

DATE: August 25, 2014

In Re:)

[REDACTED])

) Claims Case No. 2013-WV-021401.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is ordered to temporary duty with *per diem*, and it is later determined that he is not entitled to per diem, waiver under 10 U.S.C. § 2774 is appropriate only for the amounts actually expended in reliance on the erroneous information.

DECISION

A member of the U.S. Coast Guard requests reconsideration of the June 20, 2014, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-021401. In that decision, DOHA denied in part the member's request for waiver of erroneous payments of *per diem*. The member received \$205,662.22 in erroneous travel payments. This Office waived \$167,070.40 and denied waiver of the remaining \$38,591.82.

Background

The member received at least three sets of orders ordering him to perform duty during the period January 1, 2007, through September 30, 2012. In connection with these orders, the member was authorized *per diem* which included lodging, and meals and incidental expenses (M&IE). However, it was later determined that since the member's home was within commuting distance of his duty location, he was not entitled to receive *per diem*. As a result, he was overpaid \$205,662.22.

In her decision, the adjudicator found that the member acted in good faith in accepting \$120,633.96 in erroneous lodging and retained lodging payments that he received during the period January 1, 2007, through January 16, 2012. The adjudicator also found that waiver was appropriate for \$1,208.44 of the \$1,732.01 overpayment for incidentals. However, she determined that since the member was properly paid basic allowance for subsistence (BAS) for

his meals in the amount of \$18,913.52 (of the \$83,207.27 overpayment for meals) during the period January 1, 2007, through September 30, 2012, collection of \$18,913.52 would not be against equity and good conscience, nor contrary to the best interest of the United States. The adjudicator also waived \$45,228.00 (of the remaining \$64,293.75 overpayment for meals) based on the fact that the member worked 180 days a year during the period of overpayment. However, the adjudicator denied \$19,065.75 of the overpayment for meals because there was nothing in the record indicating that the member worked in excess of 180 days per year, or that he expended the remaining portion of the erroneous *per diem* payments for its intended purpose. The adjudicator further determined that the portion of the overpayment in the amount of \$88.98 which the member erroneously received as a duplicate *per diem* payment for the period August 1, 2009, through August 15, 2009, was not appropriate for waiver.¹ Therefore, the adjudicator waived a total of \$167,070.40 and denied waiver of \$38,591.82.

In his request for reconsideration, the member states that when he received his orders, the authorizing official who signed his orders explained that the member was entitled to receive *per diem*. He states that the authorizing official told him that since his home address was over fifty miles away from his duty location and his orders authorized it, he was entitled to *per diem*. In addition, he states that he used the amount of *per diem* paid to him in good faith and for its intended purpose. He submits documentation reflecting that he used an additional \$523.57 for its intended purpose for incidentals. He also states that all members who are authorized *per diem* are still entitled to receive BAS. Therefore, he does not understand why the amount of BAS paid to him was denied. He also states that when he was activated in 2007, the military out-load mission was in full operational mode, and his unit and he were constantly working security zones. He was on a one-hour recall notice even if he was in an off-duty status. He states that with his schedule, he only averaged about 4 to 6 days off of work per month. He states that on the rare occasion that he needed time off to return to his home of record, he had to take leave. He submits documentation supporting his description of his work scheduled.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of travel expenses to a member if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. The standards for waiver do not permit waiver simply because the government made an administrative error. *See* Enclosure 4 of the Department of Defense Instruction 1340.23 (February 14, 2006). In the case of erroneously authorized travel payments, the member must have spent the payments in reliance on the erroneous authorization. *See* DOHA Claims Case No. 07042001 (April 30, 2007); and DOHA Claims Case No. 07022606 (March 1, 2007). The burden is on the member to provide documentary evidence as to the expenditure of the money.

¹In her decision, the adjudicator noted that the member received a duplicate payment in the amount of \$138.00. However, we have found an additional credit due the member in the amount of \$49.02 which reduces this portion of the debt to \$88.98.

Per diem is intended to reimburse a member for the lodging and meal expenses he incurs when he is not living at home. In this case, the adjudicator considered that the member was paid a total of \$18,913.52 for BAS during the period January 1, 2007, through September 30, 2012, and found that since the member properly received BAS to reimburse him for the cost of food, he cannot be said to have spent that amount in detrimental reliance on the erroneous *per diem* authorization. See DOHA Claims Case No. 2013-WV-022009.2 (March 11, 2014); DOHA Claims Case No. 2013-WV-022010.2 (January 30, 2014); and DOHA Claims Case No. 03092220 (September 30, 2003).

We understand that the member had undertaken travel based on the erroneous information that he was provided verbally and in writing. However, it is well-established that the government is not bound or made liable by the erroneous advice and actions of its officers, agents or employees, even when committed in the course of their official duties. See DOHA Claims Case No. 08122401 (January 8, 2009), where we held that a member's entitlement to travel allowances cannot be increased by erroneous information provided by government representatives.

However, the member has submitted evidence reflecting that he used an additional \$523.57 for incidentals and \$19,065.75 for meals during the period of overpayment. He has submitted evidence that supports his description of his work schedule which required him either to work long periods of days in a row or be subject to recall. In addition, the record reflects that the member did take leave on weekends during the overpayment period, and was not paid *per diem* for those periods. This further supports that the member remained at work or on call when he was not in a leave status. Therefore, under the circumstances, we waive an additional \$19,589.32. See DOHA Claims Case No. 2013-WV-022009.2, *supra*.

Conclusion

We hereby waive an additional \$19,589.32 and deny waiver in the amount of \$19,002.50. In accordance with the Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense.

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