

KEYWORDS: Travel, M&IEs, Per Diem

DIGEST: When a member receives orders erroneously authorizing payment of *per diem*, waiver under 10 U.S.C. § 2774 is appropriate only for amounts actually expended in reliance on the erroneous authorization.

CASENO: 2017-WV-062902.2

DATE: 02/15/2019

DATE: February 15, 2019

In Re:)	
[REDACTED])	Claims Case No. 2017-WV-062902.2
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member receives orders erroneously authorizing payment of *per diem*, waiver under 10 U.S.C. § 2774 is appropriate only for amounts actually expended in reliance on the erroneous authorization.

DECISION

A former member of the U.S. Coast Guard requests reconsideration of the July 16, 2018, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-WV-062902.

Background

The member was residing in North Carolina and ordered to active duty from October 1, 2002, through September 30, 2004, at a Coast Guard training center in the same state. On July 1, 2004, the member received orders for temporary duty to report no later than July 6, 2004, in South Carolina. The member subsequently received continued orders to perform duty in South Carolina through June 30, 2012, with no break in service. She was authorized travel allowances (including *per diem* and meals and incidental expenses (M&IEs)). The Coast Guard calculated

that the member received \$263,663.65 in *per diem* during the period July 5, 2004, through June 30, 2012. However, the Coast Guard later determined that since the member commuted daily from her home in South Carolina to her local area duty station in South Carolina, she was not entitled to *per diem*. As a result, the Coast Guard placed the member in debt for \$263,663.65 (\$121,082.55 in lodging + \$142,581.10 in M&IES) for the period July 5, 2004, through June 30, 2012.¹

The member requested waiver of the debt. The Coast Guard found the member's debt ineligible for waiver because it did not represent an erroneous payment of pay and allowances under 10 U.S.C. § 2774.

On appeal, the DOHA adjudicator disagreed with the Coast Guard's determination and found the member's debt eligible for waiver consideration. The adjudicator found that in order for waiver to be appropriate under 10 U.S.C. § 2774, the overpayment must have arisen from the erroneous issuance of travel authorizations and the member must have spent the payments in reliance on the erroneous orders. The adjudicator thoroughly analyzed the record evidence which included the member's mortgage statements and other homeownership expenses. The adjudicator found that the member spent \$166,809.32 of the erroneous payments of *per diem* in reliance on the erroneous orders. The adjudicator found no further evidence that the member used the remaining \$96,854.33 of the overpayment for its intended purpose. Therefore, the adjudicator waived \$166,809.32 and denied waiver of \$96,854.33.

In the member's request for reconsideration, through her attorney, she disagrees with the Coast Guard's calculation of the overpayment. She asserts that she has clean hands and again presents evidence that she had consistently been advised by appropriate officials that she was entitled to the *per diem*. In addition, the member attaches correspondence from the U.S. Treasury dated from August 20, 2018, through September 3, 2018, advising her that she owes a total of over \$400,000.00. She insists that the Coast Guard is harassing her by initiating collection against her without giving any consideration to the DOHA adjudicator's appeal decision partially waiving the debt, nor her request for reconsideration of that decision currently under review by the DOHA Claims Appeals Board.

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 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. When a member is found to have been paid *per diem* in error, the excess amounts the member expended may generally be waived only to the extent that the money was spent for its intended purpose, in other words, in detrimental reliance on the *per diem* authorization.

¹Originally, the Coast Guard indebteded the member \$267,178.64. However, on July 6, 2018, the Coast Guard adjusted the indebtedness to \$263,663.65.

For waiver to be appropriate in this case, the member must meet a two-part test. She must have received the payments to cover erroneously authorized allowances, and she must have spent the allowances in detrimental reliance on the erroneous authorization. *See* DOHA Claims Case No. 2012-WV-022905.3 (April 30, 2013); DOHA Claims Case No. 2012-WV-062201.2 (March 15, 2013); and DOHA Claims Case No. 2011-WV-092701.3 (March 28, 2012). As the adjudicator determined, the member accepted the erroneous payments based on erroneous orders. However, even though the *per diem* authorizations were erroneous, the member has not shown evidence that she used the remaining portion of the overpayment, \$96,854.33, for its intended purpose. Therefore, the second prong of the test is not met for the remainder of the debt.

As for the amount of the debt established by the Coast Guard and the amount of collection sought against the member by the Treasury, DOHA has no authority over the establishment of an indebtedness, nor does DOHA have control over collection actions. However, since DOHA has waived the amount of \$166,809.32, and this decision is now a final action under the waiver statute, the member is only in debt for the remaining \$96,854.33. If the member wishes to contest the validity of this debt or any other amount being collected from her by disputing them and proving her entitlement, she may do so by filing a military pay and allowance claim with the Coast Guard under 31 U.S.C. § 3702. Any appeal of the Coast Guard's denial of her claim would be directed to DOHA. *See* DoD Instruction 1340.21 (May 12, 2004).

As explained above, our determination in this matter concerns the narrow issue of whether the member's debt can be waived under 10 U.S.C. § 2774. Our decision in this case does not preclude the member from addressing the issue she has raised concerning harassment with the Office of the Inspector General (IG) for the Department of Homeland Security (DHS).

Conclusion

The member's request for relief is denied, and we affirm the July 16, 2018, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense concerning the member's request for waiver under 10 U.S.C. § 2774.

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