

KEYWORDS: waiver of indebtedness; erroneous travel payment; per diem

DIGEST: When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 08011401

DATE: 1/22/2008

DATE: January 22, 2008

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In Re: )  
          ) [REDACTED] )  
          ) ) Claims Case No. 08011401  
          ) )  
          ) )  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

**DECISION**

A member of the United States Marine Corps Reserve (USMCR) requests reconsideration of the December 13, 2007, appeal decision of the Defense Office of Hearings and Appeals

(DOHA) in DOHA Claim No. 07091907.<sup>1</sup> In that decision, DOHA waived \$5.98 of the member's indebtedness to the government, but denied waiver in the amount of \$1,330.47.

### **Background**

While the member was residing in Winston-Salem, North Carolina, he was ordered to active duty effective March 1, 2005, to the Home Training Center, (HTC), Greensboro, North Carolina. The member was under orders from March 1, 2005, through October 7, 2005. Under his orders, the member was deployed to Iraq from April 1, 2005, through September 11, 2005, and received deployed *per diem*. However, the member's deployed *per diem* was miscalculated causing an overpayment of \$5.98. On December 6, 2005, the member received an erroneous travel payment in the amount of \$1,330.47, which represented payment of *per diem* for the periods March 1, 2005, through March 13, 2005, and September 15, 2005, through October 12, 2005. Because the member commuted daily from his residence to the HTC or was on leave for these periods, he was not entitled to receive *per diem*. Thus, the total claim against the member was \$1,336.45.

Our Office waived the overpayment in the amount of \$5.98, because the member reasonably may not have been aware that his deployed *per diem* was miscalculated. However, our Office denied the travel payment he received on December 6, 2005, in the amount of \$1,330.47. Although the member stated he was unaware he was not entitled to the payment, during the periods he was overpaid (March 1, 2005 through March 13, 2005, and September 15, 2005, through October 12, 2005), he was either commuting from his home to the HTC or he was on leave. Therefore, our Office found that the member should have questioned such a large payment.

In his reconsideration request, the member argues that he was paid the \$1,330.47 for his travel claim after demobilization. He states that he would not have been aware that he was receiving the per diem because he did not claim any meals or incidentals on his travel voucher. He finds it unreasonable for him to be held accountable for an administrative error when individuals who deal with these issues daily were not aware themselves of the error until two years after the fact. He admits that he does not have documentary evidence showing that he spent the funds in question on legitimate expenses. However, he asks that this matter be waived as a matter of grace and dispensation.

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<sup>1</sup>We note that our Office received by fax the member's reconsideration request on December 31, 2007, but did not receive the original by first class mail until January 14, 2008. The appeal decision clearly stated that our Office actually had to receive a request for reconsideration within 30 days of the date of the appeal decision. The member was further instructed that if the end of the 30-day period was near, to assure receipt within 30 days, a faxed signed copy of the request for reconsideration may be sent to our Office. However, transmittal of the original must immediately follow by first class mail. Failure to immediately mail the original may properly raise an issue of whether the request for reconsideration is timely.

## Discussion

Under 10 U.S.C. § 2774, we have authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment 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 the lack of good faith on the part of the member. *See* 10 U.S.C. § 2774 and DoD Instruction 1340.23 (Instruction) ¶ E4.1.2 (February 14, 2006). The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting a waiver. *See* ¶ E4.1.3 of the Instruction. A waiver is generally not appropriate when a recipient of a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay or allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary. *See* ¶ E4.1.5 of the Instruction. It is not against equity and good conscience to deny waiver when a reasonable person would have suspected that he was receiving payments in excess of his entitlements. *See* ¶ E4.1.4 of the Instruction.

Although the member states that he did not claim meals and incidentals on his travel voucher, the travel voucher summary dated December 6, 2005, reflects that he was paid *per diem* during the periods when he was either commuting daily from his home to the HTC or on leave. Even though the government made a mistake in issuing the erroneous payments, waiver is not appropriate when a member was aware of information indicating an overpayment. *See* DOHA Claims Case No. 06111301 (November 15, 2006). Even if, arguably, the member did not receive the travel voucher summary, he has not articulated any basis upon which he had a reasonable expectation of receiving \$1,330.47 for travel. The member had already received deployed *per diem* during the period April 1, 2005, through September 11, 2005, and was not entitled to *per diem* during the periods March 1, 2005, through March 13, 2005, and September 15, 2005, through October 12, 2005, because he was either commuting from his home to his HTC or was on leave. The member had no reasonable expectation of receiving such a large payment and should have immediately questioned the receipt of the payment. In the meantime, he did not acquire title to the questionable payment and should have held the amount until the government asked for repayment. Under these circumstances, waiver is not appropriate. *See* DOHA Claims Case No. 02120918 (January 2, 2003).

*Per diem* is intended to reimburse a member for lodging and meal expenses he incurs when he is not living at home. In cases of erroneously authorized travel payments, the member must have spent the payments in reliance on the erroneous authorization. We have consistently held that the burden is on the member to provide documentary evidence to substantiate that he spent the travel payment on legitimate expenses. *See* DOHA Claims Case No. 07022606 (March 1, 2007). Here, the member admits he does not have such evidence. Therefore, it is not against equity and good conscience to deny waiver of the overpayment.

## Conclusion

The member's request for relief is denied, and we affirm December 13, 2007, decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board