045-C. A member should use adequate available Government quarters on the U.S. Installation at which assigned TDY; ***however, when adequate Government quarters are available on the U.S. Installation to which a member is assigned TDY and the member uses other lodgings as a personal choice, lodging reimbursement is limited to the Government quarters cost on the U.S. Installation to which assigned TDY (44 Comp. Gen. 626 (1965)). Per diem cannot, however, be limited based on the presence of 'nearby' Government quarters (i.e., not on the U.S. Installation to which the member is assigned TDY but on another 'nearby' U.S. Installation or other uniformed facility). The documentation of non-availability indicated in par. U1045-C is required only for Government lodging 'AT' the U.S. Installation at which the member is assigned TDY.*** (Change 256, 4/1/08) (emphasis in original).

The member makes the additional argument that the JFTR defines "U.S. Installation" [Appendix A1, Part 1: Definitions] as "A base, post, yard, camp, or station: 1. Under the local command of a uniformed service, 2. With permanent or semi-permanent-type troop shelters and a Gov't mess, and 3. Where there are U.S. Gov't operations. NOTE: *This term includes only that area actually occupied by those operations (plus the minimum surrounding area necessary for close-in security) and excludes contracted hotels not contained on and operated by the installation.*" (Change 264, 12/1/08) (emphasis in original). The member contends that the Pentagon does not meet the requirements to be considered a U.S. installation, and therefore, the requirement to check for availability of government quarters does not apply. Further, he notes that contract lodging such as Army Lodging Success would not meet the definition, and the note to the definition specifically excludes arrangements such as the Army Lodging Success Program. He believes the government is therefore legally bound to pay his claim for lodging expenses.

The member alleges a second violation of the JFTR. He argues that 1 JFTR U1045-A authorizes reimbursement for quarters of a member's own choice even when government quarters are available. As noted above, the provisions allows for "when adequate Government quarters are available . . . and the member uses other lodgings as a personal choice, lodging reimbursement is limited to the Government quarters cost on the U.S. Installation to which assigned TDY." The member argues that even if the contract lodging did qualify as Government quarters, which he contends it does not, the government is still legally bound to reimburse him to the limit of the Government quarters.

Finally, the member argues that the demand for a copy of his lease agreement constitutes

a third violation of the JFTR, because when the JFTR specifies that when a reduced rate of per diem is declared, reimbursement is a flat rate and receipts are not required to substantiate such claims. The member notes that the Army Message, paragraph 10.C. declares a flat per diem rate by stating, "when issued a SNA to reside on the economy when contract lodging is not available, the soldier is authorized 55% of the local per diem rate." Then the Army Message declares in paragraph 12.B. that, "soldiers issued an SNA and drawing 55% per diem are still required to provide lodging receipts." The member points out that with respect to reduced per diem rates, 1 JFTR, U4105-14 states that a lodging receipt is not required. The member recognizes one may be necessary under Service regulations to support miscellaneous lodging tax reimbursement, but the member contends that he is not claiming lodging tax reimbursement and so the government is legally bound to pay his claim of 55% of the reduced per diem rate without receipts.²

DFAS promptly denied the member's claim and provided him their administrative determination by email on July 6, 2009. Their answer to the alleged first violation, was that 1 JFTR U4143 provides that when a contracting officer contracts for rooms and/or meals for a member traveling on TDY, the total daily amount paid by the Government for the member's lodging and M&IE may not exceed the applicable per diem authorized.

DFAS further explained that the Lodging Success Program is the Army's contracting avenue for contract lodging procurement. Quarters provided by the Lodging Success Program to Operation Enduring Freedom members are at no cost to the member. They are contracted off the installation. They meet one of the definitions of government quarters in the JFTR, "2. Lodgings or other QTRS obtained by GOV'T contract." While the normal function of the Lodging Success Program on an ordinary TDY is to refer Army travelers to a more economical lodging facility, the function of the program for mobilized/deployed members is to actually contract lodging for Army members. Therefore, no lodging costs are reimbursed without a statement of non-availability (SNA).

