DATE: April 30, 2013

In Re: [REDACTED] Claimant	)))))	Claims Case No. 2012-CL-121902.2

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

The Army found that the member had submitted fraudulent lodging claims during the periods October 2004 through June 2005 and January 2007 through June 2007. The record evidence supports this finding. Therefore, our Office will not disturb the resulting recoupment action taken against the member by the Defense Finance and Accounting Service (DFAS).

DECISION

A member of the U. S. Army Reserve requests reconsideration of our Office's February 25, 2013, appeal decision in DOHA Claims Case No. 2012-CL-121902.

Background

The member was called to active duty (AD) at the Pentagon. From 2002 to September 2004, the member submitted monthly travel vouchers for the reimbursement of his rental costs to the DFAS. In 2004, the member purchased two houses in Washington, D.C. The member lodged in one of the houses starting in October 2004. The member contends that he was advised by his unit's servicing Finance Non-Commissioned Officer (NCO) and his Judge Advocate General (JAG) office that he was allowed to combine his lodging expenses into one sum and claim reimbursement as rent. The member subsequently submitted monthly travel vouchers indicating that he was renting the home that he actually owned from October 2004 through June 2005.[1] Supporting each monthly claim for rent was a receipt bearing the name of a business that the member had established in 1993.[2]

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[1]There is also evidence in the record that during this period, the member shared a home with a staff sergeant in violation of Army regulations. The staff sergeant rented from the member the same property the member

The member returned to AD at the Pentagon in 2007. For this tour, the member again lodged in one of the houses he owned. He contends that he inquired with the Finance NCO if he could combine his lodging expenses into one sum and claim reimbursement as rent. He states that the Finance NCO told him that it was probably allowable, but advised him to consult with his servicing JAG officer. The member states that the JAG officer advised him that it was permissible, but warned him that renting from himself may not "look right." The member states that he asked about using a rental company and both officials replied in the affirmative. On January 1, 2007, the member entered into a lease agreement with a rental company for the property he owned. Under the agreement between the "landlord" and the member with the rental company agent acting for both, the member was to pay $5,100.00 per month for the period January 5, 2007, through July 5, 2007. For each month, the rental company agent issued the member a monthly receipt for the "rent" that he paid.[3] The rental company agent refunded the member the amount he paid in rent per month less a $100.00 fee. On June 25, 2007, the member moved out of the house and into a hotel where he stayed until July 2, 2007, at the cost of $1,264.32.

The member continued to lease the houses in the D.C. area to other members. A landlord-tenant dispute arose between the member and a tenant which prompted the tenant to lodge a complaint on March 6, 2007, with the Army's Criminal Investigation Command (CIC). On June 25, 2007, the member submitted revised monthly travel vouchers for the periods October 2004 through May 2005, and January 2007 through May 2007. These vouchers were more detailed and listed expenses such as first and second mortgages, property tax, electric, gas, phone, cable TV and water. In a written statement dated June 25, 2007, the member explained that he submitted the more detailed vouchers to "better reflect" the amounts that he was claiming and that he felt were payable. In an email exchange with DFAS Special Actions on July 16 and 17, 2007, the member stated that the 2004-2005 vouchers were amended to correct a double claim for property taxes and that the 2007 vouchers were also amended because DFAS did not know if reimbursements could be paid for a house bought for an earlier tour. The member also claimed that the arrangement with the rental company saved the government $1,500.00 to $2,000.00 per month in lodging expenses.

In March 2007, the Army CIC began investigating a suspected conspiracy by the member and three other members to submit fraudulent travel vouchers to DFAS to obtain money to which they were not entitled. The CIC interviewed the rental company's agent who signed the member's lease. The CIC Report of Investigation (ROI) determined that the member committed the offenses of false official statement, larceny of government funds, fraud and wire fraud when he submitted travel vouchers to DFAS claiming the maximum per diem rate for a property he

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claimed he was renting beginning June 2005 for $4,500.00 per month. In addition , there is evidence that another member claimed $4,500.00 per month in rent for the same house the member owned and claimed rent on for several months.

