GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-248893.2

August 29, 1995

Mr. John E. Higgins, Jr.
Acting Inspector General
National Labor Relations Board
Washington, DC 20570-0001

Dear Mr. Higgins:

This responds to letters of July 12 and August 22, 1994, from your office requesting an opinion concerning the travel and relocation claims submitted by a National Labor Relations Board (NLRB) employee, Mr. D. Randall Frye, incident to his transfer from Washington, D.C., to Cincinnati, Ohio. You present certain facts your office has developed in an investigation of this matter and ask for our views as to whether Mr. Frye's claims are proper under the Federal Travel Regulation (FTR).[1]

The information and documents provided to us show the following. By memorandum of July 3, 1990, the NLRB General Counsel announced that he had appointed Mr. Frye as Acting Deputy General Counsel "effective immediately." Request for Personnel Action (SF 52) forms in the file show that this was accomplished by detailing Mr. Frye from his position as Assistant General Counsel in the agency's Division of Operations Management to the Deputy position in the Office of the General Counsel. Both positions were in the Senior Executive Service (SES) and both were located in Washington, D.C.

The detail was terminated effective August 11, 1990, and effective August 12, 1990, the General Counsel appointed Mr. Frye Regional Director of Region 9, which is an SES position located in Cincinnati, Ohio. However, he apparently did not begin

[1]Related questions were submitted to us for decision by the NLRB Director of Administration in May 1992. However, upon being advised of the then on-going Inspector General investigation of the matter, we declined to render a decision at that time.

serving as Regional Director at that time because, also effective August 12, 1990, the General Counsel detailed Mr. Frye from the Regional Director position back to the Deputy General Counsel position in Washington. The SF 52 covering this detail shows that initially it was not to extend beyond December 9, 1990. Subsequent SF 52s show that this detail was extended through April 4, 1992. Mr. Frye continued to report on a daily basis to his job as Deputy General Counsel in Washington while also occupying the Region 9 Director position until April 20, 1992, when he actually reported for permanent duty in Cincinnati.

The SF 52s covering the termination of Mr. Frye's initial detail to the Deputy General Counsel position, his appointment as Regional Director and his detail back to Washington to serve as Acting Deputy General Counsel—along with the extensions of this detail through August 8, 1991—appear to have been submitted together to the agency's Personnel Office on May 30, 1991, and given final approval on June 6, 1991. On July 19, 1991, the General Counsel authorized another extension, effective August 7, 1991, for a period not to exceed December 5, 1991. Subsequent requests to extend this detail then were submitted as needed to cover the additional period into early April 1992.

You state that Mr. Frye engaged a realtor in September 1990 to sell his Washington-area residence. You provided a copy of Transfer Order No. 91-HH-1, dated August 9, 1991, which purports to transfer Mr. Frye from Washington to Cincinnati on or about August 12, 1990. You state that the date of the order apparently was originally August 9, 1990, but was altered to 1991, a full year after Mr. Frye's appointment as the Region 9 Director. The order was signed by the NLRB Director, Division of Administration. No explanation is provided for the altered date. Mr. Frye signed the required 12-month service agreement on August 16, 1991.[2] The transfer order authorized, among other things, 90 days of temporary quarters subsistence expenses (TQSE) and a house-hunting trip of not to exceed 10 days for Mr. Frye and his wife.

Mr. Frye settled on the sale of his Washington-area residence, located in Arnold, Maryland (near Annapolis), on August 16, 1991, and submitted his voucher dated that same day for reimbursement of real estate sales expenses in the amount of

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[2]An agency may pay a transferred employee's relocation allowances only after the employee agrees in writing to remain in the government service for 12 months after the transfer. 5 U.S.C. § 5724(i); and FTR § 302-1.5.

$19,012.25, which you state was paid by the agency,[3] although it was not administratively approved as required by FTR § 302-6.3(b).

After settling on the sale of his house on August 16, 1991, which was a Friday, Mr. Frye traveled to Cincinnati pursuant to travel orders authorizing the trip as official travel for the purpose of "Regional Office Visit." His travel orders authorized the travel for the period beginning on or about August 16 and ending on or about August 22, and provided that the mode of travel would be his privately owned vehicle. Mr. Frye, accompanied by his family, spent 1 night at a hotel on the road and arrived in the Cincinnati area the next day. It appears Mr. Frye went to the Region 9 office on Monday and Wednesday of the following week, and for at least some of his other time there, he and his wife engaged in house hunting in the Cincinnati area. Mr. Frye returned to Maryland the following Thursday, August 22.

