

March 31, 2005

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In Re:

[Redacted]

Claimant

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Claims Case No. 05030706

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

When a member receives orders erroneously authorizing payment of per diem, waiver under 32 U.S.C. § 716 is appropriate only for amounts actually expended in reliance on the erroneous authorization.

### **DECISION**

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claims Case No. 04072308, dated September 13, 2004, which denied the request of an Air Force member for waiver of erroneous payments totaling \$10,244.18. The debts arose due to erroneous payment of per diem.

### **Background**

The member was called to active duty as of November 2001. He states that although he lived within commuting distance of his duty station, his unit requested that his orders be amended to provide for payment of "proportional per diem" because of the long hours he was working. <sup>(1)</sup> Based on the amended orders, the member was paid per diem for the period of November 1, 2001, through February 27, 2003. Finance officials later determined that he was not entitled to the per diem. The amount of the member's debt is \$10, 244.18 (\$10,249.12 in per diem minus \$4.94 for allowable mileage).

### **Discussion**

Under 32 U.S.C. § 716, <sup>(2)</sup> we have the authority to waive repayment of erroneous payments of pay and allowances if repayment would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. For waiver of travel allowances to be appropriate, 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. 03092220 (September 30, 2003); DOHA Claims Case No. 03061301 (July 31, 2003); 67 Comp. Gen. 496 (1988); and B-234751, Dec. 19, 1989. <sup>(3)</sup>

In the present case, the record indicates that payment of proportional per diem was erroneously authorized. However, the member has not demonstrated that he spent the per diem in reliance on the erroneous authorization and therefore does not meet the second part of the test. We note that the member received Basic Allowance for Subsistence during the period in question, and there is no indication in the record that the member incurred subsistence expenses in excess of those involved in normal military duty. At earlier stages in the waiver process, the member was advised to submit proof of expenditures made in reliance on the erroneous per diem authorization, and he has not done so. Therefore, waiver is not appropriate. *See* DOHA Claims Case No. 03092220, *supra*; DOHA Claims Case No. 03061301, *supra*; 67 Comp. Gen. at 496; and B-234751, *supra*.

### Conclusion

We affirm the Settlement Certificate.

/s/

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Michael D. Hipple  
Chairman, Claims Appeals Board

/s/

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William S. Fields  
Member, Claims Appeals Board

/s/

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Jean E. Smallin  
Member, Claims Appeals Board

1. Proportional per diem is the "meals and incidental expenses" portion of per diem.

2. The Defense Finance and Accounting Service referred this matter to us citing the waiver statute that applies to members of the National Guard rather than to other military members. The record does not indicate why this waiver statute applies to this Reservist, who was on extended active duty. In any event, as explained below, the same waiver standards apply.

3. The standards for waiver under 10 U.S.C. § 2774 are the same as under 32 U.S.C. § 716.