

DECISION



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

FILE: B-184704

DATE: NOV 28 1975

MATTER OF: Lieutenant Commander , USCGR

DIGEST:

Coast Guard Reserve officer residing in Bellevue, Washington, ordered to Washington, D.C., on special active duty for training for 120 days whose orders were contingent upon waiver of per diem, is held to have voluntarily waived per diem as permitted by regulations. Later amendment of original travel orders after duty performance was begun, to authorize per diem for first 30 days, and issuance of second set of orders intending no per diem for remaining 90 days may be given prospective effect only, beginning with the date the member had knowledge of the new orders.

This action is in response to a communication dated July 1, 1975, from Lieutenant Commander , USCGR, in effect appealing the disallowance by our Transportation and Claims Division of his claim for per diem allowances for the period of March 25 to July 19, 1974, during which he was on special active duty for training at Headquarters, United States Coast Guard, Washington, D.C.

Orders dated March 13, 1974, from the Commander, Thirteenth Coast Guard District, Seattle, Washington, to Lieutenant Commander , USCGR, at his home in Bellevue, Washington, directed him to report not later than March 25, 1974, for special active duty for training for not to exceed 120 days at Coast Guard Headquarters, Washington, D.C. Those orders included a clear statement that "acceptance of these orders is subject to waiver of per diem entitlement."

The record indicates that those orders were the result of a background search by the Coast Guard, for a Reserve Officer with Commander qualifications who would accept such duty. Discussions apparently were held between Commander and Coast Guard officials long prior to the issuance of the orders. The record indicates that Commander stated that he needed orders for duty in excess of 90 days to insure his civilian employment security and that he agreed by telephone to the 120 days' active duty. In this regard the record includes a copy of a Request for Active Duty for training form dated January 21, 1974, which was signed by

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Commander and which stated that acceptance of the requested orders would be "contingent on employer granting leave of absence."

Apparently based on that request for orders, an augmentation order dated March 11, 1974, from the Commandant of the Coast Guard to the Commander of the Thirteenth Coast Guard District was sent authorizing the issuance of the March 13, 1974 orders. That augmentation order specifically stated that such orders were "contingent upon waiver of per diem." Based on the augmentation order, the March 13, 1974 orders were issued. Commander accepted the March 13 orders and reported to Coast Guard Headquarters in Washington on March 24, 1974. Those orders bear Commander signature dated March 25, 1974.

The record indicates that subsequent to reporting for duty at Coast Guard Headquarters, Commander became dissatisfied with his waiver of per diem and his sponsoring division requested that his orders be amended to provide that his first 30 days of duty be with per diem followed by the remaining 90 days of duty without per diem. In accordance with that request the record shows that by message dated April 19, 1974, from the Commander, Thirteenth Coast Guard District, to Commander his special active duty for training orders of March 13, 1974, were amended to provide for such duty of "30 days vice 120 days" and per diem was authorized for the 30 days. The amendment specified that all other provisions of the orders remained unchanged. In addition, the Commander, Thirteenth Coast Guard District, issued a second order, dated April 19, 1974, directed to Commander at his local Washington, D. C., address providing for the remaining 90 days special active duty for training. That order made no mention of per diem.

The record indicates that Commander served at Coast Guard Headquarters from March 24 to July 19, 1974, during which Government quarters and mess were not available. Commander was apparently paid full pay and allowances for this period and his travel to and from Washington, D. C., was at Government expense. However, he was not paid per diem for any of this period.

Commander submitted claims to the Coast Guard for full per diem at \$25 for the period of March 25 to April 23, 1974, and residual per diem at \$6 for the period of April 23 to July 19, 1974. Those claims were transmitted by the Coast Guard to our Transportation and Claims Division for settlement since they involve retroactive modification of orders and are, therefore, of doubtful validity.

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By settlement dated June 25, 1975, the Transportation and Claims Division disallowed Commander's claims in full because it found that the waiver of per diem in the orders of March 13, 1974, was in accordance with the intent of the order-issuing authority and, therefore, the later orders could not be given the effect of retroactively modifying or revoking those orders so as to increase Commander's rights.

In his appeal Commander states that he was advised that payment of per diem is a legal obligation which may not be rejected.