[2]The member claimed monthly lodging expenses in the total amount of $4,540.00 which included $4,450.00 for rent, $60.00 for laundry expense and $30.00 for ATM fees.

[3]Specifically, in January 2007, the member claimed rent in the amount of $5,100.00. In February and March 2007, he claimed $4,500.00 per month. In April 2007, he claimed $4,000.00, and in May 2007, he claimed $3,800.00. He also claimed a $60 laundry expense and $30.00 for ATM fees per month for February 2007 through May 2007.

owned. The member offered to accept non-judicial punishment in lieu of a court-martial. The member pled guilty to fraud under Article 132. The Commander imposed a forfeiture of the member's pay for one month (suspended), and a reprimand.[4]

DFAS subsequently received credible information that indicated the member's claims during the periods November 2004 through July 2005 and January 2007 through May 2007 were paid based on fraudulent information. DFAS therefore initiated recoupment against the member in the amount of $57,310.01. The member protested the collection action against him and claimed he never intended to defraud or deceive the government. On September 26, 2012, DFAS denied the member's claim. The member appealed his claim to our Office. In his appeal, he maintained that the method he used for combining his lodging expenses into one sum and claiming them as rent for both tours was sanctioned by Finance NCOs and JAG officers. The member stated that he had been threatened with court-martial had he not agreed to non-judicial punishment. He stated that he believed the Article 15 action and letter of reprimand had closed the matter. The member emphasized that he had never been tried or punished for criminal activity and had not been found guilty of defrauding the government.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the member's claim. The adjudicator found that from November 2004 through July 2005, and from February 2007 through May 2007, the member sought payment for rent using fictitious receipts. The adjudicator found that the monthly claims made by the member were fraudulent.

In the member's reconsideration request, through his attorney, he states that he had no intent to defraud the government. He argues that DOHA did not take into consideration when finding fraud the following: his correction of his claimed amount, the fact that he acted on well-meaning advice, and the fact that he saved the government money. He states that during his two deployments, he resided in a property that he owned and submitted travel vouchers each month requesting reimbursement for allowable mortgage and expenses in accordance with Volume 1 of the Joint Federal Travel Regulations (JFTR), 1 JFTR U4137. He states that due to the excessively long wait for payment from DFAS, he elected to submit one receipt for reimbursement and indicated that it was for "rent" instead of housing reimbursement. He states that the DOHA adjudicator cited a case involving another reservist that engaged in the exact same practice during the same time frame, DOHA Claims Case No. 2011-CL-071801.2 (May 21, 2012). He contends that in both his case and the other reservist's case, they were told that this method was allowable by people they trusted, their vouchers were approved by their superiors and receiving the payments in a timely manner allowed them to avoid financial hardship. He states that they both submitted their claims for no more than they were authorized under the housing reimbursement rule and ceased the method as soon as they found out it was not authorized. However, he states that in each case, the CIC launched a criminal investigation targeting them for fraud, and their chains of command chose to criminalize their actions and damage their military careers. He further states that DFAS had the information and could have requested reimbursement at that time. However, DFAS waited five years to notify him of his debt, making it impossible for him to obtain the evidence necessary to defend himself. He

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[4]The member states there was no General Officer Memorandum of Reprimand (GOMOR) when he signed the DA 2627. That would be correct as the GOMOR was not administrative in nature, but rather imposed as punishment under Article 15.

