

DATE: July 22, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 96100801

CLAIMS APPEALS BOARD DECISION

DIGEST

Upon graduation from the Air Force Academy, an Air Force officer departed the Academy to his first permanent duty assignment in Japan, with temporary duty to Mississippi en route. He traveled to his temporary duty station and completed his temporary duty. He was then ordered back to the Academy for temporary duty. Under these circumstances, 1 JFTR U7000-B does not appear to prohibit payment of per diem, since the member had departed the Academy and therefore was in a travel status performing active duty away from his permanent duty station.

DECISION

An Air Force officer claims per diem and transportation allowances for temporary duty at the United States Air Force Academy (Academy). Pursuant to Public Law No. 104-316, October 19, 1996, title 31 of the United States Code, Section 3702, which provides for the settlement of claims against the United States, was amended to provide that the Secretary of Defense shall settle claims involving uniformed service members' pay, allowances, travel, transportation, retired pay, and survivor benefits. The Secretary further delegated that authority to this Office.

Background

The member graduated from the Academy on June 2, 1993. He was relieved from his appointment as a cadet and received orders to perform temporary duty (TDY) at Keesler AFB, Mississippi, and then permanent duty at Misawa Air Base, Japan. He departed the Academy and traveled to his TDY station. He completed his TDY in Mississippi on August 19, 1993, and went on leave pending his port call to his permanent duty station.

On September 1, 1993, he was notified by telephone that he was to return to the Academy. He was later informed that he was under investigation. Subsequently, written orders were issued confirming the verbal orders and amending the member's reporting date to Misawa, which at all times remained his new permanent duty station. The member was administratively attached to Headquarters Squadron, United States Air Force Academy. He apparently was authorized per diem, billeting and transportation expenses. His orders were further amended to extend his reporting date from no later than September 11, 1993, to September 30, 1993. Subsequent orders changed his reporting date to October 31, 1993. The third amendment to his orders (apparently dated October 8, 1993) changed his reporting date to February 24, 1994, and rescinded all previous orders and amendments. It stated:

General TDY reporting instructions: Purpose of TDY - Utilization of graduates awaiting training. Pursuant to JTR[sic], vol. I, para U7000-B, officers assigned TDY to USAF Academy are not entitled to per diem. Date: 931001-940225.

As a result, he was removed from billeting and disallowed transportation, pursuant to 1 JFTR para. U7000-B. The member was cleared with regard to the investigation and departed for Misawa Air Base on January 10, 1994.

The member submitted his claim for per diem and transportation expenses for the period from October 1, 1993, through January 9, 1994, totaling \$7,777, which he states does not include all of the expenses which he incurred. He asserts that he was wrongfully denied per diem and transportation, and that U7000-B was erroneously applied to his circumstances.

Discussion

Paragraph U7000-B, provides in pertinent part that upon graduation from a Service academy and commission into a Service, an officer:

. . . when traveling under competent orders to the first permanent duty station (PDS) is entitled to the [permanent change of station] PCS allowances prescribed in Chapter 5 [of the JFTR]. Such allowances are authorized for the distance traveled under the orders, not to exceed the official distance from the member's home or the Service academy, as designated in the orders, to the first PDS via any temporary duty (TDY) station directed en route including the Service academy in cases involving authorized travel from home. When travel to the first PDS involves TDY at the academy from which graduated before reporting to the first PDS, no per diem is payable for such period of TDY.

The language set forth in this paragraph, appears to have been taken from its predecessor, paragraph 5000-4 of the Joint Travel Regulations. The language of that paragraph stems from the Act of June 27, 1944, 58 Stat. 392, which was apparently suggested by the Comptroller General in a letter to the Director, Bureau of the Budget. See B-36417, August 30, 1943, and Lieutenant Colonel H.O. Buzhardt, USMC, B-106241, Nov. 27, 1951. These documents contemplate travel by members of the uniformed services who are ordered to duty stations upon graduation from a Service academy. None of them directly addresses the circumstances presented here, nor are we able to find any intent to apply them under the circumstances in the present case.

In B-121383, Oct. 13, 1954, an officer graduated from the Naval Academy and was assigned TDY for 3 months at the Naval Academy, with orders to then report to Pensacola, Florida. Another officer graduated from the Naval Academy, was assigned 9 weeks of TDY at the Naval Academy and had orders to report to his permanent duty station in Norfolk, Virginia. Paragraph 5000 of the Joint Travel Regulations was then in effect. Both members claimed per diem for the period of TDY at the Naval Academy, which they performed prior to leaving for their permanent duty stations. The Comptroller General held in that case that per diem may be paid to officers only when they are away from their designated posts of duty. No right to per diem could accrue to the officers until they were in a travel status away from the Naval Academy, which was their post of duty. The claims were denied.

The facts presented here are contrary to those in B-121383, supra. Here, the officer was detached from the Academy and had left the Academy in a travel status. He completed his TDY, for which he was apparently entitled to per diem, and remained in a travel status awaiting his port call to Japan. At no time did the orders state that the member's permanent duty station had been changed from Japan; thus, it is our view that he was in a travel status away from his permanent duty station when his orders were amended to include TDY at the Academy.

It is our view that paragraph U7000-B was not intended to apply in these circumstances. The intent of the regulation appears to be to provide newly commissioned Service academy graduates with appropriate transportation and travel expenses for travel from the academy to their first PDS, including any applicable TDY. It appears that the limitation set out provides that if the member has TDY at the academy and remains at the academy prior to leaving for his first permanent duty station, he may not receive per diem, since, in fact, he has not yet performed travel.

The Comptroller General has held that once a member receives orders designating a permanent duty station, any duty he performs away from the permanent station places him in a travel status with entitlement to travel allowances. Lieutenant Bryan K. Latham, USNR, B-244577, May 8, 1992; and 39 Comp. Gen. 507 (1960). He has also held that an academy must be regarded as the designated post of duty of a midshipman (or cadet) for per diem purposes, and the right to per diem could not accrue until he left that place in a travel status. B-121383, supra. We conclude that in the present case, the member left his post of duty (the Academy) with orders designating his first permanent duty station (Misawa Air Base, Japan) and completed his temporary duty prior to returning to his previous post of duty. He was thus in a travel status away from his permanent duty station and entitled to per diem. Paragraph U7000-B would not prohibit payment under these circumstances.

In addition, we note that the Comptroller General has long held that a member's entitlements under travel orders vest when the travel is performed and the travel order may not be amended retroactively so as to increase or decrease entitlements under the orders except to correct an error that is clear on the face of the orders. Senior Airman Darrin L. Converse, USAF, B-270475, June 26, 1996. It is our view that in this case there was not a clear error on the face of the

orders and amendment of the orders was not appropriate.

Conclusion

We find that the member was entitled to per diem during his temporary duty at the service academy and remand the case to the Defense Finance and Accounting Service for direct payment to the member if otherwise payable.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board