

DATE: April 30, 2013

---

In Re: )

[REDACTED] )

) Claims Case No. 2012-WV-022905.3

Claimant )

---

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member is ordered to active duty and erroneously authorized *per diem*, 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 U.S. Marine Corps Reserve requests reconsideration of the March 19, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-022905.2.

**Background**

While the member was executing mobilization orders at Camp Lejeune, North Carolina, he was asked to return to active duty at the Headquarters Marine Corps (HQMC) in Arlington, Virginia. At that time, the member's home of record was Tucson, Arizona; and he had been mobilized several times in the past ten years. Each time the member was mobilized to active duty, he was mobilized from his home of record in Tucson, and he always returned there. The member's orders to Camp Lejeune ended September 30, 2008. In preparation for his transition to Arlington, the member drove there, instead of returning to Tucson. On November 7, 2008, the member purchased a home in Alexandria, Virginia. On December 15, 2008, the member was issued Active Duty Operational Support (ADOS) contingency orders from his residence in Tucson, Arizona, to Arlington, Virginia. In connection with his ADOS contingency orders from Arizona to Virginia, the member was authorized *per diem*. During the period December 15, 2008, through December 31, 2009, the member received *per diem* payments based on his

assignment to Virginia in the amount of \$30,494.27. However, the Defense Finance and Accounting Service (DFAS) later determined that since the member and his spouse were residing in their home in Alexandria, Virginia, he was entitled to receive a permanent change of station (PCS) allowance in the amount of \$74.90, instead of *per diem*. As a result, the member was overpaid \$30,419.37 (\$30,494.27 - \$74.90).

In addition, the member received basic allowance for housing at the dependent rate (BAH-D) for the rate of Tucson, Arizona, in the amount of \$19,909.07. Although the member was entitled to receive BAH-D, DFAS determined that he was entitled to receive it at the higher rate of Arlington, Virginia, in the amount of \$34,692.27. Therefore, the member was entitled to additional BAH-D in the amount of \$14,783.20 (\$34,692.27 - \$19,909.07). This amount was properly applied to the overpayment reducing it to \$15,636.17 (\$30,419.37 - \$14,783.20).

In the appeal decision, the DOHA adjudicator determined that since the member's orders reflected that he was called to active duty from Arizona when he was aware that was not the case, he should have at least questioned the impact this would have on his entitlements. The adjudicator noted that the member's orders provided a caution that in the event he entered active duty from an alternate location, reimbursement would be limited to the lesser of the actual distance traveled to the location or the distance from the PMA/PLEAD (personal mailing address/place from which ordered to active duty).

In the member's request for reconsideration, he attaches a written statement dated April 3, 2013, from the Individual Mobilization Augmentee Administrative Chief. In the written statement, the Chief states that in the Fall of 2008, the member was asked to forgo returning to his residence in Tucson while on mobilization orders at Camp Lejeune, and to immediately report to HQMC in Arlington. The Chief states that the offer extended to the member was that should he agree, he would be mobilized from his residence in Tucson. The member also attaches a written statement from a Major General endorsing his waiver request. The member contends that the debt is not valid because the agreement he made with HQMC is legally enforceable in a civil action. Therefore, he states that there is no debt.

### **Discussion**

Under 10 U.S.C. § 2774, we have 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 interests 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 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. 2012-WV-062201.2 (March 15, 2013); DOHA Claims Case No. 2011-WV-092701.3

(March 28, 2012); DOHA Claims Case No. 03092220 (September 30, 2003); and DOHA Claims Case No. 03061301 (July 31, 2003). We accept the written statement from Individual Mobilization Augmentee Administrative Chief dated April 3, 2013, as evidence that the member was erroneously advised that if he reported immediately to the Pentagon, instead of returning to Arizona, he would still be mobilized from his residence in Tucson. This statement along with the fact that the member did submit his travel vouchers each month claiming the expenses of mortgage interest, cable, gas, electric, water and phone, reflects that the member relied on the erroneous information contained in his orders and erroneous information given to him by HQMC officials. We note that according to the vouchers in the file, the member spent \$9,716.13 on those expenses during December 2008 through December 2009.

However, even though the *per diem* authorization was erroneous, the BAH-D payments at the Arlington rate totaling \$34,692.27 were not. Since the member properly received BAH-D to reimburse him for the cost of housing, 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. Further, there is no evidence in the file that the member maintained a residence in Tucson, Arizona. All evidence reflects that the member and his wife relocated to Alexandria, Virginia, prior to the member receiving his orders.

Although the member continues to assert that he is entitled under an agreement made with HQMC to the erroneous *per diem* payments, our authority in this matter pertains only to the availability of the equitable remedy of waiver.<sup>1</sup> The validity of the debt is an issue separate from the waiver process. Our decision in this matter does not affect any other available remedies the member may wish to pursue.<sup>2</sup>

---

<sup>1</sup>On October 25, 2010, under our Office's claims authority set forth under 31 U.S.C. § 3702(a), DOHA denied the member's claim for \$30,617.83 for lodging and *per diem* incident to his active duty tour at HQMC.

<sup>2</sup>However, we note that a member's entitlement is interpreted in accordance with the controlling statutes and regulations and cannot be varied by a contrary agreement or miscalculation. See DOHA Claims Case No. 97012101 (February 6, 1997).

## Conclusion

The member's request for relief is denied, and we affirm the March 19, 2013, 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: Jean E. Smallin

---

Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

---

Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

---

Natalie Lewis Bley  
Member, Claims Appeals Board