

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

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FILE: B-211545**DATE:** November 1, 1983**MATTER OF:** Newly Enlisted Airmen**DIGEST:**

1. Travel per diem authorized for service members under 37 U.S.C. § 404 is payable to a member only "when away from his designated post of duty," so that per diem is not payable to a newly enlisted airman undergoing preliminary training under orders that do not designate the first permanent duty station to which he is to proceed upon the completion of his training assignment, since the training station where he is then located is the only "designated post" that he has.
2. When orders are issued designating the first permanent duty station of a newly enlisted airman who is at a training station taking a preliminary course of instruction, the airman may then be regarded as being "away from his designated post of duty" and in a travel status. However, if Government quarters and dining halls are available to him at the training station, so that he has no actual need to incur additional living expenses while in that travel status, he remains ineligible for per diem under the Joint Travel Regulations. This is consistent with the underlying statutory purpose of per diem, which is solely "to meet the actual and necessary" additional expenses of living during periods of travel.
3. The fundamental purpose of the basic allowance for subsistence authorized

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by 37 U.S.C. § 402 is to defray costs incurred by service members in purchasing food during periods when they are not receiving cost-free meals from the Government. Although 37 U.S.C. § 402(b) was amended in 1981 to provide the allowance for an enlisted member whenever he is "performing travel under orders away from his designated post of duty," the allowance is not payable to newly enlisted airmen while they are in a travel status undergoing preliminary training and are simultaneously receiving meals without charge at available Government dining halls, since in those circumstances payment of the allowance would improperly defeat the purpose of the statute.

4. Under 37 U.S.C. § 402(b) enlisted service members are authorized the basic allowance for subsistence even though Government dining facilities are available to them, "when permission to mess separately is granted." Implementing regulations of the Department of Defense provide that the service Secretaries may grant that permission to any enlisted members "except basic trainers" who are residing with their dependents. The Secretary of the Air Force therefore has discretionary authority to grant airmen undergoing advanced courses of instruction following basic training the permission to reside with their dependents and to take their meals outside of available Government dining halls, and those airmen would be entitled to a subsistence allowance.

This action is in response to a request for a decision whether either a travel per diem allowance or a basic allowance for subsistence is payable to newly enlisted Air Force personnel during periods immediately following their completion of basic training while they are attending courses of advanced instruction in preparation for their first permanent duty assignments.¹

In view of the facts presented and the applicable provisions of the Joint Travel Regulations, we conclude that travel per diem is not payable to these newly enlisted airmen during periods when they are undergoing preliminary training in preparation for their first permanent duty assignments. We further conclude that under the statute authorizing the basic allowance for subsistence, 37 U.S.C. § 402, no subsistence allowance is payable to the airmen during periods when they are furnished meals without charge at their training stations, but that the allowance may be paid to airmen with dependents who are granted permission to take their meals outside of the available Government dining halls at those installations.

Background

Individuals first enlisting in the Air Force are generally required to attend 6 weeks of basic training. They then receive assignments for advanced instruction at several different installations which are under the jurisdiction of the Air Training Command. This advanced training may take up to 5 months, depending upon the nature of the particular course of instruction involved.

Airmen are generally assigned to advanced training in groups under blanket orders that do not name a specific permanent duty station to which they are to proceed when they finish their training assignments. Later they are issued permanent change-of-station orders transferring them

¹The request was made by the Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) who was serving as Chairman, Per Diem, Travel and Transportation Allowance Committee. The Committee assigned the request control number 83-11.

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to designated installations for their first long-term duty assignments. These permanent change-of-station orders are ordinarily issued when an airman has from 30 to 60 days of advanced training remaining. The Air Force has found these assignment procedures to be the most effective means of sending individual airmen to the permanent post of duty, while at the same time giving them sufficient advance notice of their particular permanent duty assignment to allow them to make necessary personal arrangements in preparation for the transfer.

It is indicated that Government quarters and meals are available without cost to the airmen at their training stations. Moreover, they do not have quarters at their future permanent duty stations, and they are not required to incur the additional incidental or miscellaneous living expenses normally associated with a travel assignment away from a permanent post of duty. In the request for a decision in this matter, it is suggested that it may not be reasonable or appropriate, or within the general intent of the law, to pay them travel per diem or a basic allowance for subsistence during these initial training assignments.