Upon his return, Mr. Frye and his family moved into the Marriott Residence Inn in Annapolis, which was in the vicinity of his old residence, and he commuted daily from Annapolis to Washington where he continued to perform duty as Deputy General Counsel. On October 16, 1991, he signed a contract for the construction of a residence in the vicinity of his new duty station in Cincinnati. The residence was not expected to be ready for occupancy for at least 6 months. While staying in the hotel in Annapolis, and in other Washington-area hotels, Mr. Frye claimed and was paid per diem for the period August 21, 1991, to April 20, 1992. These payments were made pursuant to a travel order for which the issuing officer is shown as an Associate General Counsel, a subordinate of Mr. Frye in the Office of General Counsel. The orders provided for round-trip travel from Cincinnati to Washington, to begin on or about August 21, 1991, and end on or about September 30, 1991, which was extended as needed to cover the period through April 20, 1992, when Mr. Frye began duty at his new duty station in Cincinnati. These travel orders

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[3]If the date of the transfer order was actually August 9, 1991, and not 1990, in view of the short time between that date and the August 16, 1991, date of settlement on the residence sale, it appears that Mr. Frye entered into a contract of sale prior to issuance of the transfer order. We have held that where an employee enters into a contract for sale of his residence prior to issuance of transfer orders, the employee may be reimbursed for the sale of the residence only if there is other clear evidence of an existing administrative intent to transfer the employee when he entered into the contract. See Kenneth E. James, B-256002, June 2, 1994; and Warren A. White, B-235046, Sept. 18, 1989. Whether such intent existed in Mr. Frye's case is not clear from the record. While he had been appointed to the Cincinnati position in August 1990, he then was immediately detailed to the position in Washington in which he was continuing to serve at the time he sold his house. Further obscuring this matter is the question of the altered date on the transfer order.

apparently were issued on the basis that his permanent station was Cincinnati and that he was on temporary duty in Washington under the detail.

Mr. Frye's family lived with him in the Residence Inn in Annapolis until January 15, 1992, when his wife and children traveled to the Cincinnati area where they occupied temporary quarters. Mr. Frye claimed TQSE for his wife and children beginning on January 16, 1992.[4] The General Counsel personally authorized an extension of TQSE to cover the full 120-day maximum, which Mr. Frye claimed for his family until they moved into their new permanent residence in early May 1992, and for himself from his arrival in Cincinnati in April 1992 to early May 1992.

From January 21, through March 31, 1992, Mr. Frye lodged in Washington-area hotels, claiming per diem on the basis that he was on temporary duty there. You state that during this period of time, the General Counsel also authorized Mr. Frye to travel to Cincinnati to visit his family based on a Federal Travel Regulation provision authorizing weekend return travel for employees assigned to extended temporary duty assignments.[5] In early April 1992, he apparently traveled to Cincinnati and joined his family in temporary quarters.

The NLRB Director of Administration previously submitted the following additional information to us to explain the agency's rationale in this matter.[6] In his capacity as Acting Deputy General Counsel, Mr. Frye directly supervised the four divisions that comprise the Office of the General Counsel, which are: Administration, Advice, Enforcement Litigation, and Operations-Management. Due to a vacancy in January 1991, in the position of Associate General Counsel for Enforcement Litigation, Mr. Frye was placed directly in charge of that division, in addition to his regular duties as Deputy General Counsel. By detailing Mr. Frye from the Regional Director position and not filling the two positions in the Office of General Counsel, the agency saved over $220,000 in annual salaries alone, which made Mr. Frye's service in Washington that much more important and justified delaying his eventual relocation to Cincinnati. Therefore, when Mr. Frye sold his Arnold, Maryland home, the General Counsel approved the plan to continue the detail of Mr. Frye to the Washington office as Acting Deputy General Counsel. Mr. Frye put his household goods into storage when he moved out of his home in Arnold and he and his family occupied lodging in the Residence Inn in Annapolis so that his children could continue to attend the schools they had been attending.

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[4]Receipts for these expenses are not included in the record before us.

[5]Apparently FTR § 301-7.15(b)(3).

[6]This information was provided to our Office in a May 22, 1992, letter of which we understand you have a copy.

As for the August 1991 trip to Cincinnati, the Director of Administration asserted that Mr. Frye worked in the regional office, but acknowledged that Mr. Frye joined his wife on several occasions to look for a home in the area.

Your office presented six issues on which our opinion is requested. Those issues with our views follow.

Issue (1): Was reimbursement to Mr. Frye for his expenses, incurred during his August 16-22, 1991, trip to Cincinnati, in conformance with the Federal Travel Regulation, when it appears that a significant reason for the trip which commenced on Friday evening, after he went to settlement on the house he had sold in Arnold, Maryland, was to hunt for a house in the Cincinnati area, even though his travel voucher shows the purpose of the trip as "Regional Office Visit"?