contends that there is an issue of fundamental fairness in this case. He states that as a reservist, he was mobilized to support his country away from his home and family. He states that he is a police officer and not as familiar with temporary duty (TDY) travel as an active duty member. He states that during the periods he was on TDY, a large number of reservists were mobilized to Washington, D.C., to supplement a shortage of active duty members who were supporting the war. He states that DFAS was ill-equipped to handle the increased volume of travel vouchers, and it was taking an average of six months to reimburse for per diem and lodging. This resulted in extreme financial hardship to the mobilized reservist. He contends that the government created a situation that forced a "work-around" by the reservists in order to be paid in a timely manner, but then held them criminally and financially liable. The member states that as a result, he sought a legal alternative and thought he had found one in the method he employed. He also states that he had no intent to defraud the government. He states that unlike the member in DOHA Claims Case No. 2011-CL-071801.2, *supra*, he did not create a fictitious lease, but went through a legitimate leasing agency and paid a transaction fee. He attaches a statement from the rental company agent in support of the fact that he was acting with transparency and in no way claimed more than he was legitimately entitled to receive under the JFTR. He also distinguishes his case from the prohibition against claiming lodging for staying with "friends and family" because the amounts claimed were authorized and readily verifiable, and although his rent may not have been negotiated at arms' length, he was actually claiming his mortgage amount, property taxes and utilities. He states that although his voucher was inaccurate, it was not fraudulent. He maintains that the CIC report, relied on by both DFAS and DOHA as evidence of his fraudulent intent, is in error. He states that the fact that he pled guilty and received non-judicial punishment should not be dispositive of fraudulent intent considering his alternative of facing a general court-martial. Finally, he states that the Article 15 dated November 2, 2007, lists only one charge, fraud, and it has since been removed from his records.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), 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. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered.

The burden of establishing fraud which will support either the denial of a claim or recoupment action in the case of a paid voucher rests upon the party alleging it, and must be proven by evidence sufficient to overcome the existing presumption in favor of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than suspicion or conjecture. However, if the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty must be drawn. *See* Comptroller General decision B-213624, May 10, 1985, *citing* B-187975, July 28, 1977. The question of whether fraud exists depends on the facts of each case. Although it is the member's responsibility to accurately complete a travel voucher to ensure proper payment, it may not be assumed automatically that a member who has not observed all the requirements of the travel regulations in completing a voucher is filing a

fraudulent claim. Innocent mistakes are made and shortcuts taken in the completion of vouchers. Not every inaccuracy on a voucher should be equated with an intent to defraud the government. Generally, when discrepancies are minor, small in total dollar amounts, or when they are infrequently made, a finding of fraud would not normally be warranted absent the most convincing evidence to the contrary. By the same token, when discrepancies are glaring, involve greater sums of money, or are frequently made, a finding of fraud could be more readily made, absent a satisfactory explanation from the claimant.

In this case, the evidence in the record is sufficient to establish a clear inference of fraud on the part of the member. The CIC investigation clearly revealed that the member committed fraud. In this regard, in March 2007, the CIC began investigating a suspected conspiracy by the member and three other members to submit fraudulent travel vouchers to DFAS to obtain money to which they were not entitled. The CIC ROI determined that the member committed the offenses of false official statement, larceny of government funds, fraud and wire fraud when he submitted travel vouchers to DFAS claiming the maximum per diem rate for a property he owned.[5] On October 23, 2007, the member, with the advice of counsel, accepted non-judicial punishment in lieu of a court-martial, and pled guilty to fraud under Article 132. The *Record of Proceedings Under Article 15, UCMJ*, DA Form 2627, signed by the member on November 16, 2007, states that the commanding officer is considering whether the member should be punished for the following misconduct:

> In that you, for the purpose of obtaining the payment of claims against the United States in an amount greater than $500.00, did at or near Arlington, Virginia, on divers occasions between on or about 12 November 2004 and on or about 2 July 2005, use certain papers, to wit: a lease agreement, which said paper, as you, then knew contained statements that you had leased . . . for $4450 per month, $5100 per month and $4500 per month, which statements were false and fraudulent in that you owned . . . and was then known by you to be false and fraudulent. This is in violation of Article 132, UCMJ.
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> In that you, for the purpose of obtaining the payment of claims against the United States in an amount greater than $500.00, did at or near Arlington, Virginia, on divers occasions between on or about 15 February 2007 and on or about 28 February 2007, use certain papers, to wit: a lease agreement, which said paper, as you, then knew contained statements that you had leased . . . for $4450 per month, $5100 per month and $4500 per month, which statements were false and fraudulent in that you owned . . . and was then known by you to be false and fraudulent. This is in violation of Article 132, UCMJ.

