

DECISION

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

FILE: B-190014

DATE: August 30, 1978

MATTER OF: Long Beach Naval Shipyard - Per Diem Allowances for Extended Periods of Training

DIGEST: Seventeen civilian employees received per diem at the higher rate in effect prior to August 1, 1976, during various dates between August 1, 1976, and July 1977. Change in JTR, effective August 1, 1976, reduced per diem to 55 percent for extended training. No basis exists for allowing the higher per diem for the training performed on or after effective date of lower rate. However, since the overpayments resulted from administrative failures in implementing the regulatory change in the per diem rate, the rate reduction was so substantial and employees acted in good faith, equities warrant reporting claims to Congress under Meritorious Claims Act, 31 U. S. C. § 236.

This decision is rendered with respect to 17 employees at the Long Beach Naval Shipyard (LBNS), Department of the Navy, Long Beach, California, who, while attending training schools for periods in excess of 120 days commencing at various dates during the period July 1976 to January 1977, were paid per diem allowances in excess of that authorized by the Joint Travel Regulations (JTR). The Office of the Comptroller, LBNS, undertook to collect the overpayments of per diem from the employees. The basis for the proposed collection action was that the per diem rate authorized for civilian employees by the JTR, Volume 2, was changed to a reduced rate of 55 percent for extended training of 120 days or more, effective August 1, 1976.

In view of the number of Shipyard employees affected and the relatively large indebtednesses subject to deduction from the pay of the employees, the Comptroller of the Shipyard agreed to withhold any and all collection actions until this Office had rendered a decision on this matter.

On each of the travel orders, the block opposite the statement, "Per diem authorized in accordance with JTR" was checked. No dollar amount was stated but the Shipyard and the employees both understood that the amount was the maximum authorized rate.

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On June 21, 1976, prior to the travel involved here, the Per Diem, Travel, and Transportation Allowance Committee, the body authorized by the Secretary of Defense to issue and change the JTR, issued a telegraphic message entitled "Reduced Per Diem Rates for Long-Term Training." The message stated that the JTR is revised, effective August 1, 1976. It stated that, for training programs of 120 or more calendar days at one location, the new per diem rate would be 55 percent of the maximum rate authorized for regular areas or high-cost areas, as applicable.

The message was not received at the Long Beach Naval Shipyard. We have been informally advised by officials of the Office of Civilian Personnel, Headquarters, Department of the Navy, that the distribution code used for dissemination of the telegraphic message of June 21, 1976, did not include the Long Beach Naval Shipyard. Navy officials also advised that, during the period under consideration, problems were encountered in disseminating written materials to Navy civilian components located at military installations. A new distribution code is now being utilized to transmit documents to Navy civilian personnel offices.

On October 1, 1976, Change 132 to JTR, Volume 2, was issued by the Per Diem, Travel, and Transportation Allowance Committee for the information and guidance of all Defense Department civilian personnel. The change was received by the Long Beach Naval Shipyard on October 15, 1976. Paragraph C4552-2i of Change 132 provided for a reduced per diem rate for long-term training programs of 55 percent of the maximum allowable per diem rate or 55 percent of the actual expense maximum, as applicable, for all locations within the continental United States, including designated high-cost areas. The effect of the change was to reduce regular per diem rates from \$35 or \$33, to approximately \$20. The reduced rate was specified to be effective August 1, 1976, consistent with advance notice dated June 21. In the Brief of Revision which accompanied the change, it was stated:

"Par. C4552-2i. Provides a reduced per diem rate for long-term training courses of 55 % of the applicable per diem or actual expense maximum when the course is in a high cost area."