Opinion: The general rule is legal rights and liabilities with regard to travel expenses vest when the travel is performed, and valid travel orders may not be revoked or modified retroactively so as to increase or decrease the rights that have become fixed after the travel has been performed. Gregg Snyder, B-252836, Aug. 4, 1993, and cases cited therein. However, travel orders may be amended or revoked to correct an error on the face of the orders or if the orders clearly are in conflict with a law, regulation, or agency instruction. Id.

In Mr. Frye's case, his transfer orders authorized him to take a house-hunting trip. If in fact, as you imply, this was the primary purpose of the trip to Cincinnati, and the regional office visit notation on his travel orders was erroneous, he may be entitled to claim travel and transportation allowances for his spouse in addition to himself on the basis it was a house-hunting trip. This includes a mileage allowance for travel via privately owned vehicle (POV) as advantageous to the government in traveling to and from Cincinnati, and mileage for local transportation while there. It also includes per diem for the employee and spouse. See Federal Travel Regulation (FTR), 41 C.F.R. § 302-4.1.

On the other hand, if it is established that the characterization of the trip on the travel order was correct, Mr. Frye's entitlement would be limited to travel and transportation allowances for an employee traveling on temporary duty. For periods during usual working hours for which it is established that Mr. Frye was not engaged in official business, it would be appropriate to charge him annual leave. He would not be entitled to per diem for any day for which annual leave is charged for more than one-half the daily working hours. FTR § 301-7.15(a).

As to the mileage allowance payable, the travel order indicates that the use of Mr. Frye's POV was for his personal convenience. Therefore, if the trip is determined to be for temporary duty and not house hunting, his mileage allowance

would be limited to the constructive cost of his trip to and from Cincinnati via common carrier. See FTR § 301-4.3.

We also note, however, that if it is determined that this trip was for both house hunting and temporary duty, Mr. Frye may be entitled to appropriate allowances for each, to the extent they can be separately determined. See Cecil D. Lewis, B-203196, Feb. 3, 1982.

Issue (2): Did Mr. Frye violate the Federal Travel Regulation by claiming per diem for the period August 22, 1991, through January 14, 1992, the period of time after he returned from the above trip to Cincinnati, and being the period of time he and his family took up residence in a hotel in Annapolis while he continued to perform the same duties in the Washington headquarters of the National Labor Relations Board and at a time prior to his having entered on duty in Cincinnati, Ohio (which was to become his new duty station)?

Opinion: Per diem is authorized by 5 U.S.C. § 5702(a)(1), under regulations prescribed by the General Services Administration, to reimburse an employee for the extra expenses of lodging, meals, and incidentals incurred in traveling on official business away from the employee's official station. FTR, 41 C.F.R. § 301-7.1. The regulations specifically provide that per diem shall not be allowed within the limits of the employee's official station or at, or within the vicinity of, the place of abode (home) from which the employee commutes daily to the official station. FTR § 301-7.5(a). See also, William Perkette, 71 Comp. Gen. 517 (1992).

Based on the facts you state and documents you furnished, discussed above, it appears that Mr. Frye's duty station remained Washington, D.C., during this period. Under FTR § 302-1.4(l), the effective date of a transfer from one duty station to another is the date on which the employee reports for duty at the new station. Although documents were issued appointing Mr. Frye to the position in Cincinnati, he was simultaneously detailed back to the position in Washington without actually effecting a change in official station until he actually reported for duty in Cincinnati in April 1992.[7] An employee's duty station is a question of fact, rather than an administrative determination. An employee's duty station is the place at which he performs the major part of his duties and is expected to spend the greater part of his time, and it has long been recognized that an agency may not designate some other place as an employee's permanent station so as to pay him per diem. See 31 Comp. Gen. 289 (1952).

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[7]The brief trip Mr. Frye made to Cincinnati in August 1991 as a "regional office visit" or for house hunting, would not appear to have constituted reporting for duty at the new station so as to effect the change of station.

In exceptional circumstances, however, we have allowed payment of per diem to an employee for temporary duty at his prior permanent station before he reported to his new duty station. See 54 Comp. Gen. 679 (1975). There we allowed per diem for an employee who after receiving notice of his scheduled reporting date at the new duty station, terminated his apartment lease at the old station, traveled on a house-hunting trip to the new station and signed a real estate purchase contract, and delivered his household goods to a carrier for shipment to the new station, but shortly thereafter he was unexpectedly called upon for an immediate temporary assignment at the old station before he reported for duty at the new station. In doing so, we recognized that the employee had significantly changed his position in preparing for the authorized transfer when he was suddenly ordered to perform a 30-day stint of temporary duty (TDY) at the old station which in the circumstances entailed incurring the expenses associated with TDY.