However, it is noted that the receipt of permanent change-of-station orders by service members performing temporary training assignments has the effect of placing them in a "travel status." 39 Comp. Gen. 507 (1960). Under this ruling airmen participating in advanced training may be regarded as being in a travel status effective on the date that permanent change-of-station orders are issued to them designating their first permanent duty stations. Due to certain recent amendments to the governing provisions of statutory law, questions have arisen concerning the entitlement of these airmen to a travel per diem allowance or a basic allowance for subsistence while they are in that travel status at their training stations.

Concerning the per diem allowance, subparagraph M4201-12, Volume 1 of the Joint Travel Regulations, generally prohibits payment of per diem to newly enlisted service members undergoing basic training and further preliminary advanced instruction. However, the governing provisions of law were amended effective November 1, 1981, to provide that with certain specified exceptions, "a member

who is performing travel under orders away from his designated post of duty and who is authorized a per diem * * * shall be paid for the meals portion of that per diem in a cash amount at a rate that is not less than the rate established under section 1011(a) of this title for meals sold to members." 37 U.S.C. § 404 as amended by section 121 of Public Law 97-60, approved October 14, 1981, 95 Stat. 999. The submission in effect questions whether subparagraph M4201-12 of the regulations was "rendered inoperative" by this 1981 amendment to the law, and if so whether the Air Force might be required to pay per diem to airmen in the circumstances described who are participating in advanced training from and after the date their first permanent change-of-station orders are issued.

Regarding the basic allowance for subsistence, the governing provisions of law were amended to provide that "An enlisted member is entitled to the allowance * * * while performing travel under orders away from his designated post of duty other than field duty or sea duty." 37 U.S.C. § 402(b) as amended effective September 15, 1981, by section 411 of the Defense Officer Personnel Management Act, Public Law 96-513, approved December 12, 1980, 94 Stat. 2905. The submission observes that the plain wording of this amendment would appear to require the Air Force to pay the basic allowance for subsistence to airmen undergoing initial training if they are in a travel status, notwithstanding that they are being furnished meals in a Government dining hall. Therefore the question arises whether 37 U.S.C. § 402(b) requires the Air Force to pay a basic allowance for subsistence to airmen participating in advanced training from and after the date their first permanent change-of-station orders are issued.

In addition, we are aware that some of the airmen who participate in advanced instruction following basic training each year have dependents. Thus, a further question is raised concerning these airmen if their dependents are residing in the vicinity of the training station during the course of advanced instruction. The question is whether the Secretary of the Air Force may properly by regulation grant the airmen permission to take their meals outside of the available Government dining halls at their training stations so that they may be paid the basic allowance for subsistence, regardless of the date permanent change-of-station orders are issued to them.

Per Diem Allowance

Under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances "when away from his designated post of duty" under orders. 37 U.S.C. § 404(a). Subsection 404(b) further provides that:

"(b)(1) The Secretaries concerned may prescribe--

"(A) the conditions under which travel and transportation allowances are authorized, including advance payments thereof; and

"(B) the allowances for the kinds of travel, but not more than the amounts authorized in this section.

"(2) In prescribing such conditions and allowances, the Secretaries concerned shall provide that a member who is performing travel under orders and who is authorized a per diem under clause (2) of subsection (d) of this section shall be paid for the meals portion of that per diem in a cash amount that is not less than the rate established under section 1011(a) of this title for meals sold to members. * * *" (Emphasis added.)

The travel per diem allowance referred to under clause (2) of subsection 404(d) is there defined to be "a per diem in place of subsistence in an amount sufficient to meet actual and necessary expenses," subject to prescribed maximum limitations.

Implementing statutory regulations published by the service Secretaries are contained in Volume 1 of the Joint Travel Regulations (1 JTR). Under those regulations no per diem allowance is payable for periods of temporary duty performed by service members ordered to active duty under orders that do not designate a specific permanent station to which they are to proceed upon the completion of the temporary duty. This prohibition does not

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preclude payment of a per diem allowance from the date a member receives new orders naming a permanent station to which he is to proceed following the temporary duty assignment. 1 JTR, subparagraph M4201-13.

