

DATE: April 20, 2015

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2014-WV-072102.2
)
)

**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 March 10, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-072102.

Background

On May 13, 2010, the member was issued annual training (AT) orders from Beaverton, Oregon, to Camp Smith, Hawaii, for the period May 16, 2010, through May 22, 2010. The member subsequently performed his AT tour and received proper payment of *per diem* based on Hawaii, and proper payment of basic allowance for housing (BAH) based on Oregon.

On May 20, 2010, the member was issued active duty (AD) orders from Oregon to Hawaii for the period May 29, 2010, through September 30, 2011. As a result, the member received a total of \$94,620.73 in *per diem* based on Hawaii. However, the Defense Finance and Accounting Service (DFAS) later determined that since the member was in Hawaii at the time he received his orders, he should have been called to AD from Hawaii, instead of Oregon. As a result, DFAS determined that the member was not entitled to receive *per diem*, but should have

received BAH and cost of living allowance (COLA) based on Hawaii. Therefore, the member was overpaid \$94,620.73 for the erroneous payment of *per diem*.

In addition, the member received BAH at the dependent rate (BAH-D) based on Oregon, in the amount of \$30,169.40. Although the member was entitled to receive BAH-D, DFAS determined that he was entitled to receive it at the higher rate of Hawaii, in the amount of \$50,223.20. In February 2013 DFAS effectively paid the member the difference between the Hawaii rate and the Oregon rate in the amount of \$20,053.80.¹ Further, DFAS determined that the member was entitled to receive \$17,866.26 in COLA at the Hawaii rate. This amount was properly applied to the overpayment reducing it to \$76,754.47 (\$94,620.73 - \$17,866.26).

In the appeal decision, the DOHA adjudicator waived \$53,109.96 of the erroneous *per diem* payments the member received during the period May 29, 2010, through September 30, 2011. However, the adjudicator denied waiver of \$20,053.80 of the overpayment because the member's October 2011 leave and earnings statements (LES) reflected a change from BAH-D based on the Oregon rate, to BAH-D based on the Hawaii rate. In addition, the adjudicator found that when he received the payment in the amount of \$20,053.80 in February 2013 he reasonably should have been aware that his entitlement was in question. Finally, the adjudicator declined to waive \$3,590.71 of the erroneous *per diem* payments because the member received this amount in basic allowance for subsistence (BAS).

In his reconsideration request, the member states that he agrees with waiver of the \$53,109.96, and denial of the \$20,053.80. However, the member takes issue with the denial of the \$3,590.71. He disagrees with the adjudicator's statement concerning the relationship between BAS and the meals portion of the *per diem*. He states that BAS and the meals portion of *per diem* are not the same allowance. He states in another case involving the same fact pattern as his case, it was decided that the member rated *per diem*. He cites the case number and attaches the decision which is an initial determination by a DOHA adjudicator granting waiver in full.

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.

¹Specifically, in February 2013 DFAS issued the member a BAH-D payment in the amount of \$50,223.20 based on the rate for Hawaii, and collected from that amount \$30,169.40 which represented the BAH-D that he received for Oregon, resulting in a payment for the difference of BAH-D in the amount of \$20,053.80 (\$50,223.20 - \$30,169.40).

We accept the fact that the two allowances are not the same for the purpose of claiming such entitlement. However, we are reviewing this case under the waiver statute. 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-062201.2 (March 15, 2013); DOHA Claims Case No. 2011-WV-092701.3 (March 28, 2012); DOHA Claims Case No. 03092220 (September 30, 2003); and DOHA Claims Case No. 03061301 (July 31, 2003). In this case, the *per diem* authorization was erroneous. However, the payment of BAS was not. 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. 2011-WV-092701.3 (March 28, 2012).

Finally, we note that the member cites an unpublished decision by a DOHA adjudicator which he purports to have the same facts as his case. First, we base our decisions on a case-by-case basis and the facts contained in the written record. Second, that decision was not issued by the DOHA Claims Appeals Board and therefore has no precedential value on the adjudicator's appeal decision in this case or our Board decision upholding the appeal decision.

Conclusion

The member's request for relief is denied, and we affirm the March 10, 2015, appeal decision. In accordance with DoD Instruction 1340.23 ¶ 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: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board