

17486 *Surity* PLM

DECISION



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

FILE: B-201588

DATE: March 25, 1981

MATTER OF: [Per Diem Allowances ^{for} Temporary Duty] at Andros Island, Bahamas

- DIGEST:**
1. Responsible Navy activity issued directive which established a specific per diem allowance rate for employees performing temporary duty at Navy Installation on Andros Island, Bahamas. Since directive was properly issued pursuant to 2 JTR para. 8101-3F, notation on an employee's official travel order which purports to authorize payment of per diem at a higher rate than is specified by the applicable administrative directive is invalid and cannot create a legal entitlement to additional per diem beyond the amount authorized by that directive.
 2. Persons receiving money erroneously paid by a Government agency or official acquire no right to the money and are legally obligated to make restitution; therefore, Navy employees who were paid excessive per diem allowances through administrative error or inadvertence incident to temporary duty assignments they performed at a Naval installation on Andros Island, Bahamas, are liable to refund the excess amounts they received, and collection action for the recovery of the erroneous travel allowance overpayments may not lawfully be waived. 5 U.S.C. 5584.

This action is in response to a letter dated December 12, 1980 (file reference PSD:NETC:MM:bgk 7220), with enclosures, from the Disbursing Officer of the Personnel Support Detachment, Naval Education and Training Center, Newport, Rhode Island, requesting an advance decision concerning the propriety of making payment on several thousand claims for additional travel allowances submitted by civilian employees of the Navy Department who performed temporary duty at a Navy installation in the Bahamas at various times after December 1, 1974. [The

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employees recently learned that their travel orders may have authorized per diem allowances at a higher rate than amounts previously paid to them in accordance with Naval administrative instructions, and they are claiming the difference.)

We have concluded that the employees may not be paid the additional per diem claimed, since travel orders are invalid to the extent that they purport to authorize payment of travel allowances in excess of the rates specified by properly issued administrative directives.

The employees affected in this matter performed temporary duty assignments at various times after December 1, 1974, at the Navy's Atlantic Undersea Test and Evaluation Center located on Andros Island, Bahamas. It is indicated that until recently commercial lodgings and restaurants were not available in the immediate vicinity of that installation, and the employees were furnished Government procured quarters and meals at nominal personal expense at the installation. The Navy activity that has primary jurisdiction over the Andros Island installation is the Naval Underwater Systems Center, Newport, Rhode Island. On November 27, 1974, the Commanding Officer of that activity issued NUSC Instruction 4600.2, establishing a daily per diem rate of \$10 effective December 1, 1974, for employees performing temporary duty at the Andros Island installation. That per diem rate was based on the daily charges for quarters and meals furnished to the employees at the installation.)

It is further indicated that the travel order forms of employees who performed temporary duty at the Andros Island installation after December 1, 1974, contained the following notation: "PER DIEM AUTHORIZED IN ACCORDANCE WITH JTR." The general per diem rate prescribed by Volume 2 of the Department of Defense Joint Travel Regulations (JTR) after December 1, 1974, for temporary duty at Andros Island, Bahamas, was much higher than the special rate prescribed by NUSC Instruction 4600.2 for the Navy's undersea testing installation on the island. The higher general rate

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authorized by the JTR was based on the higher costs of commercial lodgings and meals on the island, with seasonal adjustments to take peak wintertime resort prices into account. In claiming the additional travel allowances here in question, the employees suggest that they should have been paid per diem at the general JTR rate in accordance with the notation contained in their official travel orders, rather than the per diem they received at the lower rate specified by NUSC Instruction 4600.2.

In requesting an advance decision in this matter, the Disbursing Officer first questions whether the Commanding Officer of the Naval Underwater Systems Center acted within his lawful authority when he issued NUSC Instruction 4600.2 to limit the rate of per diem payable to employees temporarily assigned to the Navy's undersea testing installation on Andros Island, Bahamas, after December 1, 1974. If it is determined that NUSC Instruction 4600.2 was legitimately issued, the Disbursing Officer also questions whether the claimants are nevertheless entitled to payment of per diem at the higher general rate for Andros Island specified by the JTR under the notation appearing in their travel orders stating "PER DIEM AUTHORIZED IN ACCORDANCE WITH JTR." In addition, the Disbursing Officer states that payment has already inadvertently been made on the claims of 4 employees, and that approximately 5,000 other claims remain pending; the question is therefore raised as to whether the previous payments made to those 4 employees must be recouped if the remaining 5,000 claims are denied.

