



In 2006, the member volunteered for temporary duty on a contingency operation at the Pentagon, in the same permanent duty station as the AGR tour. The temporary duty assignment was unaccompanied, and the transportation of household goods was not authorized. The orders for the AGR tour were rescinded, but the member was authorized under the rescission orders to transport his household goods to his home state if transportation occurred within 180 days. The member did not leave Virginia and return his family to his home state, and they continued to reside at his Virginia residence. In these circumstances, the payment of *per diem* for the contingency operation tour is doubtful, and we have no authority to extend his household good shipment entitlement after he failed to exercise it within 180 days.

## **DECISION**

An Army National Guard officer currently on orders for temporary active duty to support a contingency operation, claims *per diem* and the reinstatement to his right to move his household goods back to the place from which he originally entered onto active duty.

### **Background**

The record shows that in December 2002 a member of the State 1 Army National Guard was ordered to active duty by his state Department of Military Affairs under 32 U.S.C. 502(f) starting January 1, 2003, for four months and 11 days. Under authority of 10 U.S.C. 12301(d), on March 11, 2003, the National Guard Bureau (NGB) issued permanent change of station (PCS) orders assigning the member as an Active Guard Reserve (AGR) to the NGB in Washington, DC under a voluntary three-year commitment from May 12, 2003, through May 11, 2006. The member was authorized to ship his household goods, and his dependents were permitted to accompany him. While at the new permanent duty station (PDS), in November 2003, the member purchased a residence in nearby Virginia. His PCS orders were amended in February 2006, to extend his active duty period under the NGB orders until August 1, 2006. Another order in May 2006 extended the period indefinitely. Then, the United States Army Human Resources Command (AHRC) issued orders dated August 10, 2006, addressed to the member's home in Virginia, directing 179 days of active duty, August 28, 2006, through February 22, 2007, under 10 U.S.C. §§ 12301(d) and 12314 at the Pentagon in support of a contingency operation, Operation Noble Eagle. The orders described this tour as temporary duty (TDY) and its length in excess of 139 days as mission essential. The orders also contained the following relevant provisions: the member continued his assignment in State 1 Joint Force Headquarters; his duty station was at the Pentagon; it specifically prohibited the movement of household goods; it prohibited dependents from accompanying him; and it provided that any *per diem* would be in accordance with the Joint Federal Travel Regulations.

The NGB released the member from the unexecuted portion of the NGB tour, and in relevant part that rescission order contained the following provisions: it did not affect his membership in the State 1 Army National Guard; it returned him to the control of the State 1 Joint Force Headquarters; it authorized him to ship his household goods to his home of record or

PLEAD; it provided that the shipment of household goods was at the dependent rate; it permitted his dependents to accompany him; it authorized up to six months of storage of household goods while selecting a home, beginning on the date of order issuance and terminating 180 days after termination of active duty; it specified that the member had to apply for shipment of his household goods within 180 days of separation from service; and it provided that the member was released from active duty on August 27, 2006.

In accordance with the member's request, AHRC issued orders, dated September 7, 2006, that amended the previous AHRC order, to change his address from his home in Virginia to an address in his home state. An additional AHRC amendment has extended his active duty tour under the AHRC order to 544 days, or to February 22, 2008. The member continued to reside at his Virginia residence and commutes daily between it and the Pentagon. The member did not return to State 1 pursuant to his reassignment, and continues to receive a basic allowance for housing for that residence.<sup>1</sup>

The member claims that under title 32 of the United States Code, he is a mobilized State 1 Army National Guard member and that his legal residence is in State 1; therefore, he is entitled to *per diem* while under the AHRC orders. The member asks us to consider new evidence in the form of an order issued by the State 1 Joint Force Headquarters which assigns him to a new duty position in that headquarters and relieves him from a prior duty assignment there, presumably as evidence of his new PDS.<sup>2</sup>

In its May 8, 2007, administrative report, DFAS states that the member had informed them that he requested that he be relieved from the NGB PCS orders and be recalled to active duty under title 10 of the United States Code to better his chances of promotion. DFAS states that the place from which called or ordered to active duty (PLEAD), is the address to which the orders are addressed. The PLEAD can only change when there is a break in service of at least one full day, in which case it is the place of entry into the new period of service. The member's current orders were addressed to his Virginia address, and he is within the local commuting area. Therefore, *per diem* is not appropriate. DFAS also checked the property records claimed by the member as his new home of record, and it is owned or occupied by third persons, which the member states is his sister's home.