Upon receipt of the formal change to the JTR on October 15, 1976, the civilian personnel officials at Long Beach have advised this Office

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that as to paragraph C4552-21, they reviewed only the Brief of Revision and did not read the regulatory change itself. They erroneously interpreted the Brief to apply only to high-cost areas and thus believed that the reduction in rates applied solely to long-term training in high-cost areas. They further advised that their erroneous interpretation was not discovered until February 1977 when two naval shipyard employees, one from Charleston and one from Long Beach, learned that the Long Beach employee was being paid per diem at the maximum allowable rate of \$35 or \$33 per day while the employee from Charleston was being paid per diem at the reduced rate of approximately \$20 per day. On February 14, 1977, a clarifying memorandum concerning the reduced per diem rate for long-term training was distributed to employees of the Long Beach Shipyard and stated as follows:

"Long-term programs are considered to be any continuous full-time training or research and study programs of 120 or more calendar days at one location conducted at a government or non-government college or university, or other academic institution or training facility.

"Prior to receipt of reference (a) [referring to change 132] 15 October 1976, per diem rates were based on the current rate known to be in effect at that time, i. e. \$33.00, \$35.00 or actual expense which is determined by the location. By reference (a), which was effective 1 August 1976, per diem rates were reduced and are calculated on 55% of the maximum amount prescribed rounded to the next higher dollar, i. e. per diem rate normally set at \$35.00 would thus become \$20.00, etc.

"Since long-term training will be calculated on 55% of the maximum rate prescribed, it is requested that the above information be given wide dissemination."

In a memorandum dated February 16, 1977, from the Commander of the Shipyard to our Claims Division via the Navy Accounting and Finance Center, it was stated, in pertinent part, as follows:

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"2. Two Shipyard employees departed on training in excess of 120 days 6 July 1976 to Great Lakes, Illinois and San Diego, CA; two Shipyard employees departed 16 August 1976 to Great Lakes, Illinois; one employee departed 20 September 1976 and will return 22 February 1977; one employee departed 15 July 1976 to Washington, D. C. (actual expense area) and returned 13 November 1976. All of the above employees were advanced per diem based on the current rate known to be in effect at that time, \$33.00 or \$35.00 (\$42.00/\$50.00 actual expense) vice \$20.00 (\$24.00/\$28.00 actual expense).

"3. According to the individual travel claims submitted, employees receiving training at Great Lakes, San Diego and Washington, D. C. received partial payments issued at those activities based on cost plus lodging not to exceed the maximum per diem rate and actual expense. Apparently, those activities were unaware of reference (a) or interpreted the change in the same manner as this Command.

"4. To compute the travelers' per diem based on the \$20.00 or actual cost rate required by reference (a) will result in each individual traveler having to pay back from \$1,254.00 to \$2,018.00. Overpayment for the five employees who have returned is \$7,167.00; estimated cost for the employee returning on 22 February 1977 is \$1,980.00. It is felt that this would be unjust in that the overpayment was made through an administrative oversight in interpreting the 'Brief of Revisions' and not through any fault of the employees."

The record shows that the Shipyard Commander requested authority to waive the requirements of Change 132 on overpayments made to those travelers whose travel claims had already been finalized and to an individual traveler who was to return to the Shipyard on February 22, 1977. The request was denied by the Navy Department's Director of Civilian Personnel on the grounds that Comptroller General decisions precluded relief based on the failure to receive timely notice of the change and that the statute authorizing waiver specifically excludes travel allowances.

Shipyard officials stated that the 17 employees were assigned temporary duty training at the following locations: Great Lakes - 8; San Diego - 5; Maryland - 3; and Washington, D. C. - 1. The employees were dispatched in the following chronological order with the corresponding indebtedness owed by each:

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<u>July 1976 - (3)</u>	<u>Indebtedness</u>
Herold, Rodney L.	\$2,018.25
Christiansen, Albert L.	1,254.50
Goodrich, Edward E.	101.41
 <u>August 1976 - (2)</u>	
Butler, Kenneth E.	\$1,808.25
Reynard, Allen H.	1,510.50
 <u>September 1976 - (1)</u>	
Fish, Donald D.	\$1,182.00
 <u>January 1977 - (11)</u>	
Robertson, Steve A.	\$2,302.01
Alton, David W.	1,890.52
Larson, George J.	1,653.39
Dow, William R.	1,626.11
Holly, Daniel L.	1,475.07
Jelinski, Donald E.	1,412.13
Kocher, Leland	797.37
Gonsalves, Carl R.	712.07
McGuire, George E.	617.25
Tonkin, Herbert E.	435.45
Nickell, Virgil L.	194.03

Both the Commander of the Shipyard and the Representative of the Federal Employees Metal Trades Council request that the overpayments made to the affected employees be waived under the provisions of 5 U.S.C. § 5584 (1970). While section 5584 authorizes the waiver of claims of the United States against a person arising out of an erroneous payment of pay or allowances, the waiver of travel and transportation expenses and allowances is specifically excluded. Since per diem is a travel allowance, erroneous overpayments thereof may not be considered for waiver under section 5584.

We have held that amendatory regulations changing per diem rates have the force and effect of law and are applicable from the stated effective date and that the rule is applicable not only to cases where the individual employee has not received notice of

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the increase or decrease in rate, but also to cases in which the installation responsible for the employee's temporary duty assignment is not on actual notice of the amendment. B-183633, June 10, 1975; and B-173927, October 27, 1971.

In B-182324, July 31, 1975, a case similar to the case at bar, the travel order was issued on May 22, 1973, for approximately 298 days temporary duty at the Air War College, and authorized per diem in accordance with the JTR. Thereafter, on August 9, 1973, the Per Diem, Travel, and Transportation Allowance Committee reduced the per diem from \$25 to \$14 for employees attending training courses at schools, colleges, and universities (including military schools) for periods of 45 days or more effective September 1, 1973. The formal "Change" in the JTR was issued November 1, 1973. The employee was paid at the \$25 per diem rate until October 31, 1973, when it was discovered that under the amended regulation he should only have received the reduced \$14 per diem from September 1, 1973. His orders were amended on November 13, 1973, to reflect the requirements of the JTR change and recoupment of the overpayment was made by his agency. We held that there was no authority to pay a rate in excess of \$14 subsequent to September 1, 1973. We concluded that Joint Determination of August 9, 1973, accomplished the change in the JTR, effective September 1, 1973, consistent with the procedure authorized in 33 Comp. Gen. 505 (1954). See also B-177417, February 12, 1973, and Bruce Adams, 56 Comp. Gen. 425 (B-186770, March 18, 1977).

In the instant case we must determine the effective date of the amendment to the JTR covering per diem for long-term training. The travel orders issued to the employees authorized "per diem * * * in accordance with JTR" and covered travel between July 1976 and July 1977. By message dated June 21, 1976, the Per Diem, Travel, and Transportation Allowance Committee revised the JTR effective August 1, 1976, to provide "Reduced Per Diem Rates for Long-Term Training." The formal "Change" in the JTR was issued October 1, 1976, and shows an effective date of August 1, 1976, as set forth in the advance notice of June 21, 1976. The advance notice accomplished the revision of the JTR consistent with rule of 33 Comp. Gen. 505. Such notice is deemed to give actual or constructive notice to persons whose rights might be affected favorably or adversely. See B-182324, *supra*. Therefore, there is no basis for payment of per diem at the higher rate for long-term training on or after August 1, 1976.

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However, we feel the equities in the instant case, particularly the substantial reduction in the subsistence rate are such as to warrant our reporting this matter to the Congress pursuant to the Meritorious Claims Act of April 10, 1928, 31 U.S.C. § 236 (1970).

Accordingly, we are forwarding a report to the Congress requesting consideration of the overpayments as Meritorious Claims and advising the Long Beach Naval Shipyard that no further collection action need be taken during the next session of the Congress.

Deputy

R. F. Kottler
Comptroller General
of the United States