

DATE: April 30, 2007

In Re:

[REDACTED]

Claimant

)
Claims Case No. 07042001

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member ordered to active duty receives full *per diem* and it is later determined that he was not entitled to it because his home of record was within the commuting distance of his duty station, erroneous payments paid to the member can be waived only to the extent the money was spent for its intended purpose.

DECISION

A Reservist in the Air National Guard (ANG) requests that we reconsider the October 21, 2005, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 05093008. The member's total debt for the overpayment of *per diem* is \$41,067.88. Our Office waived \$21,528.19 of the claim against him, but denied waiver of the remaining \$19,539.69. The member requests that we waive an additional \$17,500.50.

Background

The record shows that the member was ordered to active duty. Prior to receiving his orders, the member vacated his residence in Antioch, Tennessee, which was approximately 14 miles from his duty station in Nashville, Tennessee. The member moved his belongings to a friend's house in Union City, Tennessee, which was approximately 180 miles from his duty station. He maintained a post office box address in Antioch, Tennessee. When the member arrived for duty in Nashville, he was given a non-availability statement for lodging and mess.

He was told that he could secure commercial lodging and receive full *per diem*. When the member filed his travel claims, he used his Union City address. He subsequently received full *per diem* for the duty he performed in Nashville, during the period December 7, 2001, through September 17, 2003, because his Union City address was not within the commuting distance of his duty station. It was later determined that the member was not entitled to full *per diem* because he had not established residence in Union City. His home of record was determined to be Antioch, which was within the commuting distance of Nashville. As a result, the member was overpaid \$41,067.88.

In his request for waiver, the member provided receipts for lodging (\$20,278.85) and estimated that he spent \$25 a day on meals during the period of overpayment. The Defense Finance and Accounting Service (DFAS) recommended that our Office give the member credit for the \$20,278.58 he spent on lodging and \$8,775.00 he spent on meals. In considering his request for waiver, our Office agreed with DFAS finding that the member expended \$29,053.85 (\$20,278.85 + \$8,775.00) for its intended purpose in reliance on the erroneous information he received. Our Office gave the member credit for the \$29,053.85 he expended minus basic allowance for housing (\$4,424.81) and basic allowance for subsistence (\$3,100.85) he received during the period, or \$21,528.19. However, our Office concluded that collection of the remaining portion of the overpayment (\$19,539.69) would not be against equity and good conscience since there was no evidence showing he expended it for its intended purpose.

In his request for reconsideration, the member states that he is unable to give a day- to- day itemization of his expenses

for meals and incidentals and he does not have receipts. However, he provides an estimate of the amount he spent on food items and meals. He estimates that he spent approximately \$41 a day on meals and incidentals from 2001 to 2002, and \$45 a day on meals and incidentals from 2002 to 2003. He provides a spreadsheet showing the amount he was paid for meals and incidentals during the period of overpayment.

Discussion

Under 10 U.S.C. 2774, [\(1\)](#) our Office has 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 there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In cases like this, which involve erroneous payments of *per diem* to a member ordered to active duty that the member thought were proper, waiver is only appropriate to the extent the member actually spent the payments for the purpose for which they were paid to him. *See* DOHA Claims Case No. 07011710 (January 24, 2007); DOHA Claims Case No. 03092220 (September 30, 2003); DOHA Claims Case No 03061301 (July 31, 2003); DOHA Claims Case No. 03040701 (April 15, 2003). The burden is on the member to provide documentary evidence as to the expenditure of the money. *Id.*

In this case, waiver of \$21,528.19 was recommended by DFAS. This amount was substantiated by documentary evidence in the form of lodging receipts and the member's written estimate that he spent \$25 a day for meals during the period of overpayment. Our Office accepted DFAS's determination finding the member's written estimate to be reasonable under the circumstances. In his request for reconsideration, the member now estimates that he spent \$41 a day during 2001 to 2002 and \$45 a day during 2002 to 2003 for meal and incidentals. However, the member has provided no explanation for the increase in the daily expenditure he now claims - (\$25 v. \$41/\$45). He admits that he does not have receipts and is unable to give a day to day itemization of his meals and incidentals. Because there is no evidence that the remaining \$19,539.69 was expended for the purpose for which it was intended, waiver of that amount is not appropriate.

Conclusion

The Settlement Certificate is affirmed. This is the final administrative decision of the Department of Defense in this matter.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom

Member, Claims Appeals Board

1. The Defense Finance and Accounting Service referred this matter to our Office under the waiver statute that applies to members of the National Guard, 32 U.S.C. § 716, rather than to other military members. The record does not indicate why this statute applies to this Reservist, who was on active duty. The standards for waiver under 10 U.S.C. § 2774 are the same under 32 U.S.C. § 716.