UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 19, 2009

CBCA 1461-TRAV

In the Matter of RUTHANNE S. DARLING

RuthAnne S. Darling, Stafford, VA, Claimant.

Sheila Melton, Acting Chief, Travel Mission Area, Standards and Compliance, Defense Finance and Accounting Service, Indianapolis, IN, appearing for Department of Defense.

**SHERIDAN**, Board Judge.

Claimant, RuthAnne S. Darling, née Toner, a civilian employee of the Products Support Division of the Air Force Petroleum Agency, was deployed on temporary duty assignment (TDY) to the Al Udeid Air Base, Qatar (Air Base). Pursuant to an audit of the division's travel pay vouchers, it was determined that claimant had been reimbursed at a higher per diem rate than had been authorized. Defense Finance and Accounting Service (DFAS) seeks to recover the overpayment and claimant requests that the Board review the DFAS recoupment decision. For the reasons stated below, the DFAS decision is affirmed.

## Background

Since November 2002, the Products Support Division of the Air Force Petroleum Agency has been responsible for providing an ongoing rotation of military and civilian personnel to the Air Base, in support of an aerospace fuels laboratory. This rotation was within the United States Central Command Air Force (CENTAF) area of operation (AOR).

The CENTAF Commander has the authority to determine the policy on the type of per diem payable to military and civilian personnel within the CENTAF AOR. JTR C4550.

Such policy was set forth by the CENTAF Commander in a Memorandum for All Personnel issued on April 7, 2003:

> Government furnished meals (dining facilities, boxed lunches, or Meals Ready to Eat (MREs)) are readily available. Current reporting instructions state "All available meals are directed" and the member will receive an incidental expense rate of $3.50 a day. As such, installation commanders are not authorized to change the per diem rate on any member's orders. In accordance with established policy, all personnel are to make maximum use of available government furnished meals even when official duties necessitate off-installation travel. Personnel who eat elsewhere do so as a matter of choice or convenience and at their own expense.

Personnel were advised that "as a last resort" they could seek compensation for meals consumed at commercial dining facilities, but they would need special approval by the installation commander at their TDY location.

Claimant, a civilian employee of the Products Support Division, was issued TDY travel authorization TE-0388 on June 13, 2003. The authorization provided: "PROPORTIONAL PER DIEM RATE: A. ALL GOVT MEALS ARE AVAILABLE AND DIRECTED. B. PARTIAL GOVT MEALS ARE AVAILABLE AND DIRECTED. C. GOVT MEALS ARE NOT AVAILABLE OR DIRECTED." The agency indicates that TE-0388 shows option A as having been circled; claimant represents that TE-0388 shows initials of the authorizing official next to option C. The copy of the orders is not fully legible, but the Board's copy of TE-0388 shows option A as being circled. The TE-0388 orders did not set forth per diem or M&IE (meals and incidental expenses) rates.

Claimant was on TDY at the Air Base from June 23, 2003, to October 23, 2003. While at the Air Base, meals were available to claimant at no cost in the mess hall. Claimant did not eat at the mess hall but instead ate commercial meals. When she returned from TDY, claimant submitted a travel voucher which was reimbursed by the agency using the commercial per diem rate of $80, which included $16 per day for incidental expenses.

In May 2007, the Air Force Audit Agency, Wright-Patterson Area Audit Office, issued findings in audit F2007-0024-FCW000 regarding Product Support Division travel pay vouchers. The audit identified certain overpayments, including overpayments made for per diem that used rates that were higher than the authorized rates. As a result of the audit findings, several vouchers were recomputed to reflect an authorized per diem rate of $3.50,

including compensation for meals and incidental expenses. The agency informed claimant that because she had only been authorized government meals, she should not have been paid for the meals and should have only received $3.50 per day for incidental expenses. The agency recomputed claimant's voucher using the incidental rate of $3.50 and determined that the claimant owed a debt of $9116. The agency's collection of the $9116 was suspended pending resolution of this matter. While there was some discussion of the agency issuing a statement of no availability (SNA), so that the claimant could be paid a higher per diem rate, there is no indication in the record that a SNA was ever issued. Claimant asks the Board to review the agency decision and find she is not is liable for the $9116 repayment.

## Discussion

Department of Defense Joint Travel Regulations (JTR) that were applicable when claimant traveled in 2003 provided that when it can be determined the per diem rates contained in the JTR are in excess of need for a particular duty assignment, authorizing and order-issuing officials should seek authority to prescribe a lower per diem rate. JTR C4550-C (2003). The JTR provided further that: "Such authority must be requested and approved in advance of the travel. . . . The authorized fixed per diem rate must be stated on the travel authorization. This rate shall be the per diem rate payable on the travel voucher without any receipts and/or itemization by the employee." *Id*. The Federal Travel Regulation (FTR) also allowed the agency to prescribe a reduced per diem rate under certain circumstances, but noted that the reduced per diem rate must be stated on the travel authorization in advance of travel. 41 CFR 301-11.200 (2003).

