

DATE: October 4, 2004

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In Re:

[Redacted]

Claimant

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Claims Case No. 04092101

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

A service member is entitled to *per diem* for meals when he is ordered to annual training away from home and government mess is not available. Government mess is considered to be not available if (1) the member's orders specifically state that government mess is not available, and (2) the unique circumstances of the member's duty and assignments prevent him from taking any meals at government mess facilities located at the nominal site of his assignment.

**DECISION**

The Defense Finance and Accounting Service (DFAS) requests a reconsideration of the August 23, 2004, decision of this Office in DOHA Claim No. 04072707.

**Background**

The record indicated that the claimant was a member of the United States Naval Reserve residing in Virginia (home). The record did not show that he was assigned to a particular station or activity. The Commanding Officer, Naval Air Station Joint Reserve Base (NAS JRB) Willow Grove, Pennsylvania, issued a training order, <sup>(1)</sup> dated August 10, 2003, which ordered the claimant to annual training for 50 days from August 10, 2003, to September 28, 2003, and directed him to report not later than 0730 hours, August 11, 2003, to the Commanding Officer, NAS Willow Grove, for duty with the Naval Criminal Investigation Service. He was to return home upon completion of this tour. Travel by privately-

owned conveyance on August 10, 2003, and September 28, 2003, was authorized as advantageous to the Government. Paragraph 9 stated that Government quarters would be available, but paragraph 10 stated: "GOVERNMENT MESSING WILL NOT BE AVAILABLE AT WILLOW GROVE, PA (10 AUG 2003 THRU 28 SEP 2003) (JFTR U4400.B). MAX DAILY /IE [meals and incidental expenses] IS \$46.00 FOR WILLOW GROVE, PA." (2)

The claimant traveled from home to Willow Grove on August 10, 2003. He lodged at the Bachelor Officers Quarters (BOQ) on base at the rate of \$10.00 or \$22.00 per night, depending on the room and the night. (3) Since one room was not available for his complete tour, the claimant moved several times within the BOQ. Regarding his meals, the claimant did not keep receipts or log their costs because he believed that paragraph 10 of his training order implied that he would be paid *per diem* for them.

Upon completion of his tour, the claimant returned home on September 28, 2003. (4) He submitted a travel voucher dated September 30, 2003. Upon review on October 4, 2003, he was allowed \$69.00 in per diem for the days in transit of August 10, 2003, and September 28, 2003 (\$34.50 each); \$196.00 in mileage and transportation; and \$982.00 for lodging; total, \$1,247.00, paid October 8, 2003. The claimant was denied *per diem* for the complete days at Willow Grove, and no explanation was given for that denial.

The member pursued his claim for *per diem* for the complete days at Willow Grove. By memorandum dated January 11, 2004, the office of the Commanding Officer, NAS JRB Willow Grove, stated: "Due to mission constraints, member was unable to utilize Government messing while performing Active Duty from 10Aug03 through 28Sep03, a period of 50 days." The member submitted a supplemental voucher dated February 8, 2004, that claimed *per diem* for meals for that period. Since he had not kept receipts or other records of meal costs, he supplied a breakdown based on the *per diem* meal rates for the Willow Grove area: \$8.00 for breakfast, \$15.00 for lunch, and \$21.00 for dinner. In his memorandum dated March 24, 2004, the member described his duties as follows:

"During the performance of my duty I was in civilian clothes due to the fact that the majority of my assignments required me to be off station and not in uniform. The fact that I spent my time off station, at all times of the day and night, did not allow me to use the dining facilities on base, I was able to use the BOQ to sleep and bath[e]."

By memorandum dated March 25, 2004, DFAS denied the claim on the grounds that: (1) applicable regulations prohibit *per diem* when government quarters and a government mess are both available, and (2) reimbursement on the basis of occasional meals was not possible because such had to be based on actual costs, which had not been provided by the member. The claimant appealed that decision to our Office.

In our August 23, 2004, Appeal Decision, our Office allowed the member's claim for the commercial meal rate for the period August 11, 2003, through September 27, 2003, if otherwise correct based upon the following rationale.

The liability of the government for reimbursement of a traveler's expenses is limited to that provided by law and regulations. *See* B-205113, Feb. 12, 1982. Volume 1, Joint Federal Travel Regulations (JFTR), paragraph U7150-A4a, (5) stated in pertinent part:

"a. Active Duty for Less Than 20 Weeks. Except if subpars. 1b and c apply, when the active duty period contemplated by an order at any location is for less than 20 weeks (except as noted in par. U2146), per diem or AEA, as applicable, and travel and transportation allowances are payable as provided for TDY in Chapter 4."

The tour at issue was well under 20 weeks long. Since the tour was not for a class of instruction, 1 JFTR U2146 did not apply. The exception made by 1 JFTR U7150-A1b, "Travel and Transportation Allowances When Member Commutes," did not apply either since the member did not commute each day between his home and base. As for the exception made by 1 JFTR U7150-A1c, it stated in pertinent part that there is no entitlement to *per diem* for members performing annual training duty when both government quarters (other than temporary lodging facilities) and government mess are available.

The member's claim was denied on the grounds of 1 JFTR U7150-A1c(1). However, in this case, it did not appear that government mess was available to him. At 1 JFTR U4400-B, the regulations stated in pertinent part that messing was

not available when an order-issuing official determined either that the use of the mess would adversely affect mission performance, or the member's duty hours and mess operating hours were not compatible.