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[5]The record reflects that CIC found that the two enlisted members did not commit any offenses and provided legal documents in support of their TDY claims. Specifically, the CIC reviewed the members' bank records and found that the members did in fact make monthly payments to the member, and there was no indication that either member wrongfully profited or knowingly participated in any offense. However, the CIC found that the officer who was renting from the member did commit the offenses of false official statement, larceny of government funds, fraud and wire fraud when he submitted settlement vouchers to DFAS claiming the maximum per diem rate for the duration of his active duty orders. The officer had returned home two months prior to the end of his orders, but still claimed he was in TDY status.

In his most recent correspondence to our Office, the member's attorney states that the Article 15 has since been removed from the member's record.[6] This, however, has no effect on our finding that fraud exists in this case. Even if the member had faced a general court-martial and been acquitted, it has long been held that the disposition of criminal liability does not determine civil liability. The charge of violation of the UCMJ, Article 132, is of criminal nature and a claim for reimbursement for lodging is of civil nature. The burden of proof required for conviction of a crime is different from that required for proof a civil claim. Therefore, an acquittal in a criminal case does not preclude administrative action on a voucher where fraudulent action is established by sufficient evidence. *See* 68 Comp. Gen. 108 (1988); 60 Comp. Gen. 357 (1981); and B-151027, Mar. 26, 1963.[7]

The member maintains that he only claimed the amounts he was entitled to under the JFTR. He states that during his two deployments, he resided in a property that he owned and submitted travel vouchers each month requesting reimbursement for allowable mortgage interest and expenses in accordance with 1 JFTR U4137. He also alleges that his resubmission of his claims for the correct amount in June 2007 supports his position that he had no fraudulent intent. He attaches a statement from the rental company agent in which the agent states that he believed the member when he said that he was only claiming the amount that he was entitled to receive because the member came back after the first month of rent and told the agent that his mortgage rate had been reduced so he was now only claiming rent in the amount of $4,500.00. In addition, he states that he saved the government money. He states that he did not create a fictitious lease agreement like the member in DOHA Claims Case No. 2011-CL-071801.2, *supra*.

First, we acknowledge that at the time of the member's TDY, paragraph U4137 of the JFTR stated that the allowable expenses when a member purchases and occupies a residence at a TDY point are interest, property tax and utility costs.[8] However, the member did not submit his travel vouchers in accordance with the 1 JFTR U4137. He submitted receipts from October 2004 through June 2005 reflecting that he was paying rent. For his second tour, he entered into a lease agreement with a rental company for the property he owned. In addition, we note that it was not until after the CIC began its investigation that the member submitted revised monthly travel vouchers for the periods October 2004 through May 2005, and January 2007 through May 2007, that purported to reflect what was allowable under 1 JFTR U4137. Although these vouchers were more detailed and listed the expenses of a first and second mortgage, property tax and utility costs, the monthly expenses claimed were significantly less than the monthly amounts the member was reimbursed for as "rent."[9] The subsequent actions taken by the member in June

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[6]This Office notes that the member's attorney previously notified this Office that the presence of the Article 15 and GOMOR had led the Army Grade Determination Board to inform the member that upon eligibility for retired pay, his rank and grade would be reduced to MAJ/04.

[7]We note that since acquittal on criminal charges may merely involve a finding of lack of requisite intent or failure to meet the higher standard of proof beyond a reasonable doubt, the doctrine of *res judicata* does not bar the government from claiming in a later civil or administrative proceeding that a travel voucher was fraudulent. However, in this case, the member pled guilty to fraud. Therefore, the doctrine of *res judicata* may be applicable to bar the member from later claiming in a civil or administrative proceeding that he did not commit fraud.

[8] We also note that 1 JFTR U4137 was recently changed so that mortgage interest and property taxes associated with the purchase of any dwelling purchased at the TDY location may not be claimed as substantiation for payment of per diem while on TDY.

