

KEYWORDS: Waiver of Indebtedness

DIGEST: Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of military pay and allowances if repayment would be against equity and good conscience and not in the best interests of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member.

CASENO: 2012-WV-082016.2

DATE: 03/19/2013

DATE: March 19, 2013

| | | |
|------------|---|----------------------------------|
| In Re: |) | |
| [REDACTED] |) | |
| Claimant |) | Claims Case No. 2012-WV-082016.2 |
| |) | |

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of military pay and allowances if repayment would be against equity and good conscience and not in the best interests of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member.

DECISION

A retired member of the U.S. Army requests reconsideration of the February 21, 2013, appeal decision in DOHA Claim No. 2012-WV-082016. In that decision, this Office granted waiver of the government’s claim in the amount of \$4,265.00, and denied waiver of \$117,123.00.

Background

The member was called to active duty (AD) at the Pentagon. From 2003 to March 2005, the member submitted monthly travel vouchers for the reimbursement of his rental costs to the

Defense Finance and Accounting Service (DFAS). On March 16, 2005, the member purchased a home. The member subsequently submitted monthly travel vouchers indicating that he was renting the home that he actually owned.

On December 14, 2007, the Army Criminal Investigation Command (CID) began investigating questionable monthly travel vouchers submitted by the member. On August 16, 2008, the CID's final report of investigation was issued. The CID found that the member committed the offenses of false official statement, larceny, and fraud when he submitted travel vouchers containing a fictitious lease agreement and receipts for rent at a property he purchased in March 2005. The CID's report of investigation stated that the *Commander's Report of Disciplinary or Administrative Action Taken* (DA Form 4833) was required. We note that there is no record of the DA Form 4833 in the file. However, we also note that the record reflects that the member was released from active duty before being prosecuted by the Army and DFAS has advised us that he is still subject to prosecution. On November 17, 2010, the Army CID requested that the Defense Finance and Accounting Service (DFAS) initiate recoupment of the unauthorized payments made to the member for lodging. On November 30, 2010, DFAS notified the member that he was in debt to the government in the amount of \$121,388.00, for the *per diem* he claimed as rental payments for a home he actually owned during the period March 1, 2005, through October 31, 2007.

The member subsequently requested waiver of the government's claim under the provisions of 10 U.S.C. § 2774. On July 21, 2011, DFAS denied the member's request for waiver. DFAS based its decision on the CID's finding that the member submitted false documents to support his travel vouchers. The member requested reconsideration of DFAS's denial of his waiver request. In DFAS's administrative report sent to our office, DFAS recommended that denial of the member's waiver request be sustained.

In the appeal decision, the DOHA adjudicator declined to follow DFAS's recommendation to sustain their denial of the total amount of the overpayment. The adjudicator found that since the member did not purchase his home until March 16, 2005, and the CID investigation revealed that the member was still obligated to pay rent on the apartment he was leasing through March 31, 2005, waiver of the apartment rental cost for the period March 1, 2005, through March 31, 2005, in the amount of \$4,265.00, is appropriate, and that all other conditions necessary for waiver of that amount have been met. However, the adjudicator denied the overpayment resulting from the member claiming *per diem* costs for a home he owned from April 1, 2005, through October 31, 2007, in the amount of \$117,123.00. Although the member stated that there was no intent on his part to defraud the government, and he acted only to streamline the process of reimbursement of his travel claims, the adjudicator noted that the member failed to provide any evidence that he discussed his intentions to claim *per diem* for a home he owned with appropriate officials or was advised by his finance office, DFAS or his supervisor to submit self-created receipts for *per diem* expenses. In addition, the adjudicator found no evidence that the member was advised by his finance office or other appropriate officials that he was entitled to receive *per diem* for a home he owned. The adjudicator noted that a member of his rank with over 20 years of service, should have known that the submission of self-created receipts for an apartment rental for a home he owned, was at least questionable. As for the member's contention that he only submitted travel vouchers for what he was due, the

adjudicator responded that our office has consistently held that a member is not entitled to reimbursement for lodging and/or related expenses incident to a temporary duty tour, where the home he rents or leases is owned by himself or a relative. Finally, the adjudicator noted that our office has consistently held that when a member provides questionable, incorrect, false, or fictitious information to agency officials which directly results in an overpayment, he is not free from fault in the matter, and waiver is not appropriate.

In the member's request for reconsideration, he disagrees with the adjudicator's application of the rule that a member is not entitled to reimbursement for lodging and/or related expenses incident to a temporary duty tour, where the house he rents or leases is owned by himself or a relative. He states that this rule is in direct conflict with paragraph U4137 of the Joint Federal Travel Regulations (JFTR), which states that a member may purchase and occupy a residence at a temporary duty (TDY) location. Allowable expenses include mortgage interest, property tax and utility costs. He states that the purchase of his home brought about considerable savings to the government. His apartment rent was \$4,265.00 per month and he claimed \$3,650.00 per month for his home. He states that it was never his intent to gain from his purchase of his home, and that he took a considerable loss when he sold his home at the end of his TDY tour. He also disagrees with the adjudicator's application of the rule that when a member provides questionable, incorrect, false, or fictitious information to agency officials which directly results in an overpayment, he is not free from fault in the matter, and waiver is not appropriate. He states that the claims he made were for legitimate expenses. He also points out that under paragraph T4005 of the JFTR, it states that there will be no refusal for reimbursement for failure to follow the JFTR. In addition, he states that during the waiver process with DFAS, DFAS requested he submit his receipts for mortgage interest, property taxes, and utilities. He states that he thought that DFAS was at last seeing that he had no intention of defrauding the government and were going to accept his receipts in order to offset the indebtedness. However, DFAS denied his waiver request. He requests that his expenses be reviewed in order to offset the indebtedness. Finally, he states that he was entitled to meals and incidental expenses (M&IE) during the period of overpayment and requests that this amount be applied to offset the indebtedness.

