Leslie Wilcox
Civ.Pers.

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**DECISION**

**THE COMPTROLLER GENERAL OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-180010.11 DATE: March 9, 1977

MATTER OF: Arbitration Award of Per Diem for Travel to Nearby Temporary Duty Station

DIGEST: Internal Revenue Service (IRS) instruction permits payment of per diem only when employee's residence is determined to be outside the commuting area of his temporary duty station. Arbitrator's award of per diem to employees should be resubmitted to him since award was based on finding that agency's definition of Chicago commuting area was improper and no determination was made that employees' residences were outside their commuting areas as required by IRS instruction. Arbitrator should determine what Chicago commuting area is and arbitrate grievance in light of such determination.

This decision is in response to a request dated December 21, 1976, by Warren F. Brecht, Assistant Secretary of the Treasury (Administration), for a ruling as to whether the Department has authority to implement the arbitration awards in "Internal Revenue Service, Chicago District Office and National Treasury Employees Union, Chapter 10 (Mueller, 1976)."

The subject of the arbitration is the entitlement of Messrs. David Diersen and Arnold Snap, Internal Revenue Service (IRS) employees, to per diem for temporary duty assignments in the vicinity of their residences. Mr. Diersen, who was permanently stationed in Joliet, Illinois, lived 26 miles from that post of duty. In November of 1973 he was assigned to temporary duty at the District headquarters office in Chicago, Illinois, 32 miles distant from his residence. Mr. Snap was permanently assigned to duty in Waukegan, Illinois, and he commuted 2 miles to his duty station. In August 1974 Mr. Snap was detailed to the District's headquarters office in Chicago, 37 miles from Waukegan. Both employees were in a temporary duty status in excess of 10 hours per day throughout the periods of their respective temporary duty assignments.

Based on the determination by Chicago District officials that Messrs. Diersen and Snap lived within the commuting area of the Chicago headquarters office, both were denied per diem under the following authority of IR Manual 1763 § 341(2):

"(2) Per Diem will be allowed employees assigned to temporary duty outside the commuting area of his official post of duty, except that per diem will not be allowed employees whose permanent residence (from which he commutes daily to his official station) is within the commuting area of the place of temporary duty. 'Commuting area' is defined as the geographical area which usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities within which people live and can reasonably be expected to travel back and forth daily to their usual employment. The maximum extent of the area should be determined by the accepted practice, or what can reasonably be expected, based on availability and cost of public transportation, convenience and adequacy of highways, and/or the travel time to and from work."

The employees grieved and, when the parties were unable to informally resolve their differences, the matter was submitted to arbitration. By decision dated October 25, 1976, the arbitrator held that both employees were entitled to per diem while on temporary duty at the District headquarters office in Chicago. That holding was predicated on the arbitrator's construction of IR Manual 1763 § 341(2), quoted above, and his determination that the action of Chicago District officials establishing the seven-county area of Cook, DuPage, Kane, Kankakee, Lake, McHenry, and Will as the commuting area for the headquarters office in Chicago was improper. The rationale for that holding is explained in the following excerpt from the arbitration decision:

"Joint Exhibit 7 entered into evidence, was a map of the State of Illinois with the seven county area accentuated and marked for reference. Such exhibit reveals that the farthest point of Kankakee County, one of the seven counties included in the commuting area, would be approximately 70 miles from the Chicago loop office. There is nothing to be found in the language of Section 341(2) to indicate that the boundary lines of counties are to be referred

> to in establishing a commuting area. A visual examination of Joint Exhibit 7 reveals that Lake County, Indiana, is located immediately southeast of the Chicago area. The northwestern portion of said county appears to be approximately 12 to 15 miles from the Chicago loop. Lake County, Indiana, however, is not included in the commuting area as interpreted by the IRS. It is clear on its face, that an employee living in the northeast corner of Lake County, Indiana, would in fact, be much closer to the loop office than are either of the grievants herein. Both grievants are approximately twice the distance from the loop office as would be an employee living in the northeast section of Lake County, Indiana.
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> "On the basis of such single observable fact alone, it would appear that the interpretive definition of commuting area that was made by the IRS within the meaning of Section 341(2) of the travel regulations was not made as a result of any consideration being afforded the specified criteria as set forth in such section. In the judgment of the arbitrator, Section 341(2) would appear to require observance of certain specified criteria directed at determining accepted practice, what reasonably could be expected based on availability and cost of transportation, convenience and highways, and by reference to the bench mark of the time required to travel to and from work. The setting of the commuting area by reference to county boundaries, in the judgment of the arbitrator, is not responsive to such specified considerations."

On this basis the arbitrator found that the denial of per diem to the grievants violated the terms and provisions of the collective-bargaining agreement.

The record of the arbitration proceedings and the IRS petition for review indicate a dispute as to whether the terms of the Multi-District Agreement limit the arbitrator to a consideration of the

express provisions of that agreement or whether the arbitrator's jurisdiction extends to the construction of an agency regulation not specifically set forth in the agreement. For this reason the Department of the Treasury has requested the review by the Federal Labor Relations Council (FLRC) of the arbitration award to determine whether the arbitrator exceeded his authority under the agreement. Since an exception has been noted with the FLRC, this Office will not rule upon the facts or the interpretation of the agreement. 54 Comp. Gen. 312, 317 (1974); cf. 54 Comp. Gen. 403 (1974); 54 id. 888 (1975). Our decision will be confined to a consideration of whether the IRS may comply with the arbitrator's award of per diem to Messrs. Diersen and Snap, assuming that the award is otherwise properly rendered.

