

DATE: September 30, 2013

In Re:

[REDACTED]

Claimant

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Claims Case No. 2012-WV-102301.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware, or reasonably should be aware, that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

DECISION

A member of the United States Army Reserve requests reconsideration of the appeal decision dated August 15, 2013, of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-102301. In that decision, this Office denied waiver of erroneous payments in the amount of \$46,857.54.

Background

The member, a U.S. Army Reserve officer, was issued orders to active duty (AD) for 730 days from Melbourne, Florida, to Fort Belvoir, Virginia, effective October 6, 2001. The member received temporary duty (TDY) entitlements based on his Fort Belvoir, Virginia, location and Basic Allowance for Housing (BAH) based on Melbourne, Florida, his permanent duty station (PDS). On September 12, 2003, the member was issued orders calling him to AD from Melbourne, Florida, to Fort Belvoir, Virginia, for 179 days, effective October 6, 2003. During this period of AD, the member continued to receive TDY entitlements based on his Fort Belvoir, Virginia, location, and BAH based on Melbourne, Florida. During this period, the member was also issued orders to perform 90 days active duty for training (ADT), effective April 2, 2004, again from Melbourne, Florida, to Fort Belvoir, Virginia.

On June 30, 2004, the member was issued contingency operations extended active duty (CO-EAD) orders calling him to AD for two years effective July 1, 2004, from Melbourne, Florida, to Fort Belvoir, Virginia. These orders authorized him PCS (permanent change of station) entitlements. On December 21, 2005, the member purchased his home in Chantilly, Virginia. The member's orders were later amended, and his period of service was extended through June 30, 2007. During the period July 1, 2004, through June 30, 2007, the member received BAH with dependents (w/DEPNS) based on his Fort Belvoir, Virginia, assigned location.

On June 29, 2007, the member was issued orders calling him to perform AD from his home in Chantilly, Virginia to Fort Meade, Maryland, effective July 1, 2007, for 365 days. These orders reflected, "Performing in a temporary duty status." On July 2, 2007, the member's orders were amended to reflect that he entered AD from Melbourne, Florida, instead of his residence in Chantilly, Virginia. They were again amended on July 21, 2008, to reflect that his duty location would be Chantilly, Virginia, instead of Fort Meade, Maryland. As a result of these orders, during the period July 1, 2007, through March 31, 2008, the member received \$46,857.54 in *per diem* payments. However, the Defense Finance and Accounting Service (DFAS) later determined that since the member commuted locally from his family residence in Chantilly, Virginia, to his duty location in Chantilly, Virginia, he was not entitled to receive *per diem*.¹

Discussion

Title 10, United States Code, § 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 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 his request for reconsideration the member raises several points of concern. He believes that this Office, DOHA, is being untruthful when we state that we have no record of the member calling us regarding his monthly vouchers. He states that he "answered any and all questions from the DFAS staff. During our last correspondence, I provided you with my primary contact and DFAS. I would encourage you to speak with her regarding my case." This Office must deny the employee's request to speak with specific individuals. We must render decisions in accordance with Department of Defense Instruction 1340.23, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances* (hereinafter Instruction) (February 14, 2006). We base our decisions on the written record, including the administrative report from the component concerned (usually DFAS) with input from the employee. Our Office does not have the authority to perform investigations. See DOHA Claims Case No. 2009-WV-090804.2 (April 14, 2010), and DOHA Claims Case No. 07111603 (November 30, 2007). While the member

¹ During the period July 1, 2007, through March 31, 2008, the member also received BAH w/DEPNS based on the Melbourne, Florida, location in the amount of \$16,056.00. These amounts were specifically outlined in the appeal decision.

may have had communications with DFAS, there is no record in the file that he called this Office (DOHA) regarding his monthly vouchers. The member has also requested certain documents from us. Should the member require any documentation, he should direct his inquiries to DFAS or the Army.

In addition, the member states that this Office and DFAS are incorrect in our assertion that he purchased his home on December 21, 2005. He states that date is incorrect; the correct date is September of 2004. Both DFAS and this Office base the December date for the member's property in Chantilly, Virginia, on the Form HUD-1A in the record, which indicates on page 2 of the form that the settlement date was December 21, 2005. As DFAS stated in their letter dated July 12, 2012, forwarding the member's case to our Office for the appeal decision:

[The member] has also addressed an issue with our report in which we address the purchase of his Chantilly, VA home to be in 2005. He states the home was purchased in 2004. The housing documents that were provided to our office, Form HUD-1A, Settlement Statement, lists [sic] the settlement date as December 21, 2005. Additionally, in this case the purchase date being in either 2004 or 2005 does not change the facts in the case, nor would this date impact or change our decision. However, we wanted to address the dates for [the member] to be assured our office was using accurate documents in his case.

In the appeal decision, the adjudicator also uses the December 21, 2005, date as the purchase date of the house based on the information in the record. In his request for reconsideration, the member lists this type of error as a cause for concern. He contends that staff members were not applying the same type of rigor in reviewing his packet as he was in preparing it. This is only one of numerous examples the member points out as a concern in his request for reconsideration. The main problem with these examples is (1) the record actually contains evidence that supports the factual contentions of our Office; (2) the member provides no contrary evidence other than his mere assertions; and (3) regardless, there is no impact on the actual decision.

