

January 2, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 02120918

CLAIMS APPEALS BOARD DECISION

DIGEST

A service member cannot reasonably expect to receive per diem payments for the period of time he was in confinement because his meals and lodging were provided by the government during that period. When such a payment is determined to be erroneous, he has a duty to return it. In such a situation, waiver under 10 U.S.C. § 2774 is not appropriate.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 02070216, dated July 17, 2002, which denied the request of a former member of the United States Air Force for waiver of a \$904.00 debt which arose from an erroneous payment of per diem to him.

Background

The record shows that the member was issued travel orders⁽¹⁾ authorizing him to travel from Grand Forks Air Force Base, North Dakota, to Aviano Air Base, Italy, to attend a court martial proceeding. He was provided government transportation to Italy and, while there, was in confinement. Therefore, his meals and lodging were provided to him; he incurred no expenses; and he was not entitled to per diem.

The member subsequently returned to the United States at government expense and filed a voucher for settlement. On March 13, 2000, he was erroneously issued a payment for per diem,⁽²⁾ causing him to become indebted to the government in the amount of \$904.00. It was later determined that the member was, in fact, entitled to per diem in the amount of \$90.00 for the actual days he traveled to and from his destination. However, instead of applying the \$90.00 to the original debt, the travel office erroneously paid it to the member. Accordingly, the member remains indebted to the government in the amount of \$904.00.

The member originally requested waiver of the \$904.00 debt based upon his assertion that he was unaware of the fact that he was not entitled to receive per diem, that his travel orders authorized per diem, and that payment to him resulted from the government's administrative error. On appeal, his representative further argues that the government cannot deny relief to the member if the member did not willfully accept the erroneous payment. And even though the Travel Order stated that he was authorized \$0 per diem, the representative believes that the member should have been given "hands on advice." Because of the member's junior grade and the brevity of his time in the service, he did not understand all the rules and regulations regarding travel, and did not realize that \$0 on the Travel Order meant no funds.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive claims of the United States against service members arising out of erroneous payments of pay and allowances only when collection would be against equity and good conscience and not in the best interest of the United States and only when there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other persons having an interest in obtaining a waiver. *See* 4 C.F.R. § 91.5 (1996). The standard employed to determine whether a person was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person should have been aware that he was receiving more than his entitlement. *See* DOHA Claims Case No. 01012202 (February 28, 2001) citing 66 Comp. Gen. 124, 126 (1986); and DOHA Claims Case No. 97122313 (February 24, 1998). An individual who should have known or did in fact know that a payment was erroneous has a duty to set aside the overpayment for its eventual return to the government. The member is at fault if he does otherwise. In such circumstances, recovery of the erroneous payment is neither against equity and good conscience nor contrary to the interest of the United States. *See* DOHA Claims Case No. 01012202, *supra* citing B-249371.2, Apr. 30, 1993; and DOHA Claims Case No. 97011409 (June 6, 1997).

For the purposes of this decision, we assume that the government was at fault for erroneously paying the member per diem. Even so, he has not articulated any basis upon which he could demonstrate a reasonable expectation to that mistaken payment. While in Italy, he was in confinement, and his meals and lodging were provided to him. Therefore, he incurred no expenses. Although, block 13 of his Travel Order stated that per diem was authorized in accordance with the Joint Travel Regulation (JTR), the dollar amount of per diem shown in block 14 was zero (0). Further, block 16 stated that payment of per diem allowance while traveling or while at the disciplinary action point was not authorized. Clearly, the member knew or should have known that he was not entitled to receive a payment for per diem. Accordingly, he did not acquire title to the \$904.00 payment merely because the government made an administrative error, and should have held the aforesaid amount until the government asked for repayment. *See* DOHA Claims Case No. 02111801 (December 2, 2002) citing DOHA Claims Case No. 990331117 (April 15, 1999). Under the circumstances, waiver is not appropriate.

Conclusion

We affirm the Settlement Certificate.

/s/
Michael D. Hipple
Chairman, Claims Appeals Board

/s/
William S. Fields
Member, Claims Appeals Board

/s/
Jean E. Smallin
Member, Claims Appeals Board

1. Travel Order No. TMO145, dated January 24, 2000.

2. Voucher No. THB18392.