Provisions of statutory law authorizing payment from public funds to reimburse Federal employees for their subsistence expenses while traveling on official business are contained in chapter 57 of title 5, United States Code. The statutes provide that an employee while traveling on official business outside the continental United States is entitled to a per diem allowance under prescribed regulations at rates established for each locality where travel is to be performed. See 5 U.S.C. 5702(a). The purpose of the statutes authorizing per diem allowances for Federal employees is solely to offset their necessary subsistence expenses

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during periods of official travel, and therefore the Federal Travel Regulations (FPMR 101-7) (FTR) caution agencies to avoid establishing per diem rates at levels which exceed a traveler's normal necessary costs of transient quarters, meals, and incidental expenses at a particular locality. See FTR para. 1-7.3a and B-174464, February 28, 1972.

Regulations which implement the above-cited law and regulations and which apply to civilians employed with the Defense Department, are contained in Volume 2 of the JTR. Prior to December 1, 1974, the regulations prescribed a general seasonal per diem rate for Andros Island, Bahamas, coupled with a formula for reducing that rate for travelers utilizing quarters and messing facilities provided by a Government contractor. That formula was replaced by paragraph C8101-3f., 2 JTR (change 110, December 1, 1974), which directed local command authorities to establish a per diem rate for employees who use Government quarters or Government contractor lodging facilities at a temporary duty station where commercial food establishments are not available, commensurate with the normal cost of Government procured food and lodgings furnished to the employees at the installation. That paragraph has remained a part of the regulations, with slight modifications, since December 1974 and currently appears as paragraph C4552-3f., 2 JTR (change 181, dated November 1, 1980).

It is our view that under these provisions of statute and regulation, the Naval command authorities having jurisdiction over the Atlantic Undersea Test and Evaluation Center on Andros Island had both the authority and the responsibility in the circumstances described to issue an administrative instruction establishing a special per diem rate effective December 1, 1974, for employees performing temporary duty at the installation based on the normal cost of quarters and meals furnished to the employees there. This responsibility was carried out through the issuance of NUSC Instruction 4600.2 on November 27, 1974, and it is our view that the issuance of that administrative instruction was clearly a valid and legitimate exercise of command authority.

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With respect to the question raised as to whether the claimants in this case are nevertheless entitled to payment at higher per diem rates under the terms of their travel orders, the rule is well established that provisions of travel orders which are in conflict with statutory law--or agency regulations and administrative instructions--are invalid and cannot create an otherwise unauthorized entitlement to travel allowances. See, e.g., B-193813, July 22, 1980, 59 Comp. Gen. ___; B-188051, May 4, 1977; B-188106, March 3, 1977; and B-185429, July 2, 1976. The claimants here were furnished with Government procured quarters and meals during their temporary duty assignments at the Navy's Atlantic Undersea Test and Evaluation Center and were not required to obtain more expensive commercial accommodations at hotels or resorts on Andros Island incident to the performance of their official duties. Their lawful entitlement to reimbursement for their subsistence expenses was therefore prescribed by the per diem rate established in NUSC Instruction 4600.2, rather than the higher general per diem rate set by the JTR for Andros Island. Since the lower rate was prescribed under the authority of the JTR it is the "per diem authorized in accordance with JTR" as provided in the travel orders. The wording of the travel order is not in conflict with NUSC Instruction 4600.2 since it merely directs that payment of per diem will be under the rules set forth in the JTR, which rules include payment at that rate in the circumstances involved.

Therefore, payment may not be made on the employees' claims for additional per diem. With regard to the question raised concerning the entitlement of 4 of the employees to keep the amounts they previously received when their claims were inadvertently paid, it is to be noted that persons receiving money erroneously paid by a Government agency or official acquire no right to the money and are legally obligated to make restitution. Action should now, therefore, be taken to recoup the improper payments previously made through inadvertence on the claims of the 4 employees, and such collection action for the recovery of the erroneous travel allowance overpayments may not lawfully be waived. See 5 U.S.C. 5512, 5514, and 5584.

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The questions presented are answered accordingly.

Milton J. Fowler

Acting Comptroller General
of the United States