

DATE: March 11, 2014

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In Re: )

[REDACTED] )

) Claims Case No. 2013-WV-022009.2

Claimant )

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**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 January 23, 2014, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-022009. In that decision, DOHA denied in part the member's request for waiver of erroneous payments of *per diem*. The member received \$44,811.90 in erroneous travel payments. This Office waived \$35,654.06 and denied waiver of the remaining \$9,157.84.

**Background**

The member received two sets of orders ordering him to perform duty during the period February 1, 2011, 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 \$44,811.90.

In her decision, the adjudicator first determined that since the member was properly paid basic allowance for subsistence (BAS) for his meals in the amount of \$3,598.84 during the period February 1, 2011, through January 31, 2012, collection of \$3,598.84 would not be against

equity and good conscience, nor contrary to the best interest of the United States. The adjudicator also determined that waiver was not appropriate for the erroneous *per diem* payments the member received for federal holidays and weekends in the amount of \$5,559.00, since his duty location was within the local commuting distance of his home. However, the adjudicator found that the member acted in good faith in accepting \$26,988.10 in erroneous lodging payments and \$8,665.96 in erroneous M&IE payments that he received during the period February 1, 2011, through January 31, 2012. Therefore, the adjudicator waived a total of \$35,654.06 and denied waiver of \$9,157.84.

In his request for reconsideration, the member states that when he received his orders, he specifically asked the authorizing official to verify that he 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 states that even though his commute was over fifty miles away and over an hour in duration without traffic, if he knew that he was not entitled to receive *per diem*, he would have declined it and commuted from home to avoid this misfortune. He further 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 his schedule at the security detachment required him to work weekends at odd hours to complete his assigned mission. He states that his schedule varied depending on last-second recall notifications. Finally, he states that repayment of the debt would cause him financial hardship.

### **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.

*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 \$3,598.84 for BAS during the period February 1, 2011, through January 31, 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. 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. In addition, financial hardship is not a factor for consideration in determining whether a waiver is appropriate.

However, we have been advised by the Coast Guard that the member was working a schedule in the security detachment that required him either to work weekends 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 \$5,559.00.

### **Conclusion**

We hereby waive \$5,559.00 and deny waiver in the amount of \$3,598.84. 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

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Gregg A. Cervi

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Gregg A. Cervi  
Member, Claims Appeals Board