

KEYWORDS: Waiver of Indebtedness

DIGEST: When a member knows, or reasonably could be expected to know, he is receiving pay in excess of an entitlement, he has a duty to attempt to obtain a reasonable explanation from an appropriate official and to retain such amounts for repayment to the government.

CASENO: 2012-WV-061201.2

DATE: 10/25/2012

DATE: October 25, 2012

In Re:)	
[REDACTED])	Claims Case No. 2012-WV-061201.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member knows, or reasonably could be expected to know, he is receiving pay in excess of an entitlement, he has a duty to attempt to obtain a reasonable explanation from an appropriate official and to retain such amounts for repayment to the government.

DECISION

The member requests reconsideration of the August 28, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-061201. In that case this Office waived \$1,950.00 of the overpayment and denied waiver of \$28,377.51.

Background

The member, a U.S. Army Reserve Officer, was issued orders to active duty to Fort Jackson, South Carolina, effective August 15, 2004. These orders were for 365 days. On June 20, 2005, he was issued orders extending the period of service to 730 days. On July 13, 2006, the member was issued orders with a report date of August 15, 2006, ending August 14, 2007. There were further extensions that do not impact upon the overpayment at issue in this case.

During the period September 1, 2005, through December 31, 2006, the member received per diem in the amount of \$30,327.51. The Defense Finance and Accounting Service (DFAS) initially determined that since the member claimed reimbursement of lodging and/or rental fees based on a home he rented from his spouse, he was not entitled to reimbursement. As a result, the member became indebted to the government for the erroneous payments he received from September 1, 2005, through December 31, 2006, in the amount of \$30,327.51.

In their administrative report, dated June 8, 2012, DFAS recommended that this Office waive \$21,707.51, which represents the lodging reimbursement the member received for the periods September 1, 2005, through April 16, 2006, and September 1, 2006, through December 31, 2006. DFAS recommended denial of \$8,620.00, which represents lodging reimbursement the member received for the period April 17, 2006, through August 31, 2006, due to the member submitting tainted travel vouchers and/or leasing from a relative.

In the appeal decision, the adjudicator did not agree with the DFAS recommendation. She agreed with DFAS that the member acted in good faith in accepting \$1,950.00 of the overpayment, which represents his lodging expenses for September 2005. The member provided documentation for the lodging from a legitimate apartment service, reflecting that the amount was paid to the service and used for its intended purpose.

The adjudicator determined that lodging expenses for the period October 1, 2005, through December 31, 2006, should be denied. When the member submitted his DD Form 1351-2, *Travel Voucher or Subvoucher* [travel voucher], he included fraudulent, self-created corporate housing payment receipts under a company letterhead. The member contends that this was suggested to him by the real estate agent as he was having trouble getting receipts for the rent he was paying. For the period October 1, 2005, through April 30, 2006, the member submitted his travel vouchers and claimed reimbursement for "corporate housing charges" that exceeded the amount indicated in the Contract of Sale that he signed on September 8, 2005. The Contract of Sale indicated that the amount of rent was \$1,800.00 per month, with \$1,200.00 per month credited to purchase deposit. Each month the member submitted travel vouchers for more than the \$1800.00 rent. The member contends that if the utilities were included there was no overpayment. However, there are no utilities listed on the voucher. The adjudicator noted that the member submitted travel vouchers totaling over \$2,400.00 more than the actual lease amounts during this period.

On April 17, 2006, the member purchased the property. He then transferred the property to his spouse for one cent on the same day. The member then submitted travel vouchers for May 1, 2006, through August 31, 2006, again creating receipts that indicated he was leasing the property from another rental company. The member contends that he did this based on advice he received from a Defense Military Pay Office official who advised him that he would be allowed to claim reimbursement for lodging expenses for a house he was leasing from his spouse. In fact, the member states that the local official did not know the answer initially, and had to receive guidance from DFAS. The member indicates that he continued to check on the question of leasing from his spouse, and had his finance clerk check with DFAS. It was a second representative from DFAS who told him that he could not lease from his spouse or a relative. The finance clerk asked DFAS if the travel vouchers should be refiled as a purchase instead of a

lease. DFAS advised the clerk to wait until the end of the member's tour.¹ From September 1, 2006, through December 31, 2006, the member filed travel vouchers for reimbursement of real estate expenses authorized under Volume 1, Joint Federal Travel Regulations (JFTR) U4137. However, the adjudicator determined that the member was not authorized these expenses because the member did not own the house. The member contends that under the laws of the state where he and his wife are residents all property acquired during a marriage is considered marital property in which each party has equal claim.² Therefore, as a joint owner in the property, he was eligible to claim reimbursement for expenses as a purchase during the period of the lease from his spouse as well as during the time reimbursement was filed as a purchase.

Discussion

Title 10, U.S.C. § 2774, provides authority for waiving claims for erroneous payments of pay and certain 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. Generally, these criteria are met by a finding that the claim arose from an administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of this claim.

The travel vouchers for the period October 1, 2005, through April 30, 2006, are inappropriate for waiver as they were fraudulently created and inflated by over \$2400.00 more than the actual lease amounts. When asked about the receipts, the head of the company listed on the receipt stated they were not legitimate. However, the member contends that since the real estate agent suggested it, the definition of broker under South Carolina law makes permission from the real estate agent the same as permission from the head of the company. Under South Carolina Real Estate License law, § 40-57-30(e), a broker "offers to act as an agent representing a principal in a real estate transaction." This was not a real estate transaction, and a suggestion is not permission.

The travel vouchers for the period May 1, 2006, through August 31, 2006, are not appropriate for waiver as the member submitted vouchers indicating he was leasing the rental property from his spouse. "No cost for lodging is allowed if a member stays with friends/relatives while TDY [Temporary Duty], even if payment of lodging is made to the friend/relative." *See* 1 JFTR U4129-E. The Comptroller General has recognized that the purpose of the prohibition against reimbursing friends and relatives is to eliminate potential abuses from occurring in connection with claims involving lodging with friends or family. *See* DOHA Claims Case No. 2009-WV-040805.3 (August 12, 2010), DOHA Claims Case No. 04020503 (February 18, 2004), 60 Comp. Gen. 57 (1980), and B-199683, Feb. 24, 1982. The member states that he was informed by a finance representative that he could claim reimbursement for rental expenses while leasing from his spouse. This Office notes that it has consistently been the policy 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.

¹Due to the opening of a U.S. Army Criminal Investigation Command investigation, the member did not refile the travel vouchers that originally listed the house as being leased, when in fact his spouse owned it.

² The member's residence is a different state than the location of the home.

See DOHA Claims Case No. 2009-WV-040805.3, *supra*, DOHA Claims Case No. 09031102 (March 30, 2009), DOHA Claims Case No. 02111801 (December 2, 2002), and Comptroller General decision B-223805, Mar. 20, 1987.

The travel vouchers for the period September 1, 2006, through December 31, 2006, are not appropriate for waiver. Although the member submitted vouchers for reimbursable real estate expenses, he was not the owner of the home at the time. The member contends that he is eligible to claim the expenses as the state where the member and his wife are residents has marital property rules, in that all property acquired during the marriage is equally the property of both parties. First, the property is not located in that state, and therefore, the law of the parties' residence does not apply; and second, whether the member is the owner of the property is a matter of whether his name is on the deed. It was not. Therefore, he is not entitled to these expenses.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision, dated August 28, 2012. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative decision of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

Catherine M. Engstrom
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board

