

KEYWORDS: Waiver of Indebtedness

DIGEST: When a member knows he is being overpaid, he has a duty to set aside the erroneously paid funds for eventual repayment to the Government, even if the Government fails to act after initial notification.

CASENO: 2012-WV-062201.2

DATE: 03/15/2013

DATE: March 15, 2013

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In Re:	)	
[REDACTED]	)	Claims Case No. 2012-WV-062201.2
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member knows he is being overpaid, he has a duty to set aside the erroneously paid funds for eventual repayment to the Government, even if the Government fails to act after initial notification.

**DECISION**

A member of the USMC requests reconsideration of the January 8, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-062201. In that decision, this Office waived \$3,857.39 and denied waiver of \$15,029.89 of the debt amount of \$18,887.28.

**Background**

The member was instructed that he would be issued Active Duty Operational Support (ADOS) contingency orders from his home of record (HOR), Findley, Ohio, to Arlington, Virginia. In preparation for his transition to Arlington, the member signed a lease on August 1, 2009, in Arlington, Virginia. He then changed his permanent address to Arlington using the

Marine On Line database. The member's ADOS orders were issued September 1, 2009. The Defense Finance and Accounting Service (DFAS) advised that the member was authorized basic allowance for housing (BAH) for the place where he was ordered to active duty, along with per diem, which was stated in the orders. When the member changed his address to Arlington in Marine On Line, this address effectively changed his Place Last Entered Active Duty (PLEAD), and his orders issued on September 1, 2009, reflected the change. DFAS later determined that this resulted in a change to the member's entitlement to per diem. The member was not entitled to per diem since his residence was now in the same place as his temporary duty. Since the member received \$18,887.28 in per diem for the period August 1, 2009, through February 28, 2010, he became indebted to the government in that amount.

The member also received BAH for the rate of Findley, Ohio, in the amount of \$6,166.00 during the period September 2009 through February 2010. Although the member was entitled to receive BAH, DFAS determined that he was entitled to receive it at the higher rate of Arlington, Virginia, in the amount of \$11,550.00. Therefore, the member was entitled to additional BAH in the amount of \$5,384.00. This amount should have been applied to the member's indebtedness; however, the record shows that the member received this amount retroactively in June 2010.

### **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, those criteria are met by a finding that the claim arose from 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 the waiver.

In the administrative report, DFAS recommended waiver in the amount of \$13,503.28 (this would be the amount of per diem for which the member was indebted) and to deny waiver in the amount of \$5,348.00 (this would be the difference of the amount of BAH for which the member was owed). The adjudicator determined that this was not appropriate. She noted that the record indicates the member became aware of the overpayment in December 2009. The member stated that he was contacted by the Marine Corps Mobilization Command (MOBCOM) in early December 2009 and was told that he would have to pay back all the per diem he had received. Our Office has consistently held that when a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for eventual repayment to the Government, even if the Government fails to act after notification. *See* Department of Defense Instruction (hereinafter Instruction) 1340.23, ¶ E4.1.1.

The member asserted that after he was informed of the debt, he immediately contacted his superiors about the problem, and they assured him that the problem would be fixed. As the adjudicator noted in the appeal decision, the member did not provide any corroborating written documentation of what he was told. Our decisions and those of the Comptroller General have consistently held that there is no basis for waiver based on reliance on incorrect advice unless the official(s) are identified and the member's version of the events is corroborated by pay and

disbursing officials with evidence of what he told them and what they told him. *See* DOHA Claims Case No. 04110101 (November 3, 2004), and DOHA Claims Case No. 04100402 (October 26, 2004).

In order for waiver to be appropriate, the member must meet a two-part test. The member 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. 2011-WV-092701.3 (March 28, 2012). The adjudicator determined that the only payments properly subject to this scrutiny were the \$4,972.24 he received on October 19, 2009, and the \$4,269.15 he received on December 18, 2010, for a total of \$9,341.39. The adjudicator determined that the file revealed costs associated with the member's lease of his apartment in Arlington which met the above criteria for waiver in the amount of \$3,857.39. She noted that the member had not provided any information concerning expenses he paid for maintaining his residence in Ohio.

In the member's request for reconsideration, he repeats the facts that are already in the record, but adds no new evidence. As to information regarding expenses he paid for maintaining his residence in Ohio, none was offered that meets the requirements of the Joint Federal Travel Regulation (JFTR).

The member contends that he has acted honorably and has not attempted to defraud the government. The Board finds no indication of fraud, misrepresentation, or lack of good faith on the part of the member. The Board is unable to say that the member is entirely without fault. However, the legal definition of "fault" does not imply any ethical lapse on the part of the member. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person: if such a person knows or reasonably should know that he is receiving money to which he is not entitled, waiver is precluded. *See* Instruction ¶ E4.1.4.

The member states he still feels he is entitled to per diem, but could accept waiver of his indebtedness. The Board does not provide waiver based on compromise of amounts owed the government.

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the appeal decision dated January 8, 2013, in which this Office waived \$3,857.39 and denied waiver of \$15,029.89 of the debt amount of \$18,887.28. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

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Jean E. Smallin

Chairman, Claims Appeals Board

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Gregg A. Cervi  
Member, Claims Appeals Board

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Natalie Lewis Bley  
Member, Claims Appeals Board

