

**U.S. Office of Personnel Management
Compensation Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name]

Organization: [agency component]
National Park Service
Department of the Interior
[city & State]

Claim: Request for hazard pay differential, per diem during evacuation, and privately owned vehicle mileage

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0020

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

7/11/2011

Date

The claimant occupies the position of Park Ranger (Protection), GL-025-09, at [agency component] in [city & State]. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of hazard pay differential for hours worked on August 28, 2009; per diem in connection with what he refers to as "emergency temporary duty (TDY)" during evacuation for the period August 27-30, 2009; and privately owned vehicle mileage between his temporary lodging and work site during this period¹. We received the claim on January 28, 2010, the agency administrative report (AAR) on April 15, 2010, and the claimant's response to the AAR on April 27, 2010. For the reasons discussed herein, the claim is denied.

Hazard pay differential

The claimant states that on August 28, 2009, he was "participating as a member of a firefighting crew" working "on the fireline" in connection with what was called the Gloria Fire. He provides the following rationale for this statement in his claim request:

Based on past incidents, the understanding of "member of a firefighting crew" and "fireline" was anyone part of the interagency firefighting force participating in fighting the fire. The interagency force was there for the sole purpose of firefighting whether it is providing security, delivering supplies, or evacuating residents. I drove through the fireline several times as a part of an interagency firefighting crew, assisted in locating and evacuating visitors, and enforced the mandatory evacuation. Everyone that is a member of the interagency firefighting crew is playing their role in fighting the fire on the fireline. The fire is just as dangerous to law enforcement on the fireline as the people using the shovels and picks.

The agency states the claimant "was driving vehicles on August 28 and this, by definition, does not fall under the criteria for firefighting," and that the intent of hazard pay "is only for those who are actually in fire gear working on a fireline, not performing other duties off of the fireline."

The claimant responds to the agency position as follows:

I was in fire gear and on the fireline multiple times that day. I drove through the fireline multiple times to save local land owners, stopped directly on the fireline to check on the welfare of firefighters, and was in firefighting gear. Again, I was a member of an interagency fire fighting crew as stated in the regulation... The regulation does not specify and limit the scope of fire fighting duties only to the person on the fireline with a pick, shove [sic], and Pulaski. I believe most anyone in the profession of fire fighting would say anyone doing work on the fireline is engaged in fire fighting, no matter what their role is. The overall mission is to fight the fire and the regulation does not limit the scope to certain specific positions... I believe the regulation is to compensate those on the fire fighting crew for being in danger of the fire. I was in just as much danger as the workers with picks, shovels, and Pulaskis because I was standing right next to them on

¹ The claimant also requested OPM review his claim for overtime under the Fair Labor Standards Act (FLSA). The claim for overtime has been separated from this claim and will be adjudicated in a separate decision under the provisions of section 4(f) of the FLSA of 1938, as amended, codified at section 204(f) of title 29, United States Code (U.S.C).

the fireline. .. I never said I was only driving vehicles. I listed multiple things I was doing in my narrative. I am also a certified fire fighter.

Section 550.904 of title 5, Code of Federal Regulations (CFR), specifies that hazard pay differential is to be paid only for the specific hazardous duties listed in 5 CFR part 550, subpart I, Appendix A. The specific firefighting duties listed are:

- (1) *Forest and range fires.* Participating as a member of a firefighting crew in fighting forest and range fires on the fireline.
- (2) *Equipment, installation or building fires.* Participating as an emergency member of a firefighting crew in fighting fires of equipment, installations, or buildings.
- (3) *In-water under-pier firefighting operations.* Participating in in-water under-pier firefighting operations (involving hazards beyond those normally encountered in firefighting on land, e.g., strong currents, cold water temperatures, etc.).

Regarding forest and range fires, the plain language of the regulation is that the hazardous duty involve *fighting fires*, not performing any of the peripheral or support activities described by the claimant, such as conducting evacuations or checking on the welfare of the firefighters. Mere proximity to the fireline, the wearing of firefighting gear, or firefighter certification is not sufficient to meet this definition. The claimant's expansive definition of "firefighting crew" to encompass any individuals associated with the overall firefighting effort is not supported by the clear and specific wording of the regulation. The claimant misconstrues the underlying purpose of hazard pay differential, which is to compensate individuals whose work and duties meet the specific delineated duties or types of work listed in 5 CFR part 550, subpart I, Appendix A. It is not, as he posits, intended to compensate individuals solely "for being in danger of the fire." Thus, the claim for hazard pay differential is denied.