Under section 12(a) of Executive Order 11491, as amended, all Federal Service collective-bargaining agreements are subject to "existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level." Accordingly, an agency may not expend funds to implement an arbitration award that is inconsistent with applicable laws and regulations. 54 Comp. Gen. 921 (1975), 55 id. 183 (1975), 55 id. 564 (1975). Here the IRS contends that the arbitrator's award is inconsistent with governing laws and regulations as implemented by IR Manual 1763 § 341(2) in that the arbitrator failed to find that the grievants incurred additional expenses because of their travel, they were in a travel status more than 10 hours each day, and they did not reside within the commuting area of the District's headquarters office in Chicago. IR Manual § 312(1)(a)1 provides per diem for employees whose travel or temporary duty is in excess of 10 hours during the same calendar day. In view of this and since the record indicates that the arbitrator found that the employees were involved in travel and temporary duty in excess of 10 hours per day, we shall confine our decision to the issues concerning the commuting area.

Paragraph 1-7.3a of the Federal Travel Regulations (FPMR 101-7) (May 1973) makes it the responsibility of each

department and agency to authorize only such per diem expenses as are justified by the travel circumstances and requires that care be exercised to prevent fixing per diem rates in excess of those required to meet the necessary authorized subsistence expenses. In addition, FTR para. 1-7.5d(1) (May 1973) provides:

> "(1) Travel of 24 hours or less. For continuous travel of 24 hours or less, the travel period shall be regarded as commencing with the beginning of the travel and ending with its completion, and for each 6-hour portion of the period, or fraction of such portion, one-fourth of the per diem rate for a calendar day will be allowed. However, per diem shall not be allowed when the travel period is 10 hours or less during the same calendar day, except when the travel period is 6 hours or more and begins before 6 a.m. or terminates after 8 p.m. * * *"

We have held that FTR para. 1-7.5d(1), supra, does not require per diem to be paid when temporary duty travel exceeds 10 hours, but that, with the stated exceptions, it merely precludes payment of per diem when temporary duty travel is less than 10 hours during the same calendar day. B-184175, August 5, 1975. Consistent with the requirement that employees be authorized only such per diem expenses as are necessary, we have recognized that agencies may issue regulations restricting the payment of per diem where the employee's temporary duty point is within the commuting distance of his residence or permanent station. We have upheld the propriety of such restrictions based on commuting time, B-173174, July 21, 1971, as well as on specific commuting distances, 55 Comp. Gen. 1323 (1976); B-170291, October 21, 1970; B-175608, December 28, 1975; B-185374, July 29, 1976. We have further recognized the propriety of regulations which do not prescribe a particular mileage or commuting time but require a case-by-case determination of whether the temporary duty is at a point beyond normal commuting range from the employee's residence or official station. B-146029, July 24, 1961; B-156699, May 24, 1968; B-176477, February 1, 1973. Under these decisions, the instruction in IR Manual 1763 § 341(2), quoted above, properly precludes payment of per diem to an employee whose permanent residence is within the commuting area of his place of temporary duty.

As evidenced by the following statement from his decision, the arbitrator does not dispute the appropriateness of the per diem restriction imposed by IR Manual 1763 § 341(2):

> "By the above finding and disposition with respect to the specific grievances involved in this case, the arbitrator wishes to make specifically clear to the parties, that such award of per diem or reference to the 10 hour rule is not intended to otherwise bind the parties to a consideration or concept that is to bind them with respect to subsequently establishing a commuting area within the meaning of 341(2) by application of the considerations and criteria therein expressed. It is anticipated and suggested that the IRS will subsequently establish a 'commuting area' pursuant to the criteria and considerations expressed in Section 341(2). * * *"

However, the arbitrator's award of per diem to Messrs. Diersen and Snap is made without regard to whether their residences were within the commuting area of the District's headquarters office in Chicago. While we do not question the arbitrator's finding that the District's implementation of IR Manual 1763 § 341(2) is improper, his award of per diem in disregard of that provision is contrary to regulations. As a condition of per diem entitlement, IR Manual 1763 § 341(2) requires a determination that the employee did not live within the commuting area of the District's headquarters office as defined therein. It is thus incumbent upon the arbitrator either to make that determination himself or to remand the case to the IRS for its determination. The record indicates such determination cannot be made now because the Chicago commuting area has not been properly established under the IR Manual criteria.

In cases where the arbitration award does not conform to statutory or regulatory requirements, or where the award is too indefinite to permit implementation, we have held that the defective award should be resubmitted to the arbitrator for appropriate corrective action. 54 Comp. Gen. 539 (1974), 55 id. 427 (1975). Therefore, the award in this case should be resubmitted to the arbitrator for further proceedings with instructions

that he either hear evidence and determine the extent of the Chicago commuting area under the criteria in IR Manual 1763 § 341(2) or remand the case for that determination to the IRS and arbitrate the grievances in the light of such determination.

[signature]

Acting Comptroller General
of the United States

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-180010.11

MAR 1977

Henry B. Frazier III
Executive Director
Federal Labor Relations Council

Dear Mr. Frazier:

Enclosed is a copy of our decision of today holding that the arbitration award in "Internal Revenue Service, Chicago District Office and National Treasury Employees Union, Chapter 10 (Mueller, 1976)," should be resubmitted to the arbitrator for a specific finding as to whether Messrs. Diersen and Snap resided within the commuting area of the Chicago District's headquarters office.

The submission to this Office states that the Federal Labor Relations Council has been asked to rule on the question of whether the arbitrator exceeded his authority in making the award. You will note that our decision is confined to a consideration of whether the Internal Revenue Service may comply with the arbitrator's award of per diem, assuming the award is otherwise properly rendered.

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States

Enclosure