That regulation is founded upon the limitation contained in 37 U.S.C. § 404(a) that eligibility for travel allowances does not accrue unless a service member is "away from his designated post of duty." Our Office and the courts have held that this statutory limitation precludes payment of per diem to service members on temporary training assignments if their only designated post of duty is the training station where they are then located.² We have also held that if a service member in that situation receives orders naming another post of duty as the place he is to go for permanent duty upon the completion of the temporary assignment, then he may be regarded as being in a travel status "away from his designated post of duty," and he may then be allowed per diem if so authorized under the regulatory conditions prescribed by the service Secretaries.³

Concerning the per diem authorized for newly enlisted personnel who are undergoing initial training with orders designating their first permanent duty assignment, subparagraph M4201-12, 1 JTR, directs that:

"12. UNDERGOING PROCESSING, ETC. * * * no per diem allowance is payable for any period a newly inducted or a newly enlisted member

²See Califano v. United States, 145 Ct. Cl. 245 (1959); 38 Comp. Gen. 849 (1959); 39 Comp. Gen. 511 (1960); 43 Comp. Gen. 203 (1963); 53 Comp. Gen. 740 (1974); and Matter of Trotman, B-202822, May 21, 1981.

³See 39 Comp. Gen. 507 (1960), cited above. Compare also 44 Comp. Gen. 621 (1965); and Matter of Zinke, B-202319, May 4, 1981.

is undergoing processing, indoctrination, basic training (including follow-on technical training and/or home station training for members of the reserve components), or instruction at a place where both Government mess and Government quarters (other than temporary lodging facilities) are available prior to reporting to the first permanent station. (See subpar. 13 when a first permanent station is not specified in a member's orders.) * * *."

Thus, by this provision of the regulations the service Secretaries have generally authorized no per diem for newly enlisted personnel during periods when Government quarters and dining facilities are available to them while they are undergoing preliminary training in preparation for their first permanent duty assignments. This rule is applicable notwithstanding that the enlistees may be considered to be in a travel status after permanent change-of-station orders are issued to them at their training stations. This provision gives recognition to the general underlying statutory purpose of the per diem allowance, which is to meet the actual and necessary additional living expenses personally incurred by service members for hotel or other room rentals, meals purchased at restaurants, and other incidental expenses when they are performing official business on temporary assignments away from their permanent posts of duty. The allowance is not designed as a mere gratuity payable to members simply on the basis that they are in a travel status or are performing an assignment regarded as temporary.⁴ New enlistees undergoing preliminary training at places where Government quarters and dining halls are available, prior to reporting to their first permanent duty stations, do not actually need to incur the additional costs of living normally encountered by service members away from

⁴See Ronka v. United States, 127 Ct. Cl. 180 (1954); Bornhoft v. United States, 137 Ct. Cl. 134 (1956); 35 Comp. Gen. 555 (1956); 37 Comp. Gen. 126, 127-128 (1957); and B-174464, February 28, 1972.

their designated posts of duty on official business, and the service Secretaries have prohibited payment of per diem to the enlistees under subparagraph M4201-12, 1 JTR. We do not find this regulatory prohibition inconsistent with the governing provisions of 37 U.S.C. § 404(d)(2) which directs that the purpose of per diem is to meet the actual and necessary subsistence expenses of travel.

As the submission notes, 37 U.S.C. § 404 was amended in 1981 to add subsection 404(b)(2), quoted above. Our view is that the new subsection does not limit the authority of the service Secretaries to prescribe by regulation the conditions under which travel and transportation allowances, including per diem, may be paid. Rather, subsection 404(b)(2) establishes a minimum rate for the meals portion of the per diem allowance for a member "who is authorized a per diem." Our view is that the subsection does not require payment of the meals portion of a per diem allowance at any rate to members who are subsisted in kind and who are authorized no per diem whatever by the service Secretaries. Hence, we conclude that subparagraph M4201-12, 1 JTR, was not rendered invalid or inoperative by the statutory amendment in question.

When a newly enlisted airman arrives at a training station under orders that do not designate his first permanent duty station, he is precluded by 37 U.S.C. § 404(a) and subparagraph M4201-13, 1 JTR, from receiving a travel per diem allowance, since he is not in a travel status "away from his designated post of duty." At that point the training station where he is located is the only designated post that he has. On the date that he is later issued orders naming his first permanent duty station, he may then be regarded as being in a travel status "away from his designated post of duty." However, if Government quarters and dining facilities are available to him at the training station, so that he has no necessity of incurring additional living expenses during the period he is in that travel status, he remains ineligible for per diem under subparagraph M4201-12, 1 JTR. Hence, in the circumstances presented, we conclude that newly enlisted airmen are not entitled to per diem while they are at their training stations even though they may have been issued orders designating their first permanent duty stations.

