

DATE: July 25, 2019

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2018-WV-101007.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is ordered to temporary duty with *per diem*, and it is later determined that he is not entitled to *per diem*, waiver under 10 U.S.C. § 2774 is appropriate only for the amounts actually expended in reliance on the erroneous information.

DECISION

A member of the United States Air Force Reserve requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-WV-101007, dated March 11, 2019.

Background

The member was ordered to a temporary duty (TDY) assignment in Virginia on October 15, 2016, through November 25, 2016. Although the member received basic allowance housing (BAH) based on her New Hampshire residence during this period, she did not receive any TDY entitlements. On December 5, 2016, the member received orders extending her TDY from November 26, 2016, through September 29, 2017. These orders stated this was a permanent change of station (PCS) move and the member was authorized PCS entitlements. The orders also stated flat rate *per diem* may be authorized depending the length of the long-term TDY. On December 21, 2016, new orders were issued placing the member in a TDY status for 350 days effective October 15, 2016. On January 1, 2017, the member began drawing BAH for her Virginia duty station and received a retroactive BAH payment for the period November 26, 2016, through December 31, 2016. The member continued to receive BAH for her Virginia duty

station through June 15, 2017. During the period November 26, 2016, through December 31, 2016, the member received TDY allowances for the same Virginia duty station.

It was later determined that the member's orders, issued on December 21, 2016, placing her in a TDY status for 350 days effective October 15, 2016, were not authorized. Therefore, the member became indebted for the amount of *per diem* she received during the time she received BAH for her Virginia duty station. As a result, the member was overpaid \$13,913.55 in *per diem*.¹

The member's command endorsed the member's request for waiver on the basis that it had issued orders erroneously authorizing flat rate *per diem*, and assured the member that she was entitled to receive it. In the appeal decision, the DOHA adjudicator found that the member reasonably relied on her travel pay official's advice concerning her entitlement to the TDY expenses. However, the adjudicator determined that waiver was not appropriate because the record did not contain evidence that the member used the erroneous payments of *per diem* for its intended purpose. She cited case precedent reflecting that the burden is on the member to substantiate actual expenditures made pursuant to the erroneous authorization.

In her reconsideration request, the member provides evidence in the form of credit card statements, bank statements, receipts for paid utility expenses, and other financial documentation reflecting miscellaneous expenses she incurred in support of her TDY during the period of overpayment.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience, and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. When a member receives payments of *per diem* under erroneous orders, waiver is appropriate only to the extent that the *per diem* payments were spent for their intended purpose in reliance on those orders. *See* DOHA Claims Case No. 03061301 (July 31, 2003).

The member has submitted evidence reflecting that she used \$9,412.78 for the lodging and utilities she procured during the time period in question. Waiver of that amount is proper. Since she has provided no evidence that the remaining balance of the *per diem* she received was spent for its intended purpose, waiver of the remaining \$4,500.77 is denied. *See* DOHA Claims Case No. 2016-WV-032402.4 (December 8, 2016); and DOHA Claims Case No. 03061301, *supra*.

¹Since the member's original orders authorized her *per diem* during the period October 15, 2016, through November 25, 2016, she was entitled to receive \$4,775.25 in *per diem*. Therefore, her debt was determined to be \$13,913.55, the *per diem* erroneously paid to her during the period November 26, 2016, through December 31, 2016.

Conclusion

Partial waiver is granted in the amount of \$9,412.78. Waiver of the remainder of the debt, \$4,500.77, is denied. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board