Discussion

Title 10 of the United States Code, Section 2774, provides for waiver of a claim of the United States against a member which arises out of the erroneous payments to a member of pay and allowances, including travel, transportation and relocation expenses and allowances. Waiver is available only when the collection of the claim would be against equity and good conscience, and would be in the best interests of the United States. Under 10 U.S.C. § 2774(b), waiver is not appropriate if there exists in connection with the claim an indication the erroneous payment was solely or partially the result of fraud, misrepresentation, fault, or lack of good faith on the part of the member. Under the terms of the statute and implementing regulations found under Department of Defense Instruction 1340.23 (February 14, 2006), the appropriateness of waiver turns on the knowledge and conduct of the member who received erroneous payments. The principal test is whether a member knew or reasonably should have known that an erroneous payment occurred and failed to bring the matter to the attention of the responsible officials. The

standard employed to determine whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving erroneous payments. *See* DOHA Claims Case No. 97052111 (September 30, 1997);¹ B-256417, July 22, 1994; B-256600, July 14, 1994; and B-201816, July 8, 1981.

As pointed out by the adjudicator in the appeal decision, an individual of the member's rank with over 20 years of service, is expected to know that presenting self-created receipts as an apartment rental for a home he owned is at least questionable. Although the member states that the purchase of his home brought about considerable savings to the government and it was never his intent to gain from the purchase, even if the member is able to substantiate that his monthly mortgage interest, property taxes, and utilities equaled what he claimed per month as rent, \$3,650.00, waiver of the indebtedness would still be inappropriate under 10 U.S.C. § 2774. Under the waiver statute, we have consistently held that when a member provides questionable, incorrect, false, or fictitious information to agency officials which directly results in an overpayment, he is not free from fault in the matter, and waiver is not appropriate. *See* DOHA Claims Case No. 2012-WV-061201.2 (October 25, 2012); and B-224647, Sept. 28, 1987. In this case, the CID report of investigation concluded that the member committed the offenses of false official statement, larceny and fraud when he submitted vouchers containing a fictitious lease agreement and receipts for rent of a property he owned. The member purchased the property in March 2005, and was not authorized the reimbursements he claimed. The evidence in the file clearly supports a determination that the member filed fraudulent travel vouchers. He used a fictitious company name and address for his nonexistent lessor. In fact, the CID found that the address the member used for his nonexistent lessor turned out to be his daughter's address.² Therefore, waiver under the circumstances is not appropriate. The facts in this case indicate that it would not be against equity and good conscience to collect the debt.

We acknowledge that paragraph U4137 of the JFTR, states that a member may purchase and occupy a residence at a temporary duty (TDY) location, and the allowable expenses include mortgage interest, property tax and utility costs. However, this paragraph does not authorize a member *per diem* that he claimed as rental payments for a home he actually owned. If the member had properly filed his travel voucher, and not created fictitious receipts, he would have received reimbursement as prescribed under this paragraph. We also note that under U2700-C of the JFTR, if payment is made before discovery of a suspected falsified expense, the payment recipient must reimburse the government. As for the paragraph T4005, found under Appendix O of the JFTR, it states that commands/units are expected to take appropriate disciplinary action when a traveler fails to follow the JFTR. Disciplinary action should be for willful violations and may be in the form of counseling or non-judicial action, and action must not be through refusal to reimburse. In the member's case, the CID found he fraudulently submitted travel vouchers and requested that DFAS initiate recoupment of the unauthorized payments made to the member

¹This decision was decided under 5 U.S.C. § 5584 because the applicant for waiver was a civilian employee. However, the standards for waiver under 10 U.S.C. § 2774 and 5 U.S.C. § 5584 are the same.

²On March 19, 2008, a special agent of CID interviewed the member's daughter. She verified her address, but she had no knowledge concerning the fictitious company. She stated that she did not own the business and never rented or leased property.

for lodging. In addition, we are unsure whether or not the Army has pursued prosecution of the member for his offenses.

Finally, we have no record of the member's claimed legitimate expenses, *i.e.*, what he paid for his monthly mortgage interest, property taxes, and utilities. Even if we did have this information, any claimed expenses for purchase of the member's home used for his lodging during his TDY would not change our decision under the waiver statute. DOHA's authority in this matter pertains only to the availability of the equitable remedy of waiver. We cannot waive any amount that otherwise is inappropriate for waiver. If the member wishes to pursue the matter as a claim, he may do so under DoD Instruction 1340.21 (May 12, 2004). Under DoD Instruction 1340.21, 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. He must present his claim under the applicable statutes and regulations; and if DFAS decides against him, he may appeal that determination through DFAS to our office.³

Conclusion

The member's request for reconsideration is denied, and we affirm the February 21, 2013, appeal decision to deny waiver in the amount of \$117,123.00. In accordance with Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

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

³However, as explained in the appeal decision, because fraud exists with regard to the member's claim for lodging reimbursement for the period April 2005 through October 2007, most likely the member's claim would be denied because the member cannot later reclaim these expenses even when these expenses are actually incurred, since the fraudulent submissions are viewed as vitiating any payment arising out of the transaction. *See* DOHA Claims Case No. 2011-CL-071801 (May 21, 2012) and DOHA Claims Case No. 05091301 (October 31, 2005).