The statutory authority under which Commander's entitlement to per diem in these circumstances must lie is 37 U. S. C. 404 (1970) which authorizes payment of travel and transportation allowances (including per diem) under regulations prescribed by the Secretaries concerned which regulations may prescribe the conditions under which such allowances are authorized and the allowances for the kinds of travel. The regulations issued pursuant to that authority are found in Volume 1 of the Joint Travel Regulations (1 JTR), paragraph M4205-7 (change 252, February 1, 1974) of which provides as follows:

"REDUCED RATES FOR PER DIEM. The Secretary of the department concerned may authorize no per diem or rates of per diem in lesser amounts than those indicated in this Part when circumstances of the travel or duty to be performed so warrant and are peculiar to that particular department. This authority may be delegated to a chief of an appropriate bureau or staff agency of the headquarters of the department concerned or to a commander of an appropriate naval systems command headquarters, but may not be redelegated. In the absence of such authorization, travel orders prescribing rates of per diem differing from those appearing in this Part will be without effect and the per diem allowances prescribed in this Part will be paid."
(Emphasis added.)

The Commandant of the Coast Guard has been delegated the authority under that paragraph to issue orders providing for no per diem, such as the orders dated March 31, 1974, issued to Commander. In this regard Article I-C-1 of Coast Guard Reserve Training Manual provides for waiver of per diem in certain cases during active duty for training provided that voluntary waiver of per diem as a condition of acceptance is indicated on the active duty for training orders, as was done on Commander's orders.

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We also note that in a memorandum dated March 12, 1974, from the Chief, Marine Safety Technology Division, concerning the request for special active duty for Commander [redacted] the estimated costs for such active duty are shown as including salary, allowances, and travel but for per diem such expenses are stated as "none."

The administrative report includes a memorandum dated April 24, 1975, from the Chief, Reserve Training Division, to the Chief, Pay and Allowances Division, concerning the circumstances of Commander [redacted] special active duty for training. That memorandum states that the March 13, 1974 orders intended that Commander [redacted] waive per diem in return for assignment to Headquarters. It also indicates that the orders for 120 days active duty were issued at his request because he desired long-term orders to satisfy his employer and the "30+" system whereby a member would be called to active duty for a 30-day trial period with per diem followed by "local orders" without per diem, was not satisfactory to him. However, the memorandum indicates that when he became dissatisfied with his waiver of per diem, the amendment to his orders and the local orders were issued to bring his orders into line with the current special active duty for training practice at Headquarters (30+ system). That is, that he would serve the first 30 days with per diem followed by 90 days without per diem.

As was indicated in the Transportation and Claims Division settlement, it has long been held by this Office that in the case of members claiming per diem for temporary duty, the rights of the member and the Government become fixed under the applicable orders and regulations in effect at the time such duty is performed. Travel orders may not be modified retroactively so as to increase or decrease the rights which have become fixed under the applicable statutes and regulations unless an error is apparent on the face of the order and all of the facts and circumstances clearly demonstrate that some provision previously determined and definitely intended has been omitted through error or inadvertence. See 48 Comp. Gen. 119/122 (1968), 47 Comp. Gen. 127/130 (1967), and 24 Comp. Gen. 439 (1944).

In this case it is clear that the waiver of per diem included in the March 13, 1974 orders was not erroneous and was definitely intended by the order-issuing authority, and was voluntarily accepted by Commander [redacted]. Thus, we may not give retroactive effect to the April 19, 1974 amendment to those orders; however, we may give that amendment prospective effect. Therefore, in accordance with

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the purpose of the amendment to the March 13 orders and the orders of April 19, 1974, as expressed in the Chief, Reserve Training memorandum, supra, we will consider those orders as, in effect, one set of orders covering the 120-day period. Compare 48 Comp. Gen. 655 (1969). Since those orders may not be given retroactive effect, we consider them as authorizing full per diem only from April 19, 1974, their effective date and the date it appears Commander first had knowledge of them (43 Comp. Gen. 833 (1964)), through April 24, 1974, the end of the first 30 days of active duty. For the remaining period, April 25 through July 19, 1974, it is clear no per diem was intended nor authorized.

Accordingly, Commander claim for per diem may be allowed for the period of April 19 through 24, 1974; however, the disallowance of the remainder of his claim is sustained. He will receive payment on the above basis in due course.

Paul G. Dembling

Acting Comptroller General
of the United States