BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Grievant

and

Department of State

Record of Proceedings
FSGB Case No. 2014-007R

December 17, 2014

ORDER: Motion for Reconsideration of Relief and Remand

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	Warren R. King
Board Member:	J. Robert Manzanares
Special Assistant:	Lisa K. Bucher
Representative for the Grievant:	*Pro se*
Representative for the Agency:	Kathryn Nutt Skipper Attorney HR/G
Employee Exclusive Representative:	American Foreign Service Association

I. THE ISSUE

The Agency filed a motion requesting Reconsideration of Relief and Remand of the Foreign Service Grievance Board's decision issued on September 30, 2014, in which the Board found that grievant's spouse was entitled to medical per diem.

II. BACKGROUND

During grievant's tour in [redacted] his spouse became pregnant. She had had five previous pregnancies, none of which resulted in a viable birth. The post medical team (Foreign Service Medical Provider or FSMP) and the State Department Medical Office (MED) both agreed that this was a very high-risk pregnancy and that the preferred option was that the spouse return to the U.S. as soon as possible for a special procedure and stay under the care of a single obstetrician specializing in high-risk care for the remainder of her pregnancy. Although MED authorized a 14-day medical evacuation for the procedure, it advised grievant that, under its long-standing practice, it could not authorize further medical evacuation per diem under 16 FAM 317.1(c) prior to the 24th week of gestation. MED instead directed grievant to seek the much lower Separate Maintenance Allowance (SMA).

Grievant claimed that the regulation itself stated only that per diem for complicated obstetrical care could be provided for up to 180 days, and therefore permitted his spouse to receive such per diem beginning in approximately the 10th week of pregnancy when she returned to the U.S. for treatment.

The Board concluded that the Agency's regulation was not ambiguous, and that any clarification meant to be provided by the Agency's long-standing practice was both plainly erroneous and inconsistent with the Agency's own regulations, and arbitrary and capricious.

The Board found that, under the terms of the regulation, grievant's spouse was entitled to medical evacuation per diem from the time she returned to the U.S. through early April, as requested, and granted grievant $16,955.

The Agency requests the Board reconsider the relief aspect of its decision to correct clear error and manifest injustice. Specifically, the Agency claims grievant did not meet his burden of proof as to the amount of per diem to which he claimed entitlement, and the Board's decision did not refer to nor apply the applicable per diem regulations in the calculation of per diem. The determination of the amount of per diem, the Agency argues, should be remanded to the Agency for consideration under the applicable per diem regulations.

III. DISCUSSION

The decisions of the Board are final, subject only to judicial review, as provided in Section 1110 of the Foreign Service Act of 1980 as amended.[1] However, the Board's regulations[2] provide that the Board may reconsider any decision upon the presentation of newly discovered or previously unavailable material evidence. In addition, the Board has held that a motion to reconsider may be based on an intervening change in controlling law, the availability of new evidence or the need to correct clear error or prevent manifest injustice. It has further

[1] 22 U.S.C. § 4137 and 3 FAM 4455(c)

[2] 22 CFR § 910.1

stated that "absent extraordinary circumstances, revisiting the issues already addressed is not the purpose of a motion to reconsider." *See, e.g.*, FSGB 2009-024 (Order dated July 6, 2010).

Although the Agency maintains it properly exercised its discretion under 16 FAM 317.1 in not authorizing medical per diem travel for grievant's wife, it does not seek reconsideration of the merits. Rather it is the specific relief that was ordered for which the Agency seeks reconsideration. The Board's decision granting the grievant $16,955 (71 days of per diem -- $19,305 less $2,350 received under SMA), the Agency argues, is an error and merits the board remanding the matter for the calculation of per diem under the applicable regulations. The Agency argues that although not clear, the amount $19,305 appears to include both the maximum lodging allowance and the Meals and Incidental Expense (MI&E) portion of per diem applicable at the time.

According to the Agency, the MI&E portion of per diem was $71/day in the Washington, DC, area from January-April 2013. It is a flat rate, and receipts are not required. However, the Agency asserts as to the lodging part of the per diem, receipts are required. And it claims there is no acceptable lodging receipt in the record to support payment to grievant for the maximum allowable amount for lodging. Furthermore, the Agency claims, there is no document that supports the SMA amount ($2,350.00) grievant claimed in the original grievance he had received.

A newly provided document provided by the Agency (ROP #013 - 10-20-2014 Exhibit 1) documents the SMA amount grievant received ($2,579.82) was more than what grievant indicated in his original grievance he had received. Grievant claims that the calculation difference was a mistake and that he did not intend to mislead the Board. Grievant agrees that the Agency's record is accurate and agrees to that calculation for the SMA.

Neither party raised the issue of lodging receipts in the original record; therefore, the Board did not address this issue in its decision.

The regulation is clear. 14 FAM 572.2 states:

> Maximum authorized per diem rates for official travel shall be daily rates not in excess of the rates established as provided in 14 FAM 572. Worldwide per diem rates include a maximum amount for lodging expense and a fixed rate for meals and incidental expenses (MI&E). **Receipts for lodging are required.** (Emphasis added.)

The Federal Travel Regulations provide for exemption of receipts under certain circumstances; however, in the instant case, grievant would not be eligible for this exemption.[3]

In his original grievance, grievant asserted that his spouse did not stay at his friend's house for free. He asserts they paid for lodging and other expenses. Grievant has the opportunity to request a letter from his friend documenting the amount paid them for the lodging provided to his spouse and submit it to the Agency for review and payment.

IV. DECISION

The Board approves the Agency's Motion for Reconsideration of Relief and Remand for the specific purpose of recalculation of the eligible per diem, and asks the Agency to determine the amount of per diem that grievant should receive. Grievant should provide documentation for expenses incurred for the lodging of his spouse while staying at the friend's that the Agency should take into consideration in its determination. The Agency should report back to the Board within 30 days its calculations for the revised amount to be awarded grievant.

For the Foreign Service Grievance Board:

[3] FTR § 301-52-4 provides for an exemption if receipt of spending for lodging is confidential.

[redacted]

Warren R. King
Presiding Member

[redacted]

J. Robert Manzanares
Member