

DATE: July 25, 2013

In Re:)

[REDACTED])

) Claims Case No. 2011-CL-072201.3

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Claims against the government may be allowed only for expenses authorized by statute or regulation. The claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed.

DECISION

A member of the U.S. Marine Corps Reserve requests reconsideration of the April 24, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-CL-072201.2. In that decision, this office denied the member's claim for *per diem* and lodging expenses in the amount of \$77,203.00.

Background

Pursuant to ADOSAC/Short Tour (Active Duty Operational Support – Active Component) orders issued on August 13, 2010, the member was initially called or ordered to active duty by Marine Corps Mobilization Command from her address in Michigan to Camp Smith, Hawaii, for 46 days from August 16, 2010, through September 30, 2010. Under these orders, her address in Michigan was the Place from Which Called/Ordered to Active Duty (PLEAD). The member then received orders issued on September 20, 2010, for consecutive duty for annual training for a period of 12 days from October 1, 2010, through October 12, 2010, at Camp Smith. Orders issued on October 13, 2010, modified the member's annual training orders, to reflect the member's placement in a drill status. These orders stated that the member was in a drill status from October 13, 2010, through October 15, 2010, and that no *per diem* was

payable to the member. Pursuant to ADOS - Contingency (Iraqi Freedom) orders issued on October 18, 2010, the member was ordered to active duty for 46 days with the Commanding Officer, Camp Smith, from October 16, 2010, through November 30, 2010. These orders stated that the member's address in Michigan was her PLEAD. Orders issued on November 23, 2010, modified the October 18, 2010, orders to direct active duty for 350 days from October 16, 2010, through September 30, 2011, at Camp Smith. These orders authorized *per diem* in excess of 180/139 days in accordance with volume 1, Joint Federal Travel Regulations (JFTR), paragraph U7150. Orders dated May 18, 2011, modified the May 18, 2010, orders to shorten the member's tour to 273 days, ending on July 15, 2011.

The member claimed *per diem* for her active duty tour during the period October 16, 2010, through July 15, 2011, totaling \$77,203.00. The Defense Finance and Accounting Service (DFAS) subsequently denied the member's claim. DFAS determined that the member had traveled to Camp Smith for annual training from her PLEAD in Michigan. However, the member then entered into a drill status, which is inactive duty training (IDT), while in Hawaii. Therefore, the member experienced a break in service exceeding one full day when she performed her IDT. Thus, when the member entered a new period of service by being ordered to active duty in conjunction with her orders for ADOS – Contingency, her PLEAD changed to Camp Smith. Since the member's new PLEAD was Camp Smith, she could not be paid for duty at the PLEAD.

The member appealed DFAS's denial of her claim to our office. The DOHA adjudicator disallowed the claim and the member subsequently requested reconsideration of that denial. In her reconsideration request, she argues that she did not have a break in service.

Discussion

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A claimant must prove by clear and convincing evidence on the written record that the United States Department of Defense is liable under the law for the amount claimed. *See* DoD Instruction 1340.21 (Instruction) ¶ E5.7 (May 12, 2004). Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law. *See* DOHA Claims Case No. 05033105 (November 30, 2005); DOHA Claims Case No. 05021409 (March 30, 2005); and DOHA Claims Case Nos. 02101611 through 02101635 (December 12, 2002). Thus, a claimant must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious or contrary to law. *See* Instruction ¶ E7.3.4 and DOHA Claims Case No. 07032201 (April 4, 2007).

Travel and transportation allowances for members of the reserve components (RC) are governed in part by 37 U.S.C. § 474, which provides in pertinent part as follows:

(a) Except as provided in subsection (f) and under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed or to be performed under orders, without regard to the comparative costs of the various modes of transportation—

The DoD-chartered Per Diem, Travel and Transportation Allowance Committee (PDTATAC) publishes the JFTR. The JFTR directly implements the travel and transportation entitlements authorized by law for members of the Uniformed Services and thus has the force and effect of law. Volume 1 of the JFTR, paragraph U7150, change 284, August 1, 2010, was the relevant regulation in effect at the time of the member's travel. Under paragraph U7150A1b, a RC member called to active duty may not be paid *per diem* when both the member's home/PLEAD and place of active duty are in the corporate limits of the same city or town, the member commutes daily between home/PLEAD and the place of active duty, or where the home/PLEAD and place of active duty are within a reasonable commuting distance of each other.¹

Appendix A, 1 JFTR contains the definition of PLEAD and states that the PLEAD changes only if there is a break in service exceeding one full day, in which case it is the place of entry into the new period of service.²

The member was released from active duty effective October 12, 2010, while in Hawaii. The member performed IDT during the period October 13, 2010, through October 15, 2010, while in Hawaii. The member's performance of IDT constituted a break in service exceeding one full day.³ The member then entered a new period of service when she was ordered to active duty at Camp Smith. Thus, the member's PLEAD became Camp Smith. Although the member argues that IDT is active duty and thus, she did not experience a break in service, active duty is defined for pay and allowance purposes for the uniformed services under 37 U.S.C. § 101(18) as full-time duty in the active service of a uniformed service, and includes full-time training duty, annual training duty, full-time National Guard duty, and attendance, while in the active service, at a school designated as a service school by law or by the Secretary concerned. *See also* 1 JFTR Appendix A. In addition, the term active service means service on active duty. *See* 37 U.S.C. § 101(20). The term IDT is defined under a separate section of 37 U.S.C. § 101.⁴

¹The language in 1 JFTR U7150 changed from "home or PLEAD" to "home/PLEAD," by Change 152, August 1, 1999. This change was merely stylistic with no substantive effect. Therefore, no per diem is payable to a member if either the member's home or PLEAD and place of active duty are in the corporate limits of the same city or town, the member commutes daily between either his home or PLEAD and the place of active duty, or where his home or PLEAD and place of active duty are within a reasonable commuting distance of each other.

²Appendix A, 1 JFTR, change 286/540, October 1, 2010, was the regulation in effect at the time of the member's travel.

³Although "break in service" is not defined in the 1 JFTR, it is defined under Volume 7A, Chapter 1 of the Department of Defense Financial Management Regulation, DoD 7000.14-R. Under paragraph 010203.A.5, a break in service is defined as being "released from active duty, discharged."

⁴Under section 101(22) the term IDT "means duty prescribed for members of a reserve component by the Secretary concerned under section 206 of this title or any other law; and special additional duties authorized for members of a reserve component by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned; and includes those duties when performed by members of a reserve component in their status as members

Therefore, reimbursement of the amount the member claims for *per diem* and lodging expenses is denied in accordance with established law and regulations.

Conclusion

The member's request for relief is denied, and we affirm the April 24, 2013, appeal decision. In accordance with DoD Instruction 1340.21 ¶ E7, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: James E. Moody

James E. Moody
Member, Claims Appeals Board

of the National Guard, but (except as provided in section 206(d)(2) of this title) does not include work or study in connection with a correspondence course of a uniformed service.”