

DATE: March 28, 2012

In Re:)

[REDACTED])

) Claims Case No. 2011-WV-092701.3

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is ordered to temporary duty travel, and it is later determined that such order was improper, erroneous payments paid thereafter can be waived only to the extent the money was spent for its intended purpose.

DECISION

A member of the United States Marine Corps (USMC) requests reconsideration of the January 17, 2012, amended appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2011-WV-092701.2. In that case, based on new information DOHA waived an additional \$13,282.66 of the remaining \$16,197.49 of the overpayment. Previously, DOHA had waived \$10,950.00. This brought the total waiver to \$24,232.66. DOHA declined to waive \$2,914.83.

Background

The record shows the member's place of entry of active duty (PLEAD) was Wilmington, North Carolina. On December 7, 2009, the member received orders to perform active duty from December 29, 2009, through December 31, 2010, at Camp Lejeune, North Carolina. The member was authorized per diem and received travel advance payments in the amount of \$27,147.49. However, the Defense Finance and Accounting Service (DFAS) determined that the member was not entitled to per diem, but was only entitled to BAH (basic allowance for housing) and BAS (basic allowance for subsistence). Therefore, the member was overpaid \$27,147.49.

DFAS recommended in their administrative report that this Office waive the entire amount of the overpayment. Our adjudicator did not agree with a complete waiver. Initially, since the

member provided documentation to support lodging costs, the adjudicator recommended waiving \$10,950.00, and declined to waive the rest. The member then provided additional information regarding lodging and meal costs which supported waiver of much more of the amount received. In an amended decision, the adjudicator then determined that an additional \$13,282.66 should be waived. However, the adjudicator declined to waive \$2,914.83, which had been identified in the initial decision as the amount the member received for BAS.

The member requests reconsideration and contends that his actual costs exceed the amount he was erroneously paid. He contends that if he is not paid the BAS and the per diem he will have incurred greater expenses for sustenance than were reimbursed.

Discussion

Title 10, United States Code, § 2774, provides authority for waiving claims for erroneous payments of pay and allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. When a member is found to have been paid per diem in error, the excess amounts he 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.

For waiver to be appropriate in this case, the member must meet a two-part test. He must have received the payments to cover erroneously authorized allowances, and he must have spent the allowances in detrimental reliance on the erroneous authorization. *See* DOHA Claims Case No. 03092220 (September 30, 2003); DOHA Claims Case No. 03061301 (July 31, 2003); 67 Comp. Gen. 496 (1988); and B-234751, Dec. 19, 1989. In this case the per diem authorization was erroneous; the BAS payment was not. Since the member properly received BAS to reimburse him for the cost of food, he cannot be said to have spent that amount in detrimental reliance on the erroneous per diem authorization. Therefore, one prong of the test is not met. The member has provided no new information which would persuade this Office to change this decision.

Conclusion

The appeal decision of January 17, 2012, is sustained. We continue to decline to waive \$2,914.83; the remainder of the overpayment is waived. In accordance with the Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed//

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

Gregg A. Cervi
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board