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<sup>1</sup>See 14 March 2007 letter of Chief, Compensation & Entitlements Division, Office of Deputy Chief of Staff G-1.

<sup>2</sup>DoD Instruction 1340.2, ¶ E5.7, provides that all relevant evidence to prove a claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence presented at later stages of the administrative process will not be considered. The member has not offered proof of compelling circumstances that prevented him from offering this evidence earlier; however, even if considered, it would not have changed the outcome here.

## Discussion

For the reasons that follow, we conclude that the member's claim for *per diem* while serving under these particular AHRC orders is doubtful. As discussed in the appeal decision, in 2003, the member, an Army National Guard member from State 1, voluntarily accepted orders for a permanent change of station (PCS) from State 1 to Arlington, Virginia, to work at the NGB on an AGR tour. The member subsequently purchased a home within the commuting area of his new PDS. As noted in the appeal decision, Arlington, as a PDS, includes the Pentagon. The member served under the NGB orders for over three years. These series of orders ended when the member sought and received new orders under title 10 to support a contingency operation at the location of the PDS, without returning to State 1. The record also indicates that he is receiving basic allowance for housing for the Virginia residence. The initial AHRC order in 2006 ordered the member to temporary active duty in support of a contingency operation; the orders were sent to the member's Virginia address that the member had occupied while on his permanent duty NGB tour in Arlington; the orders specifically stated that movement of household goods and dependents was not authorized; and *per diem* was authorized only in accordance with volume 1 of the Joint Federal Travel Regulations (JFTR).

The JFTR does not provide for *per diem* reimbursement in the circumstances in which this member finds himself. The Comptroller General has held that if a member is detached from his permanent duty station under PCS orders and thereafter proceeds to a temporary duty station, he enters a travel status only if the temporary duty location is outside the limits of his old station. Furthermore, the member's permanent station, for travel purposes, remains at the same place until he leaves that station for permanent assignment at another place. Assignments to temporary duty at the permanent station may not be considered as placing the member in a travel status. *See* the Comptroller General's decision in B-189601, Dec. 30, 1977. If emergency circumstances arise, the member would have the right to the travel and transportation allowances authorized within the permanent duty station under 1 JFTR ¶ U4105-H.

We agree with the DOHA adjudicator that the September 7, 2006, amendment to the member's AHRC orders did not have the legal effect of qualifying the member for *per diem*. The member continued to commute between the Pentagon and his Virginia residence and did not reside during the relevant period of time at the State 1 address. As the adjudicator explained, there is a well-established rule that a travel order may not be retroactively modified to increase or decrease the traveler's entitlements, except to correct an error or complete an order to show original intent. *See, e.g.*, Comptroller General decision in B-259663, June 12, 1995, cited in the appeal decision. The exceptions are not applicable here.

The Board cannot consider the member's request that we extend the period of time that the member had to use the household good movement entitlement in the NGB AGR tour rescission order. The 180-day time limit in that order is specified in paragraph U5360-G of volume 1 of the JFTR, which are promulgated pursuant to statutory authority and have the force and effect of law. Therefore, the Board may not extend the time limitations set forth therein. *Compare* Comptroller General decision B-259606, June 12, 1995. There is a limited hardship exception, which does

not appear to apply here; but for a hardship extension, a Secretarial Process is required.

### **Conclusion**

The claimant's request for reconsideration is denied, and we affirm the May 30, 2007, appeal decision in DOHA Claim No. 07051102 disallowing the claim. In accordance with DoD Instruction 1340.21, ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: William S. Fields

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William S. Fields  
Member, Claims Appeals Board