By issuance of the April 7, 2003, policy memorandum, the CENTAF Commander directed military and civilian personnel to make use of all available meals and determined that military and civilian personnel were to receive an incidental expense rate of $3.50 a day. Personnel were warned that, if they ate other than government provided meals, they did so as a matter of choice or convenience and at their own expense. The direction applied to military and civilian personnel of the Products Support Division deployed to the Air Base. Claimant's TDY orders stated that "ALL GOVT MEALS ARE AVAILABLE AND DIRECTED," but did not set forth any authorized per diem rate.

The FTR addressed situations where meals were furnished at no cost to civilian personnel by the Government:

> **What M&IE rate will I receive if a meal(s) is furnished at nominal or no cost by the Government or is included in the registration fee?**

> Your M&IE rate must be adjusted for a meal(s) furnished to you (except as provided in § 301-11.17), with or without cost, by deducting the appropriate amount shown in the chart in this section for CONUS travel, reference Appendix B of this chapter for OCONUS travel, or any method determined by your agency. If you pay for a meal that has been previously deducted, your agency will reimburse you up to the deduction amount. The total amount of deductions made will not cause you to receive less than the amount allowed for incidental expenses.

41 CFR 301-11.18. The JTR also addressed the amount to be paid for incidental expenses, where, as here, an employee was lodged on base and all meals were provided without cost:

> On days that all meals and lodging are provided without cost to an employee incident to a TDY or training assignment, the per diem allowance is:
>
> . . . .
>
> 2. $3.50 incident to an OCONUS assignment when the lodgings are on a . . . base . . . owned or operated by the U.S., unless the order-issuing official determines that the $3.50 is not adequate and authorizes/approves the incidental expense rate in http:/www.dtic.mil/perdiem/opdrform.html (in this case, payment of the http:/www.dtic.mil/perdiem/opdrform.html rate must be stated in the travel order) . . . .

JTR C4556.

Claimant argues that her orders stated "GOVT MEALS ARE NOT AVAILABLE OR DIRECTED," and that nowhere in the orders was she warned that her per diem would be limited to $3.50 a day for incidental expenses. We disagree with claimant's first assertion. While the copy of the orders that was provided for Board review was of poor quality, the orders clearly showed option A, "ALL GOVT MEALS ARE AVAILABLE AND DIRECTED," as having been selected, because that option was circled. As to claimant's assertion that the travel orders did not state the reduced per diem rate, she is correct. No per diem rate was stated in the orders. However, that does not negate the fact that claimant was only authorized government meals, and the regulations provide a mechanism for calculation of the proper rate of per diem for days where all meals and lodging are provided without cost to an employee.

It stands to reason, and the CENTAF policy memorandum directs, that personnel who choose to eat something other than the government provided meals do so as a matter of choice

and at their own expense. The policy memorandum also directed, and the JTR C4556 mandates, that a rate of $3.50 is to be used for OCONUS assignments where all meals and lodging are provided without cost to the traveler. The $3.50 rate for incidental expenses is set by the JTR, and the agency used that rate in reaching its determination that claimant had been overpaid $9116. The agency's assessment of the $9116 is affirmed.

While we believe that the regulations read together dictate a finding that the agency is entitled to recoup the $9116 overpayment, we are troubled by the fact that the agency failed to include clear notice of the reduced per diem rate in claimant's travel orders. Further, it appears to us that by initially paying the commercial per diem rate of $80, the agency itself may not have understood that the claimant should be reimbursed at a reduced per diem rate. While we are sympathetic to the fact that the agency has placed the claimant in a difficult position by determining it should collect a $9116 debt due to poorly written travel orders, compounded by a mistaken overpayment of the voucher which resulted in the creation of a debt more than five years after the travel, the Board does not have the authority to waive repayment of the debt. The authority to waive a debt belongs to the head of the agency from which the debt arose. *Sam Hankins*, CBCA 1309-RELO, slip op. at 3-4 (Apr. 8, 2009); *Helene Mikes*, GSBCA 15374-RELO, 00-2 BCA ¶ 31,138; *Michael J. Kunk*, GSBCA 14721-RELO, 99-1 BCA ¶ 30,164 (1998). To the extent the agency is persuaded that claimant suffered an adverse impact as a result of its failure to specify the lower per diem rate in the travel orders in accordance with regulations, and the head of the agency determines that collection of the debt "would be against equity and good conscience and not in the best interests of the United States," the agency has the authority to waive repayment of the debt. 5 U.S.C. § 5584(a); *Michael J. Kearney*, CBCA 483-RELO, 07-1 BCA ¶ 33,557; *Marsha K. Schmitt*, GSBCA 16828-RELO, 06-2 BCA ¶ 33,331; *Cindy L. Luciano*, GSBCA 16403-RELO, 04-2 BCA ¶ 32,715.

## Decision

Accordingly, the Board must deny this claim.

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PATRICIA J. SHERIDAN
Board Judge