DFAS's answer to the second violation was that Lodging Success contracted quarters are provided at no cost to the member. Therefore, the reimbursement for other lodgings used is limited to what the member would have been paid had he stayed in the contracted quarters. If there would have been "no" reimbursement in the contracted quarters, there is no reimbursement authorized.

²The member makes a few additional points in support of his claim. The JFTR is paramount to the Army Message. The JFTR prohibits administrative regulations that prescribe different allowances. The JFTR intends that travel reimbursement allowances be consistent across all services. In regard to that point he notes that Department of Defense Directive 5154.29 requires that the Per Diem, Travel and Transportation Allowance Committee review all DoD written material that implements JFTR provisions. His final point is the JFTR has the force and effect of law.

DFAS's answer to the third violation was that DFAS-IN Regulation 37-1, Ch. 10, subparagraph A-6 states that a finance office may request any additional information/documentation required to validate a payment. This is a disbursing officer's right to ensure a valid payment. The request for receipts is, therefore, proper. Agencies may require additional information, receipts, etc. that the JFTR does not require. An agency may not prescribe regulations conflicting with the JFTR, but may make them more restrictive. DFAS found there was no legal basis for the lodging reimbursement and denied the claim.

The member disagreed with the DFAS analysis in correspondence dated July 27, 2009. He noted that regardless of the assertion that contract quarters provided by the Lodging Success Program are included in the definition of Government quarters, DFAS failed to address his argument that they must still be located on a U.S. Installation for the quarters to be "available." He notes that DFAS failed to address his argument that the Pentagon does not meet the JFTR definition of a U.S. Installation. He points to the note in the definition which states, "this term . . . excludes contracted hotels not contained on and operated by the U.S. Installation."

The member asserts that DFAS's answer to the second violation presumes the meaning of Government quarters cost in the JFTR (1 JFTR U1045) to be "what the member would have paid had they stayed in contracted quarters." The member argues this interpretation is unsupported and without legal justification. Additionally, the member argues there is always some cost associated with obtaining lodging. The meaning of Government quarters cost would more likely be either the government's cost or the member's cost, but not "no" cost.

As to the third violation, the member argues that to say an agency may not prescribe regulations conflicting with the JFTR, but may make them more restrictive contradicts itself and makes no sense. Refusing payment for a claim by demanding documentation that is specifically waived by the JFTR, is to prescribe allowances different from those in the JFTR. The member argues that the government's statement that it is a disbursing officer's right to ensure a valid payment cannot pertain to flat amount reimbursements. The member asserts the government's insistence on collecting receipts in the case of flat amount reimbursements is improper and illegal. On August 31, 2009, DFAS forwarded the member's claim to DOHA with a recommendation that it be denied.

On September 16, 2009, DOHA disallowed the member's claim. Regarding the member's position that lodging receipts were not necessary, the adjudicator pointed to 1 JFTR U2510-A, which states, "Receipts are required for: 1. Lodging expenses regardless of amount, and 2. Expenditures over \$75 or more." The adjudicator concluded that a receipt would be required in either case for a claim of \$16,897.65. As to the member's argument that the flat rate provision defeats the need for receipts, the adjudicator pointed to the provision in the Army Message in paragraph 12.B. that stated, "Soldiers issued an SNA and drawing 55% percent per diem are still required to provide lodging receipts." The adjudicator also pointed to the Department of the Army Personnel Policy Guidance for Overseas Contingency Operations, July 1, 2009, subparagraph 11-8b: "It is the responsibility of the Soldier to retain copies of all documents and receipts for later submission and audit." The adjudicator explained the

established rule that under Federal law good acquittance must be obtained when payments are made to individuals. The more detail provided, the better support for the claim. See DOHA Claims Case No. 98030603 (March 13, 1998). The adjudicator pointed out that the record shows no documentation which contains the name, location, type, rates, or dates of occupancy of the lodgings for which the member claimed reimbursement. Without such basic documentation, the Federal Government cannot obtain the good acquittance necessary to pay the reimbursement for the lodging at issue. The adjudicator cited 1 JFTR U2010-A1, or the prudent traveler rule. There is no SNA in the record that would reflect the member attempted to obtain no-cost Government quarters, which a prudent traveler would certainly do. The adjudicator cited 1 JFTR U4100 which explains the purpose of the per diem travel allowance, "A per diem allowance is designed to offset the cost of lodging, meals, and incidental expenses incurred by a member while performing travel, and/or TDY away from the member's PDS [permanent duty station]." Therefore, when Government quarters are free, there is no cost to offset, as the purpose of per diem is to offset the member's cost of travel, not the Government's. For all the above reasons, the claim was denied. On October 1, 2009, the member requested reconsideration.