At paragraph 10 of the member's order, the Commanding Officer, NAS JRB Willow Grove, had stated that the government mess at that station was not available to the member. That official's office reiterated that finding by memorandum dated January 11, 2004. Although the grounds were not stated in the memorandum, the member provided a detailed written statement confirming that his duty assignments required that he be off station and not in uniform, at all times other than when he was sleeping--a circumstance which made it impossible for him to use the dining facilities on base.

Since competent authority stated in writing that a government mess was not available, 1 JFTR U7150-A1c(1) did not apply, and the member was entitled to *per diem* under 1 JFTR chapter 4 per 1 JFTR U7150-A4a. Therefore, our Office concluded that the locality rate, also known as the commercial meal rate, for the Willow Grove area was applicable since the circumstances of the instant case did not meet the requirements for the government meal rate and the proportional meal rate under 1 JFTR U4149-B and -C, respectively.

Our decision characterized the member's tour as active duty for training. In its request for reconsideration, DFAS states that it does not disagree with our decision or its rationale insofar as it applies to active duty for training, but notes that the member's orders state that he was to perform annual training. It is also DFAS's position on reconsideration that, because the member was performing annual training and the training site was his permanent duty station, the member's claim for *per diem* should be denied since messing was available at the location. DFAS cites to no additional legal authority beyond the regulations in support of its position and provides no additional documentary evidence. Our reconsideration focuses on this claim of error.

### **Discussion**

Our Office must render decisions based on applicable statutes, regulations and prior administrative decisions. The JFTR is the implementing regulation for travel entitlements under title 37, United States Code, Chapter 7, and as such, it has the force and effect of law. We cannot allow a claim at variance with the JFTR. *See* DOHA Claims Case No. 99122105 (March 21, 2000), *aff'd* Deputy General Counsel (Fiscal), December 21, 2001.

The Comptroller General has previously taken the position that Congress did not intend reservists on annual training to receive *per diem* when government lodging and mess are available. *See* 48 Comp. Gen. 517, 521-522 (1969). In this regard, reserve members are treated in a manner similar to their active duty counterparts who are not entitled to *per diem* in those instances where the government provides quarters and mess. *Id.* at 522-523. While the Congress has amended Chapter 7 of title 37 many times since the Comptroller General's 1969 decision, it has not amended the law to contradict the Comptroller General's 1969 interpretation.

As a preliminary matter, we concur with DFAS's observation that the member's order characterized his tour as annual training, rather than active duty for training. However, the Board has previously noted that it makes no difference whether the duty is described as annual training or active duty for training in cases like this one, where the reservist is away from home and the issue is whether government lodging and mess are available. *See* DOHA Claims Case No. 04042602 (May 6, 2004) *citing* B-203925, Sept. 2, 1981. Additionally, we cannot find in the documentary record (and DFAS does not cite to) a definitive statement that the duty location at issue was in fact the member's permanent duty station, as DFAS asserts. Absent more definitive evidence, we demur on making any finding in that regard.

However, even if it is assumed for the purposes of this decision that Willow Grove was the member's permanent duty station, it would not change the outcome in this case. There is some language in the Comptroller General's decision which suggests that messing is available, if messing facilities are physically present and generally available at the location to which the member is assigned. *See* 48 Comp. Gen., *supra* at 522 ("at a military installation where quarters and messing are, in fact, available"; "if a mess and quarters are available for the members at the duty station"). However, other language in the decision would seem to indicate that messing is not available if it is not available to the individual member because of the particular circumstances of his duty, even though such facilities may be physically present on the installation. *Id.* at 521, 523 ( "when they are not furnished mess"; "where mess and quarters are provided

for him"). *See also* B-270475, June 26, 1996.

In light of the forgoing, it was not unreasonable for our Office to conclude that messing was not available to this particular member given: (1) that his orders specifically stated that government messing would not be available, (2) the commanding officer of the installation at which the member performed annual training stated in writing that due to mission constraints, the member was unable to utilize the messing facilities, and (3) the un rebutted statement from the member that his duty assignments required that he be off station and not in uniform, at all times other than when he was sleeping--a circumstance which made it impossible for him to use the dining facilities on base for any of his meals.

This case is distinguishable from our decision in DOHA Claims Case No. 04042602, *supra*, in which we denied a reservist's claim for *per diem* while on annual training. In that case, the member's orders stated that all government meals were available and directed, and that the member would pay lodging costs and the standard meal rate at the government mess. *Id.*

### Conclusion

For the reasons stated, the appeal decision is sustained. In accordance with 32 C.F.R. Part 282, Appendix E, paragraph o(2), this is the final Department of Defense Action in this matter.

\_\_\_\_\_/s/\_\_\_\_\_  
 Michael D. Hipple  
 Chairman, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_  
 William S. Fields  
 Member, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_  
 Jean E. Smallin  
 Member, Claims Appeals Board

1. Training Order No. N8739903RT79882.
2. This order was modified by Training Order No. N8739903RT79882, also dated August 10, 2003, to provide for flight pay.
3. The member's BOQ receipt shows arrival on July 20, 2003, and the payment by Visa card charge of \$70.00 on that date. This discrepancy in arrival dates is not explained.
4. The BOQ receipt shows a check out date of September 29, 2003. This is also not explained.

5. All 1 JFTR citations are updated through Change 200, August 1, 2003. The cited passages were not amended by Change 201, September 1, 2003.