

KEYWORD: waiver of indebtedness; per diem

DIGEST: A reservist called to active duty in support of a contingency operation erroneously received *per diem* for 31 days he was on leave. The erroneous payments can be waived only to the extent the money was spent for its intended purpose.

CASE NO: 06030601

DATE: 2/24/2006

March 24, 2006

In Re:

[Redacted]

Claimant

Claims Case No. 06030601

CLAIMS APPEALS BOARD DECISION

DIGEST

A reservist called to active duty in support of a contingency operation erroneously received *per diem* for 31 days he was on leave. The erroneous payments can be waived only to the extent the money was spent for its intended purpose.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 05120901, dated December 16, 2005, which waived in part (\$2,943.00), and denied waiver in part (\$1,178.00), a Coast Guard Reservist's application for waiver of an erroneous overpayment of per diem. On appeal, the member now requests that we waive the remaining \$1,178.00 of his debt.

Background

The member was ordered to active duty in support of a contingency operation. He was paid *per diem* in the amount of \$12,884.00, for the period May 1, 2002, through June 30, 2002, and for the period September 1, 2002, through September 30, 2002. However, it was later determined that the member was erroneously paid *per diem* for 31 days he was on leave. The member was only entitled to receive \$8,763.00. Therefore, he was overpaid \$4,121.00. The member subsequently provided documentation showing that he actually expended \$2,943.00 for lodging during the period he was on leave. Therefore, our Office waived \$2,943.00 on the basis that we believed he acted in good faith in accepting this portion of the overpayment. The member now requests waiver of the remaining \$1,178.00. He states that if he had known about his need to comply with the Joint Federal Travel Regulations (JFTR) on receipt of per diem while in leave status, he would have protected himself financially. He also states that the JFTR provisions have since been changed to allow members to receive per diem while in a leave status.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection 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 that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member.

In the case before us, the member was given erroneous advice that he would continue to receive *per diem* while in a leave status. In situations of erroneous travel payments (in this instance, *per diem*) waiver is only appropriate to the extent the member actually spent the payment for the purpose for which it was paid to him. See DOHA Claims Case No. 03092220 (September 30, 2003), DOHA Claims Case No. 03061301 (July 31, 2003), and DOHA Claims Case No. 03040701 (April 15, 2003). Therefore, waiver of \$2,943.00 was proper since the member spent this amount on lodging during the period he was in leave status. However, since the member has not provided documentation showing that he spent the remaining portion of the overpayment for its intended purpose, waiver of \$1,178.00 is denied. The member

contends that this is unfair because he would have protected himself by keeping receipts if he had known that he should do so. However, we have consistently held that the member must demonstrate that he used the payments for their intended purpose. The burden is on the member to show this portion of the overpayment should be waived and he has not done so.

As for the changes to the pertinent travel regulations, effective February 24, 2004, paragraph U7225 of volume 1 of the JFTR allows an eligible member deployed to a temporary duty (TDY) location in support of a contingency operation to be reimbursed for the actual lodging expenses for lodging retained at the TDY location while on leave. Although the member's travel entitlement is governed by the relevant portions of the JFTR that were in effect when the member traveled, the member would have only been entitled to receive his actual lodging costs if his travel occurred on or after the effective date of the change. Thus, the result would have been the same as the one reached by our Office under the waiver statute, 10 U.S.C.

§ 2774. The member was reimbursed for his actual lodging expenses.

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board