

KEYWORDS: waiver of indebtedness

DIGEST: When a member receives orders erroneously authorizing payment of per diem, waiver under 10 U.S.C. § 2774 is appropriate only for amounts actually expended in reliance on the erroneous authorization.

CASENO: 05102015

DATE: 11/2/2005

November 2, 2005

---

In Re:

[Redacted]

Claimant

---

Claims Case No. 05102015

### CLAIMS APPEALS BOARD DECISION

#### DIGEST

When a member receives orders erroneously authorizing payment of per diem, waiver under 10 U.S.C. § 2774 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 05020208, dated June 8, 2005, which denied in part the request of a Marine Corps Reserve officer for waiver of erroneous payments of per diem. The member received \$22,174.88 in erroneous travel payments. This Office waived \$4,823.62 and denied waiver of the remaining \$17,351.26.

### Background

The member was called to active duty for 179 days beginning on June 16, 1999. He subsequently performed active duty under a series of orders. Although the member lived 64 miles from his duty station, he commuted from home daily except when his duties made that impractical or impossible. For periods of active duty between October 1, 2000, and March 31, 2004, the member received \$22,174.88 in per diem for meals and incidentals. It was later determined that the authorization of per diem was erroneous. Because the member submitted receipts in the amount of \$4,823.62 for lodging, meals, and incidentals for periods when he did not commute from home, this Office waived that amount. The member appeals the denial of the remaining \$17,351.26. He argues that he spent the remaining money for meals, but he provided no receipts or other documentation.

### Discussion

Under 10 U.S.C. § 2774, 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. As explained below, in the case of erroneously authorized travel payments, the member must have spent the payments in reliance on the erroneous authorization. *See* DOHA Claims Case No. 05030706 (March 31, 2005); DOHA Claims Case No. 03092220 (September 30, 2003); DOHA Claims Case No. 03061301 (July 31, 2003); and 67 Comp. Gen. 496 (1988).

When the military waiver statute, 10 U.S.C. § 2774, was enacted, there was no authority to waive travel-related debts. For service members, that authority was added to the waiver statute by Section 2 of Public Law 99-224, 99 Stat. 1741 (1985). In 67 Comp. Gen. 496, *supra*, the Comptroller General cited the legislative history of Public Law 99-224 and

quoted House Report No. 102, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2, *reprinted in* 1985 U.S. Code Cong. & Ad. News 2659, 2660 as follows:

'...GAO's experience demonstrates that hardship has been caused in many travel, transportation and relocation cases and that employees have been required to make substantial refunds to the Government as a result of circumstances which were not their fault. This is particularly true when, as the General Accounting Office has found, many of these claims arise from erroneous agency authorizations which an employee relies on in good faith to his detriment.'<sup>(1)</sup>

For that reason, the Comptroller General required waiver applicants in travel-related cases to have spent the erroneous payments for the purpose intended in reliance on the erroneous authorization. *See* DOHA Claims Case No. 05030706, *supra*; DOHA Claims Case No. 03092220, *supra*; and DOHA Claims Case No. 03061301, *supra*.

Per diem is intended to reimburse a member for the lodging and meal expenses he incurs when he is not living at home. In our Settlement Certificate, we waived \$4,823.62 in response to the member's submission of receipts for lodging, meals, and incidentals. In the absence of proof that the member spent the rest of the erroneous per diem payments for their intended purpose, waiver of the remaining \$17,351.26 is not appropriate. *See* DOHA Claims Case No. 05030706, *supra*; DOHA Claims Case No. 03092220, *supra*; DOHA Claims Case No. 03061301, *supra*; and 67 Comp. Gen. 496, *supra*.

In our Settlement Certificate, we said that the member had not shown that he had incurred meal expenses in excess of the \$3,800.83 he received as Basic Allowance for Subsistence (BAS) during the same period. The member has said that he did not save the rest of his meal receipts because he did not believe he needed to submit them. We note that in DOHA Claims Case No. 03092220, *supra*, we accepted a member's thorough and reasonable reconstruction of his meals and incidental expenses. After adjusting for the amount the member received as BAS, we waived the amount of the reconstruction. For the periods when the member in the case

before us was not living at home, further waiver might be appropriate if his properly documented meal expenses exceeded his BAS. It is equitable to impose on the member the burden of providing some documentation as to the amount spent, especially in light of the amount involved.

Our Settlement Certificate cited DOHA Claims Case No. 05030706, *supra*, in support of our partial denial of the member's waiver request. The member objects to our comparison of that case to his because the member in that case lived within the authorized commuting distance of his duty station. Since in the case before us the member chose to commute, and since the per diem in both cases was for meals and incidentals only, that fact is not significant. We cited the decision primarily for the principle that when per diem is erroneously authorized, waiver is appropriate only if the erroneous payments are spent for the purposes intended.

## Conclusion

We affirm the Settlement Certificate. If the member can demonstrate additional meal expenses in excess of BAS for periods when he was not lodging at home, he may present such evidence through DFAS for further consideration.

/s/

---

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

---

Catherine M. Engstrom

Member, Claims Appeals Board

/s/

---

Jean E. Smallin

Member, Claims Appeals Board

1. Public Law 99-224 also amended the waiver statutes for civilian employees and National Guard members, 5 U.S.C. § 5584 and 32 U.S.C. § 716.