

KEYWORDS: Per Diem, waiver of indebtedness

DIGEST: Waiver is not appropriate when an employee knows or reasonably should know that he is receiving payments in excess of his entitlement.

CASE NO: 2018-WV-102508.2

DATE: 07/23/2019

DATE: July 23, 2019

In Re:)	
[REDACTED])	Claims Case No. 2018-WV-102508.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver is not appropriate when an employee knows or reasonably should know that he is receiving payments in excess of his entitlement.

DECISION

An employee requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-WV-102508, dated May 10, 2019, which denied the employee’s request for waiver of a debt in the amount of \$3,966.75.

Background

The employee performed temporary duty (TDY) from March 20, 2017, through July 28, 2017, for 131 days. His orders authorizing his TDY, issued on February 17, 2017, advised him that since he was assigned to long-term TDY for a duration of 31 to 180 days, he is authorized *per diem* at a flat rate of 75% of the locality rate for his actual TDY location. His orders state that his daily *per diem* rate is \$73.50 for meals and \$18.75 for incidentals, for a total daily rate of \$92.25. His orders also advised him that since his TDY was in excess of 45 days, he is entitled to scheduled partial payments (SPP) into his personal account and his government travel charge card (GTCC). Specifically, his orders state that the SPP deposit into his personal account is the *per diem* for meals and incidental expenses (M&IE) per day, for a 30-day period; that it is his

responsibility to make payment to his GTCC with the SPP deposited into his personal account every 30 days for the meals and cash withdrawn; and the SPP deposit into his GTCC happens at the same time but will be for items charged directly to his GTCC such as airline tickets, rental cars, lodging, *etc.*

During the period April 19, 2017, through July 18, 2017, the employee received SPP deposits in the total amount of \$18,042.82, which represented \$11,117.62 for *per diem* and \$6,925.20 paid to his GTCC. During an audit of his travel claim, it was erroneously determined that the employee was entitled to receive a total of \$16,051.50 for full rate *per diem*, \$123.00 daily for M&IE, for 130 days, plus one-half day *per diem* of \$61.50. Since his final settlement voucher should have reflected that he was entitled to receive \$12,084.75 (\$92.25 x 131 days) for flat rate *per diem*, the member was overpaid \$3,966.75 (\$16,051.50 - \$12,084.75).

The employee requested waiver of his debt and the Defense Finance and Accounting Service (DFAS) recommended that DOHA waive the debt in full. However, the DOHA adjudicator declined to follow the recommendation of DFAS. The adjudicator based her determination on the fact that the employee was on notice by virtue of his orders that he was only entitled to receive flat rate *per diem*. The adjudicator found that the employee also knew that for a 30-day period, he was due \$2,767.50 (\$92.25 x 30 days) in *per diem*. This amount was consistent with the monthly SPP deposits he received. Therefore, upon settlement, when he was only due an additional 10 to 11 days of *per diem*, he should have questioned why he directly received over \$4,800.00 in *per diem* for those days, not even half of a month. In addition, since the member had elected to split disbursement with his GTCC, he would not have been expecting any further travel payments at settlement.

In his reconsideration request, the employee insists that he relied on the expertise of his administrative personnel to authorize him the proper entitlement. He states that on previous trips, he was responsible for calculating and submitting his travel expenses to the travel department. However, he states that on this trip he was told that the travel department would handle the reimbursement calculations. He also states that when he received his orders, he questioned the 75% flat rate *per diem*, and was told the Union was negotiating the rate and the full rate may be approved during his trip but would not likely be retroactive. He states that he did question the travel department at settlement but was advised it was correct. He further states that he was not advised of the overpayment until nearly a year after he completed his TDY. He states that if he had the responsibility to know of the error, his agency had the responsibility to advise him of the overpayment in a more expeditious manner. In addition, he requests relief due to financial hardship. He states that since his retirement in March 2018, he has had surgery and accrued large medical bills. If he had been informed of the debt promptly, he would have been able to pay it back while he was still working. Finally, he states that he has been advised that other employees' debts for the same TDY were waived.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous payments of travel expenses to an employee if collection 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 employee. *See* Department of Defense Instruction 1340.23 (February 14, 2006).

In this case, the erroneous payments of *per diem* were made as a result of an administrative error, and there is no indication of fraud, misrepresentation, or lack of good faith on the employee's part. However, an employee is considered to be at least partially at fault in the accrual of a debt, and waiver is precluded when, in light of all the circumstances, it is determined that he should have known that he was receiving payments in excess of his entitlements. An employee is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in question. *See* DOHA Claims Case No. 2012-WV-070303.2 (November 20, 2012);¹ and DOHA Claims Case No. 2011-WV-050304.2 (November 29, 2011).

The employee acknowledges that he knew that pursuant to his travel orders, he was only entitled to receive flat rate *per diem* in the amount of \$92.25 per day. Although he may have been told that the Union was negotiating this issue, there is no evidence that he was told during his TDY or after that his orders were in error or that the Union succeeded in negotiating the full rate. In fact, he states that he was told that if the Union was successful during his TDY, it would not be made retroactive. Therefore, we agree with the adjudicator that the employee should have known that he was overpaid at the settlement of his voucher, especially since he received almost twice as much *per diem* for the additional 10-11 days that he had consistently received per month in *per diem* during his TDY.

Although the employee states that he did question the amount he received at settlement, we have consistently held that there is no basis for waiver unless the official(s) providing the faulty advice indicating that the employee was entitled to what he received are identified, and the employee's version of events is corroborated by the pay and disbursing officials with what he told them and what they told him. *See* DOHA Claims Case No. 2013-WV-091304.2 (January 15, 2015). There is nothing in the written record reflecting what he told the officials and what they told him.

As for his suggestion that the agency also share responsibility for the error, there is no basis for apportioning fault under the waiver statute. An employee derives no entitlement from an administrative error made by the government. *See* DOHA Claims Case No. 09010501 (January 8, 2009). Although we recognize that the delay in notifying the employee of the overpayment may have caused him financial hardship, financial hardship does not provide a basis for waiver. *See* DOHA Claims Case No. 00081602 (November 22, 2000). DFAS, at its own discretion, may arrange a repayment plan which takes hardship appropriately into account.

¹This cited decision was decided under 10 U.S.C. § 2774 because the applicant for waiver was a military member. However, the standards for waiver under 10 U.S.C. § 2774 and 5 U.S.C. § 5584 are the same.

Finally, the employee states that he has heard other employees in similar circumstances have had their debts waived in full. Our office bases our decisions on the individual facts and circumstances contained in the written record for each waiver applicant. Here, we find no error in the adjudicator's decision to deny waiver.

Conclusion

The employee's request for relief is denied, and we affirm the adjudicator's decision dated May 10, 2019. In accordance with the Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense.

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