The time frame of the debt is the overpayment for *per diem* from July 1, 2007, through March 31, 2008. The member's orders reflected that although he was assigned to Fort Meade, Maryland, his designated duty location was at another government agency (AGA) in Chantilly, Virginia. As the member noted on a sworn statement, dated May 15, 2009, "Prior to the mobilization in question [July 1, 2007], I had recently completed an EAD/ADOS PCS order." As this Office noted, the member's orders issued June 20, 2004, authorized him PCS entitlements. After purchase of his home in Chantilly, Virginia, he requested and received BAH w/DEPNS. At this point the member was on PCS orders to Fort Belvoir, Virginia.

According to the Joint Federal Travel Regulations (JFTR), PCS is:

[T]he assignment, detail, or transfer of a member or unit to a different PDS [permanent duty station] under competent orders that do not specify the duty as temporary, provide for further assignment to a new PDS, or direct return to the old PDS.²

² See 1 JFTR, App. A1, Change 242 (February 1, 2007), which was in effect at the time of overpayment.

The JTFR further defines PDS as the “post of duty or official station of a member.”³ The member received orders to Fort Belvoir with PCS entitlements, and he was getting paid BAH w/DEPNS for the PDS location of Fort Belvoir for three years during the period July 1, 2004, through June 30, 2007. The member had purchased his home, and since he was receiving PCS entitlements, he was no longer entitled to receive TDY compensation. *Per diem* is intended to reimburse a member for lodging and meal expenses he incurs when he is not living at home. Since the member was living at home, clearly he had no such expenses. The orders initially issued to the member for duty beginning July 1, 2007, ordered him from his Chantilly, Virginia, residence to AD at Fort Meade, Maryland, with duty location at the AGA, Chantilly, Virginia. The member was in a PCS status and should have remained in a PCS status. When the member’s orders were amended to indicate that he was entering AD from Melbourne, Florida, instead of Chantilly, Virginia, we believe the member should have questioned receiving TDY entitlements.

While the member states that he sought advice from his headquarters, and he continually asked the “tough questions,” we believe that the member should have questioned the processing of his DA 4187, *Personnel Action*, for his duty with the AGA. An attached memorandum, dated June 8, 2007, requesting the member’s duty with AGA listed him as “not local” and that he was reporting for AD from Melbourne, Florida. However, he was “local” and reported for AD from Chantilly, Virginia, for duty location at Chantilly, Virginia. As discussed, in 2004, the member voluntarily accepted orders to PCS to Fort Belvoir, Virginia, to work at Fort Belvoir, Virginia. The member subsequently purchased a home within the commuting distance of his new PDS. The member received BAH w/DEPNS for housing for the Virginia residence for three years. The Comptroller General has held that if a member is detached from his permanent duty station under PCS orders and thereafter proceeds to a temporary duty station, he enters a travel status only if the temporary duty location is outside the limits of his old station. Furthermore, the member’s permanent station, for travel purposes, remains at the same place until he leaves that station for permanent assignment at another place. *See* Comptroller General decision B-189601, Dec. 30, 1977. The member was ordered to AD at Fort Meade, Maryland, with a duty location at the AGA, Chantilly, Virginia. Neither of these locations would have necessitated a PCS as they remained within the commuting area of the National Capital Region. *See* DoDI 4515.14.⁴

The July 2, 2007, orders that amended the member’s orders to change his address to Melbourne, Florida, in an attempt to qualify the member for TDY entitlements did not have any legal effect.⁵ The member continued to commute between his residence in Chantilly, Virginia, and his duty location in Chantilly, Virginia. There is a well-established rule that a travel order may not be retroactively modified to increase or decrease the traveler’s entitlements, except to correct an error or complete an order to show original intent. *See* Comptroller General decision B-259663, June 12, 1995.

³ *See* 1 JFTR, App. A1, Change 243 (March 1, 2007), which was in effect at the time of overpayment.

⁴ The current Instruction is dated June 28, 2013; but the Instruction dated December 28, 1998, as amended, would have been in effect at the time.

⁵ Melbourne, Florida, remains the member’s home of record (HOR); however, that has no bearing on the entitlements in question in this case.

There are other issues that the member contends this Office should address, but they simply do not have any impact on the decision at issue.⁶ The member contends that his case is very complicated and he could not possibly have understood the policies involved. However, this Office questions how as a senior commissioned officer he could have thought that for three years he lived and worked in the same place in his own home drawing BAH w/DEPNS, and the next year while still living in his own home and working in the same commuting area he would be entitled to TDY while having no travel expenses. It is correct that the member is entitled to BAH w/DEPNS for that period in question at the Chantilly, Virginia, location. The member received BAH at the Melbourne, Florida, location, which must be offset. Generally, our Office prefers to settle all debts and monies owed to a member in one case; however, we were not able to obtain those figures from the member's finance office despite requests. The member may file a claim to determine if any funds are owed.

A waiver is not a matter of right. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting a waiver. *See* Instruction ¶ E4.1.1 and E4.1.3. In light of the above, it is not against equity and good conscience and in the best interests of the United States to deny waiver of the debt. The member has indicated this is a financial hardship, however, financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction ¶ E4.1.7. The member may contact DFAS to arrange for a more convenient schedule in repaying the debt, but that is entirely within the discretion of DFAS.

⁶ The member continues to contend that because of his continued service without a break over five years, his mobilization clock would be reset, thus allowing him to be in a temporary change of station (TCS) status. Whether the member counted against the active army end strength has no bearing on his entitlement to *per diem*.

Conclusion

The member's request for reconsideration is denied, and we affirm the August 15, 2013, appeal decision. In accordance with the Instruction ¶ E8.15, this is the final administrative action 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