

DATE: January 30, 2014

In Re:)
 [REDACTED]) Claims Case No. 2013-WV-022010.2
)
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 December 20, 2013, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-022010. In that decision, DOHA denied in part the member's request for waiver of erroneous payments of *per diem*. The member received \$82,951.63 in erroneous travel payments. This Office waived \$63,614.04 and denied waiver of the remaining \$19,337.59.

Background

The member received three sets of orders ordering him to perform temporary duty (TDY) during the period 2005 through 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 TDY locations, he was not entitled to receive *per diem*. As a result, he was overpaid \$79,921.63. In addition, on March 15, 2011, the member was erroneously paid \$3,030.00 for *per diem* and retained lodging he had already received for the period January 7, 2011, through January 23, 2011. This increased his indebtedness to \$82,951.63 (\$79,921.63 + \$3,030.00). These overpayments were specifically detailed in the DOHA adjudicator's decision.

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 \$6,566.59 during the period October 1, 2005, through January 31, 2012, collection of \$6,566.59 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 \$9,741.00, since his TDY location was within the local commuting distance of his home. The adjudicator further determined that waiver was not appropriate for the duplicate *per diem* payments the member received in the amount of \$3,030.00. However, the adjudicator found that the member acted in good faith in accepting \$51,039.00 in erroneous lodging payments and \$12,575.04 in erroneous M&IE payments that he received during the period October 1, 2005, through January 31, 2012. Therefore, the adjudicator waived a total of \$63,614.04 and denied waiver of \$19,337.59.

In his request for reconsideration, the member states that the overpayments resulted from administrative error with no fault on his part and repayment of the remaining indebtedness will cause him financial hardship. He further states that there is no proof that he used any of the \$9,741.00 *per diem* payments for anything other than the intended purpose. He states that he did not return home every weekend or holiday.

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 addition, financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction ¶ E.4.1.7. 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. 07022606 (March 1, 2007). The burden of proof is on the member to provide documentary evidence as to the expenditure of the money. *See* DOHA Claims Case No. 07042001 (April 30, 2007).

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 waived all lodging and all *per diem* incidental expenses. In addition, she granted waiver of all *per diem* meal payments the member received for the weekdays that he performed duties at his TDY location. The member has not presented any documentary evidence that he used the \$9,741.00 for its intended purpose but he argues that he did not go home every weekend and holiday. However, the adjudicator also considered that the member was paid a total of \$6,566.59 for BAS during the period October 1, 2005, 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. Thus, even if we assume the member did not go home during the weekends and holidays, he received BAS for the full months he was on TDY

(which would include weekends and holidays). Under the circumstances, the member should not expect to receive any further compensation for his meals. *See* DOHA Claims Case No. 03092220 (September 30, 2003).

Conclusion

The member's request for reconsideration is denied, and we affirm the December 20, 2013, decision. In accordance with the Instruction ¶ 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board