Discussion

Department of Defense Instruction 1340.21, *Procedures for Settling Personnel and General Claims and Processing Advance Decision Requests*, ¶ E7.9 states "except as provided in section E7.16, the DOHA must base its decision on the written record, including the recommendation and administrative report and any rebuttal by the claimant." When this request for reconsideration was initially reviewed at DOHA, the Board noted the member's point in his June 29, 2009, appeal that DoDD 5154.29 requires that the PDTATAC [hereinafter Per Diem Committee] review all DoD written material that implements JFTR provisions. The Board could find no evidence of such a review and contacted the Per Diem Committee for their comments regarding this claim. The Board notified the member of its actions.³

On November 12, 2009, DOHA received a memorandum, SUBJECT: PDTATAC Remarks to DOHA Claim No. 09080602 [hereinafter Remarks]. The Per Diem Committee indicates in their Remarks that they did, in fact, review the Army Message. Unfortunately, the review was requested and completed after the Army Message had already been released by the Army. Per Diem Committee staff did not find the Army Message to be in compliance with the JFTR (Vol. 1), and returned the Army Message to the Army for corrective action on April 1, 2008, through Per Diem Committee Memo RR080320. To date no action has been taken.

As to the alleged first violation, the Per Diem Committee agrees that Lodging Success

³The purpose of the Per Diem Committee is to ensure that uniform travel and transportation regulations are issued pursuant to Title 37, United States Code, other applicable laws, and decisions of the Comptroller General of the United States, for members of the seven Uniformed Services.

Program properties are not Government quarters. As they stated in their Remarks, "If GOV'T QTRS (to include contract quarters) are not on the U.S. installation to which the member is ordered for TDY, their use cannot be directed IAW [1 JFTR U1045]. . . [Lodging Success Program] properties are not [Government quarters], this is a long-decided matter as the [Lodging Success Program] properties have been represented to the Per Diem Committee as being not under contract, but under agreement." The Per Diem Committee staff notes that in their opinion "a 'tie' between [Lodging Success Program] lodgings and contract quarters apparently was established within Army. A member could be directed to use the [Lodging Success Program] but failure to obey the order to use a [Lodging Success Program] property is not a TDY reimbursement matter. There should have been no limitation placed on the lodging reimbursement other than the locality per diem lodging ceiling if the member failed to use the [Lodging Success Program] property/ properties."

As to the issue of the alleged second violation, the Per Diem Committee staff agrees "that opting out of [Lodging Success Program] lodgings is not opting out of GOV'T QTRS. Not using off-base 'contract quarters' that are in fact government quarters (if the lodgings meet the JFTR, Appendix A definition of GOV'T QTRS) is also not a JFTR violation (in this context) and should not impact lodging reimbursement. Failure to follow an order to use the 'contract quarters' is a separate personnel matter as noted in [1 JFTR] U1055."

As to the alleged third violation, the Per Diem Committee staff "agrees there is no JFTR requirement to provide lodging receipts for reimbursement of the 'flat rate' lodging portion of the 'flat rate' per diem." They note that the lodging receipt might be required to be available so that the proper amount of lodging tax may be paid.⁴ The Per Diem Committee points out in their Remarks that the "proliferation of receipt requirements has been discouraged by [the Per Diem Committee]. Since 1995, as part of simplifying travel, only receipts for lodging (except for contingency flat rate per diem) and individual expense of \$75 or more have been required as those were the only receipt 'categories' the IRS [Internal Revenue Service] required."

