

DATE: January 13, 2014

In Re:)

[REDACTED])

) Claims Case No. 2013-WV-022601.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is ordered to active 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 authorization.

DECISION

A member of the U.S. Coast Guard requests reconsideration of the November 26, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-022601. In that decision, DOHA denied in part the member's request for waiver of erroneous payments of *per diem*. The member received \$76,491.92 in erroneous travel payments. This Office waived \$58,539.39 and denied waiver of the remaining \$17,952.53.

Background

On September 16, 2010, the member was ordered to perform active duty from October 1, 2010, through September 30, 2011, later extended for an additional year. On December 6, 2010, his orders were amended to authorize him *per diem*. He subsequently received \$76,491.92 in *per diem* payments from December 29, 2010, through July 15, 2012. The Coast Guard later determined that because the member's home was within commuting distance of his duty location, he was not entitled to *per diem*. As a result, the Coast Guard determined that the member was overpaid \$76,491.92. The member also received basic allowance for subsistence (BAS) in the amount of \$5,073.41 for the period November 2011 through July 2012, which compensated him for his meals.

The Coast Guard denied the member's request for waiver. In the appeal decision, the DOHA adjudicator waived \$58,539.39 of the erroneous *per diem* payments. However, the adjudicator denied the portion of the overpayment attributed to *per diem* paid to the member for federal holidays and approximately four weekend days per month. The adjudicator found that absent any documentation supporting the member's assertion that he only spent one to two days per month at his residence, collection of the *per diem* he received for federal holidays, for approximately four weekend days per month and for the period he was on leave, would not be against equity and good conscience, nor contrary to the best interests of the United States. That amount totaled \$12,879.12. The adjudicator also found that since the member received BAS during the period of overpayment which compensated him for his meals, collection of the \$5,073.41 would not be against equity and good conscience, nor contrary to the best interests of the United States.

In his reconsideration request, the member attaches a Long Term Stay Agreement he had for lodging with a hotel for the period December 29, 2010, through September 30, 2011, in which he agreed to pay \$2,000.00 per month for room rental. The agreement states that the member's credit card will be charged the beginning of the first day of every month.

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 interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. 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).

Per diem is intended to reimburse a member for the lodging and meal expenses he incurs when he is not living at home. In his request for reconsideration, the member has provided documentary evidence that he spent an additional \$2,866.81 on lodging during the period December 29, 2010, through September 30, 2011. Therefore, waiver of an additional \$2,866.81 is appropriate, since the member spent that amount in reliance on the erroneous travel orders.

Conclusion

We hereby waive an additional \$2,866.81 of the member's debt. In accordance with 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board