From the record we have, it is not clear that this exceptional circumstances rule would provide authority to pay per diem to Mr. Frye for this period. If he sold his house and moved himself and his family out after receiving official advice that his detail in Washington was to be terminated soon, and if he was also told that he would be expected to report for duty in Cincinnati thereafter, only to be told subsequently that those plans were changed and he was instead to remain in Washington under the detail, his situation might be covered by the exceptional circumstances rule. The exception would apply, in other words, if he had significantly changed his position in preparation for the transfer, and then been forced by the unexpected turn of events to incur expenses associated with TDY, i.e., expenses for which per diem is payable. It is unclear, however, that the facts of this case actually unfolded as we have hypothetically described them here. We note, for example, that at the time Mr. Frye began claiming per diem expenses, the then current detail had several months to run. We note further that Mr. Frye decided during the same period to begin construction on a new residence, thus embarking on a course that he could expect to take several months, rather than opting to purchase an existing residence that might have been available for occupancy in a shorter period of time. Since the record is not clear with regard to several of the factors we have discussed above, we believe this issue is best left to the agency to resolve in accordance with the applicable rules as we have described them.

Issue (3): Did Mr. Frye violate the Federal Travel Regulation by claiming a Temporary Quarters Allowance in the Cincinnati, Ohio, area for himself and his family considering the fact that in October 1991, he contracted for the construction of a house near Cincinnati which would not be available for occupancy until late April 1992?

Opinion: An employee may be reimbursed the expenses of maintaining temporary quarters at the old and/or new duty station, and the use of such quarters may begin

as soon as the employee's transfer has been authorized and the service agreement has been signed. FTR § 302-5.2(d) and (e). However, the employee's use of temporary quarters must begin "not later than 30 days from the date the employee reported for duty at his/her new official station, or if not begun during this period, not later than 30 days from the date the family vacates the residence at the old official station." FTR § 302-5.2(e). When computing the length of time allowed for temporary quarters allowances, the time period begins for the employee and all members of the immediate family when either the employee or any member of the immediate family begins the period of use of such quarters for which the claim is made, and the time period runs concurrently for the employee and all members of the immediate family. FTR § 302-5.2(f).

Mr. Frye first began to claim TQSE when his family moved to the vicinity of his new official station on January 15, 1992, which he claimed on the basis of their expenses. Assuming that Mr. Frye had a valid transfer order when his family moved to Cincinnati, since this was after his transfer was authorized and was "not later than 30 days from" the date he reported for duty in Cincinnati, April 20, 1992 (i.e., not later than May 20, 1992), he met the requirement referred to above, FTR § 302-5.2(d) and (e).

Issue (4): Did the Federal Travel Regulation allow for an initial authorization of temporary quarters to the subject for a period of 90 days?

Opinion: Pursuant to 5 U.S.C. § 5724a(3), the regulations provide that the initial period for which TQSE may be authorized may not exceed 60 days. FTR § 302-5.2(a)(1). Therefore, the 90-day initial authorization in Mr. Frye's case exceeded the prescribed initial period. While an extension of the initial period may be granted, additional requirements, based on events that occur during the first 60 days, must be met to qualify for such an extension. FTR § 302-5.2(a)(2). See our discussion under issue (5), below. We see no basis on which the additional 30 days properly could be authorized in advance, as was done in Mr. Frye's case.

Also, the determinations of whether to authorize TQSE and for what period are within the discretion of the agency to make on an individual case basis, but are limited by the parameters of the regulatory provisions. The regulations do provide that, as a general policy, the period for TQSE "shall be reduced or avoided" if a house-hunting trip has been made. FTR § 302-5.1.

Issue (5): Was the authorization of an additional 30 days' temporary quarters to Mr. Frye in conformance with the Federal Travel Regulations?

Opinion: We assume that you refer here to the 30 days authorized in addition to the initial 90 days, discussed above, thus totaling the 120-day maximum. In this regard, the FTR provides that the initial 60-day TQSE period may be extended for

up to 60 days, for a maximum total of 120 days, "provided the head of the agency, or his/her designee, determines that there are compelling reasons for the continued occupancy of temporary quarters." FTR § 302-5.2(a)(2). Authorization to extend the period and the number of days authorized "shall be held to a minimum." Ibid. Such extensions may be authorized only in situations where there is a demonstrated need for additional time "due to circumstances which have occurred during the initial 60-day period of occupancy and which are determined to be beyond the employee's control and acceptable to the agency." Ibid. While such determinations are primarily for the employing agency to make, extensions are generally denied where an employee has contracted for construction of a house which he knows will not be completed within the initial 60-day period since the delay in occupying the house is not considered to have arisen from an event beyond the employee's control that arose during the initial period. See Paul E. Storer, 67 Comp. Gen. 567 (1988). This appears to have been the situation in Mr. Frye's case; however, the record before us does not show whether other circumstances may have arisen during the initial 60 days which could have justified an extension.

For your reference, copies of the decisions cited above are enclosed.

Sincerely yours,

/s/Seymour Efros
for Robert P. Murphy
General Counsel

Enclosures