

DATE: September 2, 2020

In Re:)
 [REDACTED]) Claims Case No. 2016-WV-061701.3
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is ordered to temporary duty with *per diem*, and it is later determined that he was 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 U.S. Air Force requests reconsideration of the appeal decision of the Defense Office of Hearings of Appeals (DOHA), in DOHA Claim No. 2016-WV-061701.2, dated August 9, 2019. In that decision, DOHA waived \$4,824.97, denied waiver of \$40,080.63, and remanded \$2,499.96 to the Defense Finance and Accounting Service (DFAS).

Background

The record reflects that the member owned residences in Washington, D.C., and Nevada. In addition, he leased an apartment in 2008 in Arizona.

On February 6, 2007, the member received orders for temporary duty (TDY) travel from/return to his residence in Nevada to Arizona, for the period January 31, 2007 through February 2, 2007. However, the member's Home of Record (HOR) was later determined to be in Arizona, and within the commuting limits of his TDY location. As a result, the member was indebted \$762.97 for the *per diem* payments he received while on TDY because they were based on his residence in Nevada. This portion of the debt was waived by the DOHA adjudicator based on the fact that the member's orders reflected his residence in Nevada, and he had no

reason to question his travel entitlements. In addition, the adjudicator found that the member used the funds for their intended purpose, and that all conditions necessary for waiver of the overpayment of \$762.97 had been met.

On February 15, 2008, the member received orders to perform a Permanent Change of Station (PCS) without Permanent Change of Assignment (PCA) status, while attending a training course in Texas from March 7, 2008 through September 28, 2009, from/return to his residence in Arizona. These orders stated that his residence was outside of the local commuting distance; he would not commute; and that a PCS shipment of his household goods was authorized and approved. The member performed his tour of duty and received his proper travel entitlements.

On September 12, 2008, the member was issued back-to-back orders for a TDY from/return to his Nevada address for formal training in Nevada, from September 29, 2008 through October 11, 2008. His orders stated that his residence was in the corporate city limits; he would commute; and no *per diem* was authorized.

On October 2, 2008, the member was again issued back-to-back orders returning? him to his Nevada residence on a contingency active duty status from October 12, 2008 through September 30, 2009, in Arizona. The member's orders stated that his residence was outside the local commuting distance; he would not commute; government quarters were available and directed at his duty location; and that government meals were not available during the period. The member paid *per diem* for the period of his duty in the amount of \$44,142.63. However, it was later determined that the member was not entitled to any travel payments because his address should have been his residence in Nevada, which was approximately 25 miles from his duty station and within commuting distance. As a result, the member became indebted to the government in the amount of \$44,142.63.

Finally, during the period October 12, 2008 through September 30, 2009, the member received basic allowance for housing (BAH). The Defense Finance and Accounting Service (DFAS) determined that the member was overpaid BAH during this period in the amount of \$2,499.96. DFAS reported that the overpayment resulted from the member erroneously being paid BAH based on the incorrect rank.

In the appeal decision, the adjudicator found that of the \$44,142.63 overpayment relating to the erroneous travel payments the member received, waiver was appropriate for \$4,062.00 because based on the documentation in the file, the member acted in good faith and used that amount for the intended purpose. The adjudicator remanded to DFAS, the member's debt for BAH in the amount of \$2,499.96 for a determination of its validity.

In his request for reconsideration, the member submitted documentation reflecting that he no longer resided in Arizona as of March 2008. Therefore, although his HOR may have been reflected as Arizona, he relied on his orders dated October 2, 2008, reflecting that he was receiving the proper travel entitlements.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of travel expenses to a member if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. The standards for waiver do not permit waiver simply because the government made an administrative error. *See* Enclosure 4 of the Department of Defense Instruction 1340.23 (February 14, 2006). In the case of erroneously authorized travel payments, the member must have spent the payments in reliance on the erroneous authorization. *See* DOHA Claims Case No. 2013-WV-022009.2 (March 11, 2014); and DOHA Claims Case No. 07042001 (April 30, 2007). The burden is on the member to provide documentary evidence as to the expenditure of the money.

In this case, the member has submitted documentation that he used the erroneously authorized travel payments for their intended purpose during the period October 2008 through September 2009. As of March 2008 he no longer maintained a residence in Arizona. While he was on TDY in Texas, he moved out of his apartment and back into his residence in Nevada. However, as noted in the adjudicator's decision, the member received basic allowance for subsistence (BAS) in the amount of \$2,669.71 during the period October 12, 2008, through September 30, 2009, compensating him for his meals. Therefore, since the member was in proper receipt of BAS to reimburse him for the cost of food, he cannot be said to have spent that amount in detrimental reliance on the erroneous travel authorization. *See* DOHA Claims Case No. 2013-WV-021401.2 (August 25, 2014). Under the circumstances, we waive an additional \$37,410.92 (\$40,080.63 - \$2,669.71).

As for the portion of the debt remanded by the DOHA adjudicator in the amount of \$2,499.96, DFAS is currently considering the validity of the debt. Therefore, the member may contact DFAS for the status of it.

Conclusion

We hereby waive an additional \$37,410.92, and deny waiver of \$2,669.71. In accordance with Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense regarding the member's travel debt.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board