The Board appreciates the comments offered by the Per Diem Committee.⁵ As indicated

⁴The 55% "flat rate" per diem concept, and the lack of a need for lodging receipts, existed initially in the FTR (Federal Travel Regulations) based upon an OPM regulation. When the OPM regulation was removed, the rule was maintained in the Joint Travel Regulations, Volume 2 (JTR) for many years after that. This rule that was used for civilians for many years was approved for uniformed service members by the Per Diem Committee via the Uniformed Services Military Advisory Panel (MAP) process as 1 JFTR U4105-I, as the Per Diem Committee stated "as a primary means to contain the Army's accelerating contingency travel and transportation allowances fiscal obligations while still providing adequate funds to servicemembers. The remaining six Uniformed Services have elected to use this discretionary authority only for unique circumstances when necessary."

⁵Aside from the findings of the Board in this case, it is strongly suggested that the Army review PDTATAC Memo RR080320, dated April 1, 2008, regarding those issues as to which the Per Diem Committee staff did not find the Army Message in compliance with the JFTR, in

above, in the area of uniformed service member's travel and transportation entitlements, the Per Diem Committee's role is to ensure the issuance of uniform regulations that are consistent with the law, regulations and applicable administrative and judicial decisions for members of the seven Uniformed Services. The Per Diem Committee offers a reasonable construction of the various provisions of the JFTR discussed in this decision and the interrelationship among the JFTR, DoD policy, and Service policy.

As we construe 1 JFTR U4105-I4 with other provisions of the JFTR, the plain meaning of 1 JFTR U4105-I4 shows that lodging receipts are not required for reimbursement of the lodging portion (without lodging tax⁶) of the flat rate per diem for members on TDY contingency operations orders over 180 consecutive days in one location where the Secretary Concerned authorized a flat rate per diem allowance. It is very clear that in these narrow circumstances, a flat rate on the lodging was intended as a way of limiting Service financial obligations in return for giving the member more freedom from the administrative burden of accounting for his lodging choices, and therefore expenditures. The Army's attempt to require lodging receipts when no lodging tax reimbursement is requested contradicts the clear DoD policy expressed in 1 JFTR U4105-I4.

The Lodging Success Program does not meet the 1 JFTR, Appendix A definition of Government quarters. Under 1 JFTR U1045, if Government quarters (to include contract quarters) are not on the installation to which the member is ordered to TDY, use of such quarters is not mandatory for travel reimbursement purposes. Lodging Success Program properties are not government quarters.⁷ We recognize that the member's TDY orders required him to call Lodging Success at a specified number if lodging was not available or he was not assigned to an installation, but his failure to follow such orders or the requirements of the Army Message does not affect his entitlement to reimbursement under the JFTR. See 1 JFTR U1055. DoDD 5154.29 ensures uniform application of per diem, travel, and transportation allowances through the Per Diem Committee review of and approval of regulations implementing the JFTR. The Army should use the available process should they desire to change the JFTR.

accordance with the provisions of DoDD 5154.29.

⁶The November 2009 version of Volume 1 JFTR U4105-I.4, change 275, notes that a lodging receipt is not required but may be required under Service regulations to support a lodging tax miscellaneous reimbursable expense. When the member began TDY in April 2008 under his contingency operation orders, change 256 merely required that the member had to provide the lodging tax percentage from the lodging establishment. But, since the member has not claimed lodging tax, the receipt requirement is inapplicable here.

⁷In reaching this decision, the status of the Pentagon does not factor in the judgment. The Board notes, however, that the Pentagon is not an installation, but is a reservation.

Conclusion

The request for reconsideration is granted, and the Appeal Decision of September 16, 2009, is reversed. DOHA has never received an accurate accounting of this member's total reimbursed expenditures. We remand this matter to DFAS to calculate and pay lodging owed under the 55% flat rate from December 1, 2008, through April 28, 2009, minus any previous.

reimbursements up to 55% of the maximum per diem rate. In accordance with Department of Defense Instruction 1340.21, ¶ E7.15, this is the final administrative action of the Department of Defense concerning the member's claim

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

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