Basic Allowance for Subsistence

1. Payment based on "travel status"

Subsection 402(b) of title 37, United States Code, provides that:

"(b) An enlisted member is entitled to the basic allowance for subsistence, on a daily basis, of one of the following types--

"(1) when rations in kind are not available;

"(2) when permission to mess separately is granted; and

"(3) when assigned to duty under emergency conditions where no messing facilities of the United States are available.

"* * * An enlisted member is entitled to the allowance while on an authorized leave of absence, while confined in a hospital, or while performing travel under orders away from his designated post of duty other than field duty or sea duty. * * *" (Emphasis added.)

The emphasized words were added to the statute in 1981 through its amendment by the Defense Officer Personnel Management Act. The amendment was designed to authorize payment of the subsistence allowance on an equitable basis to both officer and enlisted personnel alike when they are in a travel status. See H.R. Rep. No. 1462, 96th Cong., 2d Sess. 45-46, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6333, 6376. Under 37 U.S.C. § 402(c) officers are entitled to the subsistence allowance "at all times," including periods when they are in a travel status.

Implementing regulations are contained in chapter 1 of part 3, Department of Defense Military Pay and Allowances Entitlements Manual. Those regulations require that when officer and enlisted personnel alike are in a travel status

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and are drawing a basic allowance for subsistence, then they must pay for any meals they receive from Government dining facilities. See Table 3-1-1 (Rule 5, Note 2) and Table 3-1-5 (Rule 1, Note 3), Pay and Allowances Manual.

The fundamental purpose of the basic allowance for subsistence is to defray the costs incurred by service members in purchasing food from grocery stores, etc., during periods when they are not receiving cost-free meals from the Government. Military and naval officers are authorized the allowance "at all times" under 37 U.S.C. § 402(c) because normally they are required to pay for all of their own food, including meals they may receive in Government dining facilities. However, in some circumstances, officers are furnished meals without charge on a regular basis by or on behalf of the Government and it has long and consistently been held that at those times the monetary subsistence allowance is not payable to them, despite the plain wording of the statute that they are to be paid the allowance at "all" times, since otherwise the fundamental purpose of the statute would be defeated.⁵ In effect the nonpayment of the subsistence allowance is a charge for the meals they received at Government expense.

Although 37 U.S.C. § 402(b) now provides that an enlisted member is entitled to the basic allowance for subsistence whenever he is "performing travel under orders away from his designated post of duty other than field duty or sea duty," our view is that the fundamental purpose of the statute would likewise be defeated if enlisted personnel in a travel status were to draw the allowance for periods when they are simultaneously being furnished meals without charge on a regular basis in a Government dining hall. Compare Morriss v. United States and 30 Comp. Gen. 246, cited above. Hence, it is our further view that enlisted personnel who are in a travel status and who concurrently receive their meals in a Government dining hall may not be

⁵See Morriss v. United States, 134 Ct. Cl. 720 (1956); 30 Comp. Gen. 246 (1950); 40 Comp. Gen. 169, 173 (1960); 43 Comp. Gen. 94 (1963); and Matter of Gilmore, B-188256, March 10, 1977. See also Table 3-1-1 (Rules 7, 9 and 13), Pay and Allowances Manual.

credited with the basic allowance for subsistence under 37 U.S.C. § 402(b) unless they pay corresponding amounts for those meals either by cash or by debit to their accounts. The rules in Table 3-1-5, Pay and Allowances Manual, requiring that enlisted members pay for meals received in a Government dining hall, if while in a travel status they are being credited with the subsistence allowance, are consistent with our views on the matter.

Moreover, restrictions on expenditures of appropriated funds in effect for fiscal year 1983 include the following:

"* * * [I]f an enlisted member is in a travel status and is not entitled to receive a per diem in lieu of subsistence because the member is furnished meals in a Government mess, funds available to pay the basic allowance for subsistence to such a member shall not be used to pay that allowance, or pro rata portion of that allowance, for each day, or portion of a day, that such enlisted member is furnished meals in a Government mess." Section 767, Public Law 97-377, approved December 21, 1982, 96 Stat. 1861-1862.