Per diem for "emergency temporary duty (TDY)" during evacuation

The claimant states that on August 27, 2009, he was prohibited from returning to his government quarters due to the Gloria Fire, and therefore stayed in a hotel and purchased meals for the period August 27-30, 2009. He asserts he should have been placed on "emergency TDY" and compensated with per diem as an evacuated employee under the provisions of 5 CFR 550.405 because:

On 8/27/2009, I was returning to my assigned government quarters on the west side of [agency component]. Upon my arrival at the corner of [specific location], I was prohibited from returning to my quarters. I had no food and nowhere to stay for 4 days and 3 nights... During this time I had no access to cooking utensils or access to the food I had already purchased which was in my government quarters. This is the purpose of Per Diem; to compensate for the inability to cook at home.

The agency states:

[Claimant] is claiming his family is entitled to payment because they were evacuated and cites 5 CFR 550.405 which discusses payments during evacuation. He believes his family was evacuated from the area because the Gloria Fire prohibited his family from returning to their Government quarters. 5 CFR 550.405 authorizes agencies to provide payments to the employees because of a major evacuation, where an agency is no longer

able to function due to catastrophic circumstances. A recent example would be Hurricane Katrina where agencies in New Orleans evacuated their employees out of the area into another state to establish temporary offices. We do not believe that this CFR citation was intended to address local fire situations.

The claimant responds to the agency position as follows:

None of this wording is contained in that section. The section says nothing about major evacuations or about the agency being no longer able to function... Not only that, the FTR [Federal Travel Regulations], Chapter 301, Subchapter B, Part 301-30(c) states, "A catastrophic occurrence or impending disaster, such as a fire, flood, or act of God, which directly affects your home." The incident in question was an impending disaster, which was a fire, and which directly affected my home. So the disaster didn't even have to occur for this section to apply. Also, the regulation personalizes it to "your home." This makes the argument that it could be confined to an individual home and not necessarily an incident like Hurricane Katrina where hundreds of thousands are at risk. Numbers are not referenced in the regulation as an impending disaster is personally devastating to each person.

Payments and allowances provided for in 5 CFR part 550 subpart D are a discretionary authority which the agency may choose to exercise and are not an employee entitlement. This is made clear in 5 CFR 550.401(c), which states: "The head of an agency *may* make advance payments and evacuation payments and pay special allowances as provided by this subpart." [Italics added.] The discretionary nature of these payments is reiterated in 5 CFR 550.405 in regard to determining special allowances, including per diem:

In determining the direct added expenses that *may* be payable as special allowances, the following shall be considered: [Italics added.]

Under 5 CFR 550.401(d), which provides for the administration of this authority:

The head of an agency having employees subject to this subpart is responsible for the proper administration of this subpart. Payment of advance payments and evacuation payments and any required adjustments shall be made in accordance with procedures established by the agency.

Information provided by the agency indicates that neither the Department of the Interior nor the National Park Service has issued implementing guidance as required by 5 CFR 550.401(d) for the exercise of this authority except for evacuation payments in cases of pandemic as provided for under 5 CFR 550.409. Therefore, in the absence of any other established procedures for the administration of the authority granted under 5 CFR 550.401(c), the agency has not availed itself of the option for making advance payments, evacuation payments, or special allowances including per diem except under the specific circumstances delineated in its implementing guidance, which the agency limited to pandemics. Since the option to grant payments during evacuation is discretionary on the part of the agency and the agency has not established procedures to provide such payments under the circumstances at issue in this claim, the claimant has failed to state a claim for per diem for which relief can be granted.

We note that the term “emergency temporary duty (TDY)” is wholly constructed by the claimant from section 301-3.1 of the Federal Travel Regulations (FTR), which delineates those emergency situations for which an employee on temporary duty is authorized travel (i.e., at government expense) back to his or her permanent duty station. This constructed term would appear to relate to travel, transportation and subsistence as defined in chapter 57 of title 5, United States Code (U.S.C.). This term is not used within the context of 5 CFR part 550, subpart D and has no relation to payments authorized during evacuation as addressed within that subpart which implements the provisions of 5 U.S.C. § 5527 and Executive Order 10982. Provisions or definitions contained within one set of regulations may not be imported to an unrelated set of regulations in an attempt to establish eligibility for benefits or allowances not otherwise specifically provided for.

Privately owned vehicle mileage

Under the provisions of 31 U.S.C. §3702(a)(3), the Administrator of General Services is charged with the authority to settle claims involving expenses incurred by Federal civilian employees for official travel and transportation². Reimbursement for privately owned vehicle mileage is not subject to review under OPM’s claim adjudication authority in 31 U.S.C. § 3702(a)(2). Therefore, this portion of the claim is denied for lack of jurisdiction.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee’s right to bring an action in an appropriate United States Court.

² This claims adjudication process is administered by the General Services Administration’s Civilian Board of Contract Appeals.