

September 30, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03092220

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member is erroneously advised in writing by an appropriate official that he is entitled to receive *per diem*, waiver under 10 U.S.C. § 2774 is appropriate of amounts actually expended in reliance on that erroneous advice. In such cases, the burden is upon the member to provide documentary evidence to substantiate actual, appropriate expenditures made pursuant to the erroneous advice.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 03072301, dated August 13, 2003, which waived in part (\$867.18), and denied waiver in part (\$7,569.74), an Air Force member's application for waiver of an erroneous overpayment of *per diem* in the amount of \$8,436.92. On appeal the member requests that we waive the remaining debt.

Background

The record shows that the member is an officer in the United States Air Force. On December 17, 2002, he was issued temporary duty orders (TDY) for travel to Djibouti, Africa. He arrived at that location on January 16, 2003, and was to reside aboard the USS Mount Whitney for 30 days. However, because land facilities were not complete, the member was required to remain on the ship through April 28, 2003--a total of 109 days. Although the member was residing on the USS Mount Whitney, he had been erroneously advised in writing by his financial services office (FSO) that he was entitled to receive *per diem* at the rate of \$102. As a result, he erroneously received *per diem* in the amount of \$9,398.50. However, it was later determined that the member was entitled to receive \$961.58 in reimbursable expenses, which reduced the *per diem* overpayment to \$8,436.92. Additionally, during the period the member received *per diem*, he also received basic allowance for subsistence (BAS) in the amount of \$607.62.

The member claimed \$1,474.80 in actual expenditures for food and incidentals while aboard ship. In support of that claim, he provided documentary evidence, in the form of receipts, showing that he had expended \$709.80 for mess charges. He also claimed \$765.00 in additional expenditures for food items from the ship store and vending machines.

The member did not provide documentary evidence, in the form of receipts, to justify that figure, because he thought that such items were covered by *per diem* and there was no need for him to keep receipts to justify such expenditures. Instead, the \$765.00 figure was based upon his written estimate that he expended \$7.50 a day for 102 days. Our Office accepted the member's \$765 written estimate because it appeared to be reasonable given the unique circumstances of his case.

In the Settlement Certificate, our Office accepted the member's \$1,474.80 reconstruction of his food expenses. We first applied the member's BAS of \$607.62 to the food expense figure, leaving food expenses of \$867.18 to be deducted from the *per diem* overpayment of \$8,436.92. We denied waiver with respect to the remaining \$7,569.74 because the member provided no evidence that he had actually expended that amount for the intended purpose. On appeal, the member seeks waiver of that additional amount.

The member argues that he meets the requirements for waiver. He notes that he visited finance offices on several occasions to ensure that he was entitled to a per diem rate of \$102 and that he obtained written statements to that effect. He objects to the inclusion of his BAS in the calculation of his debt. He believes the denial of his entitlement to per diem at a rate of \$102 represents a retroactive modification of his orders or meal rate, and he points out that such retroactive modifications are prohibited.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay and allowances to a member or former member if collection would be against equity and good conscience and not in the best interest of the United States. Waiver is not appropriate if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996).

We agree that the member aggressively sought to verify his *per diem* entitlement, but received erroneous advice. Generally, the government is neither bound nor estopped by the erroneous advice or unauthorized acts of its officers, agents or employees even though committed in the performance of their official duties. The Comptroller General and this Office have consistently held that in situations of erroneous travel payments (including *per diem*) waiver is appropriate only to the extent that the member actually spent the payment for the purposes for which it was advanced in reliance on the erroneous written advice. *See DOHA Claims Case No. 03040701* (April 15, 2003) citing B-271190, July 17, 1996 and 67 Comp. Gen. 496 (1988).

As for the member's argument regarding retroactive modification of orders or rates, there have been no modifications. There was a recalculation based on the entitlements indicated on the orders, which unfortunately did not match the advice given to the member before his TDY.

While the member objects to the inclusion of BAS in the calculation of the debt, such a calculation must always begin with the amounts properly paid to the member. Here, the member's orders stated that his meals would generally come from his BAS. Therefore, for the purposes of 10 U.S.C. § 2774, the amount the member spent from his BAS must first be subtracted.

Because \$867.18 of the erroneous payment of *per diem* was used to pay for food--the purpose for which it was intended--waiver of that amount was proper. Because there is no documentary evidence that the remaining \$7,569.74 of the erroneous payment of *per diem* was expended for the purpose for which it was intended, waiver of that amount was 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