[9]Specifically, in October 2004 the member claimed he paid rent and was reimbursed $4,450.00. However, his revised voucher for October 2004 reflects a monthly total of $3,798.27.

2007 in an effort to rectify a prior fraudulent act does not make the act less fraudulent, nor does it avoid the resultant consequences of the fraud. *See* B-238614, July 26, 1990; and B-226189, Dec. 9, 1988. In fact, by revising his vouchers, the member essentially admitted that the original vouchers were false. The differences between the originals and corrected vouchers are neither minor, small in dollar amounts, nor infrequently made. The member has not offered a full explanation as to why the originals were so inflated. In addition, the factual premise for the claimed entitlement on the corrected vouchers is different from the originals. That is, the second is based on the member's entitlement to allowable expenses when he purchases a residence, while the first gave no indication of this.

As for the written statement of the rental company agent, when asked if the rental company owned the member's property how much they would charge for rent, the agent replied $2,200.00 to $2,500.00. Even if the member saved the government money, a claim that cannot otherwise be allowed cannot be allowed solely on the basis of savings to the government. *See* DOHA Claims Case No. 08122401 (January 8, 2009). Although the member contends he did not create a fictitious lease agreement,[10] there is direct evidence in the file that the member falsified lodging receipts. In October 2004 through June 2005, he created false rental receipts that he submitted with inaccurate statements he made on his monthly travel vouchers claiming reimbursement of alleged rental expenses at his TDY location, and was reimbursed based on those rental receipts.[11] In 2007 he decided to retain a rental company agency so that no one would know he was actually renting from himself. The member submitted receipts from the rental company reflecting that he actually made payment to a landlord when, in fact, the rental company agent turned around and issued the payment back to him, less a $100 fee. Therefore, since the member had not made payment for rent when he sought reimbursement, the reimbursement was obtained by misrepresentation. Accordingly, the Army has met its burden of establishing fraud on the part of the member.

The member states that he was informed by a finance representative and his JAG officer that his method of claiming rent when he purchased a house was allowable. While the member may have been misinformed about his entitlement to lodging expenses while on TDY, we cannot condone falsifying documents in order to obtain payments he believed were due him. In addition, this Office notes that it has long held that the government is not liable for the erroneous actions of its officers, agents or employees even though committed in the performance of their official duties. *See* DOHA Claims Case No. 09032301 (April 2, 2009).

Finally, even if the government had not met its burden of establishing fraud, this does not mean the member necessarily is entitled to payment on all of his claims. The record reflects that the member was essentially making "rental payments" to a company he himself owned. There is no authority under the JFTR to reimburse him for his lodging costs. Specifically, 1 JFTR ¶ U4129-E states that reimbursement for lodging cost when staying with friends or relatives is not authorized. *See* DOHA Claims Case No. 09031102 (March 30, 2009); DOHA

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[10]As mentioned above, DA Form 2627 reflects that the member submitted two lease agreements that contained false statements by the member that he leased property he owned.

[11]The member created invoices for his monthly "rent" payments with his company's name and address on the top. Each invoice lists under Rental Property Address, the address of the property he owned, his name as the tenant's name and the period and amount he purportedly paid in rent.

Claims Case No. 04020503 (February 18, 2004); 60 Comp. Gen. 57 (1980); *cf.* B-199683, Feb. 24, 1982. The Comptroller General recognized the prohibition against renting from friends and relatives is to eliminate potential abuses from occurring in connection with claims involving lodging with friends and relatives. Citing 1 JFTR ¶ U4129-E, we denied a member's claim in DOHA Claims Case No. 09031102 (March 30, 2009), in which the member leased a yacht from a corporation closely held by the member and his wife. In this case, the member owned the residence and cannot be reimbursed for purportedly renting quarters from himself.

Conclusion

The member's request for reconsideration is denied, and we affirm the February 25, 2013, appeal decision in DOHA Claim No. 2012-CL-121902 disallowing the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

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Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley
Member, Claims Appeals Board