Thus, there is a specific prohibition on payment of the subsistence allowance to enlisted members in a travel status who are being subsisted in kind and who are not entitled to per diem for that reason.

We therefore conclude that the newly enlisted airmen here in question are not entitled to the basic allowance for subsistence while they are at their training stations, even though they may be in a travel status at those stations after orders are issued designating their first permanent posts of duty, if they are then being furnished meals without charge at the Air Force dining halls available to them there.

2. Payment based on "permission to mess separately"

Under 37 U.S.C. § 402(b), quoted above, enlisted personnel of the uniformed services are authorized the basic allowance for subsistence even though Government dining facilities are available to them, "when permission to mess

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separately is granted." Implementing directives of the Department of Defense contained in paragraph 30114, Pay and Allowances Manual, stipulate that separate service regulations may provide the authorization for any enlisted members "except basic trainees" who are residing with their dependents. Supplemental directives published by the Secretary of the Air Force state that, "* * * airmen grades [E-1] and above (except basic trainees) residing with their spouse/family member at member's permanent duty station are automatically authorized to ration separately * * *." Subparagraph 41-2.a., Volume I of Air Force Manual (AFM) 177-373 (change 4, dated July 15, 1983).

An airman at a training station taking an advanced course of instruction of temporary duration prior to traveling to his first permanent duty station obviously does not qualify for the automatic authorization to ration separately now provided by subparagraph 41-2.a., AFM 177-373, for airmen residing with their families at their "permanent duty station." Moreover, we understand that airmen participating in advanced training courses are currently required to use available Government dining halls even though their families may be residing in the vicinity of their training stations, as the result of a policy determination made by the Secretary of the Air Force concerning the trainees that "unit messing is essential to the accomplishment of * * * training and readiness." Thus, none of the airmen in question are now being paid the subsistence allowance on the basis of a grant of "permission to mess separately" under 37 U.S.C. § 402(b).

Nevertheless, we have been informally advised that a revision of the current policy is under consideration by the concerned Air Force command authorities, and it may be determined that the administration of advanced instruction programs after basic training for newly enlisted airmen would be improved if airmen with dependents were granted permission in appropriate circumstances to reside and dine with their families. We would have no objection to the amendment of AFM 177-373 by the Secretary of the Air Force to permit payment of the basic allowance for subsistence to those airmen if this proposed policy revision were adopted, since the governing provisions of 37 U.S.C. § 402 and the Pay and Allowances Manual clearly give the Secretary discretionary authority to do that.

Moreover, our view is that payment of the subsistence allowance on that basis could be made without regard to whether an airman was in a "travel status" after the issuance of orders designating his first permanent duty station. An airman in that situation would remain ineligible for travel per diem under subparagraph M4201-12, 1 JTR, since Government quarters and dining facilities would remain "available" to him at his training station even though he might elect to reside and dine elsewhere under a grant of permission to do so. However, payment of the subsistence allowance could continue without alteration in that situation under the above-quoted provisions of 37 U.S.C. § 402 and Public Law 97-377, so long as the airman continued to have permission to reside and dine with his dependents and was not actually furnished meals without charge at the available Government dining halls.

Summary

Newly enlisted airmen undergoing preliminary instruction at training stations where Government quarters and dining facilities are available are not required to incur the additional living costs normally associated with travel away from a permanent post of duty, and payment of travel per diem to them is prohibited by subparagraphs M4201-12 and M4201-13, 1 JTR, even though they may be in a "travel status" after the issuance of orders designating their first permanent duty stations. Moreover, under 37 U.S.C. § 402(b) they may not be credited with a basic allowance for subsistence while they are in that "travel status" if they are furnished meals without charge at an available Government dining hall. However, the Secretary of the Air Force has discretionary authority under 37 U.S.C. § 402(b) and paragraph 30114, Pay and Allowances Manual, to grant airmen who have dependents permission to reside with their families and to take their meals outside of available Government dining facilities at any time after their completion of basic training, and if an airman were to apply for and receive that permission he would be entitled to the basic allowance for subsistence.

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The questions presented are answered accordingly.

for *Milton J. Aroslan*
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