

DATE: January 29, 2015

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In Re: )

[REDACTED] )

) Claims Case No. 2014-WV-060201.2

Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member is ordered to active duty and erroneously authorized *per diem*, and it is later determined that such order was improper, erroneous payments paid thereafter can be waived only to the extent the money was spent for its intended purpose.

**DECISION**

A member of the U.S. Marine Corps Reserve requests reconsideration of the December 30, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-060201.

**Background**

The member's place of entry of active duty (PLEAD) was Scottsdale, Arizona. On January 22, 2009, the member was issued orders to perform active duty from February 25, 2009, through November 30, 2009, at Camp Pendleton, California. In connection with his orders, the member received *per diem* payments totaling \$28,923.90. The member also received basic allowance for housing (BAH) in the amount of \$12,962.80 based on Scottsdale. However, the Defense Finance and Accounting Service (DFAS) later determined that since the member was already in the Camp Pendleton area prior to the start and acceptance of his orders, his PLEAD should have been Camp Pendleton, instead of Scottsdale. As a result, the member was not authorized *per diem* payments, and he became indebted for the payments totaling \$28,923.90 he received. Additionally, while the member was entitled to receive BAH, DFAS determined the member was entitled to receive it at the higher rate for Camp Pendleton during the period February 25, 2009, through November 30, 2009, in the amount of \$18,786.40. Therefore, the

member was entitled to additional BAH in the amount of \$5,823.60 (\$18,786.40 - \$12,962.80). Since the member was already in debt for the erroneous *per diem* payments he had received in the amount of \$28,923.90, the \$5,823.60 should have been applied to his debt reducing it to \$23,100.30. However, due to an administrative error, the member was paid \$5,823.60 on March 1, 2011. Therefore, the gross amount of the member's debt remained \$28,823.60.

The member was subsequently granted remission in the amount of \$10,771.40 of the \$28,923.90 debt. Therefore, our office considered for waiver the amount of \$18,152.50 (\$28,923.90 - \$10,771.40). The DOHA adjudicator upheld DFAS's determination to waive \$12,328.90 of the overpayment but denied \$5,823.60, which was the amount the member was paid for BAH on March 1, 2011.

In his request for reconsideration, the member states that when he received the \$5,823.60 payment in March 2011, he asked why he was receiving a payment while there was an active case open for his request for waiver of the indebtedness. He states that he was told that this amount was owed to him for an underpayment of BAH and that an active case for waiver had nothing to do with this amount being owed to him. He states that he does not understand why this amount was not applied to his debt. He further asserts that since he was paid the \$5,823.60 due to an administrative error, it should be waived. Finally, he states that repayment of this amount would cause him financial hardship.

### **Discussion**

Under 10 U.S.C. § 2774, we have authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment 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. When a member is found to have been paid *per diem* in error, the excess amounts he expended may generally be waived only to the extent that the money was spent for its intended purpose, in other words, in detrimental reliance on the *per diem* authorization.

For waiver to be appropriate in this case, the member must meet a two-part test. He must have received the payments to cover erroneously authorized allowances, and he must have spent the allowances in detrimental reliance on the erroneous authorization. *See* DOHA Claims Case No. 2012-WV-022905.3 (April 30, 2013); DOHA Claims Case No. 2011-WV-092701.3 (March 28, 2012); DOHA Claims Case No. 2012-WV-062201.2 (March 15, 2013); DOHA Claims Case No. 03092220 (September 30, 2003); and DOHA Claims Case No. 03061301 (July 31, 2003). In the appeal decision, the adjudicator determined that since the member was advised that he could travel to Camp Pendleton prior to the issuance of his orders and his orders reflected his PLEAD as Scottsdale, he relied on erroneous information given to him and contained in his orders. However, even though the *per diem* authorization was erroneous, the BAH payments at the Camp Pendleton rate were not. Since the member properly received BAH to reimburse him for the cost of housing, he cannot be said to have spent that amount in detrimental reliance on the erroneous *per diem* authorization. Therefore, one prong of the test is not met.

Further, the adjudicator noted that the member became aware of the overpayment in December 14, 2009, when he phoned the Marine Corps Mobilization Command (MOBCOM) to ask about his final pay after his end of active service (EAS). In December 2010 the debt was first posted to his leave and earnings statement (LES), and on January 21, 2010, the member requested remission of the debt. The member acknowledges receiving the payment in the amount of \$5,823.60 in March 2011 prior to a remission decision being issued in his case in May 2011. Even though the member may have been advised he was entitled to the payment, under the circumstances, we believe he should have set aside this amount for eventual repayment to the government, especially since he had not received a determination on whether his debt would be remitted or waived. Our office has consistently held that when a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for eventual repayment to the government, even if the government fails to act after notification. *See* DOHA Claims Case No. 2012-WV-062201.2, *supra*; DOHA Claims Case No. 07030507 (March 15, 2007); and DOHA Claims Case No. 98101314 (November 16, 1998). Finally, financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* DOHA Claims Case No. 2013-WV-022009.2 (March 11, 2014).

### **Conclusion**

The member's request for relief is denied, and we affirm the December 30, 2014, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense concerning the member's request for waiver under 10 U.S.C. § 2774.

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: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board