



established by this special rule that permitted him to receive the Level II Executive Schedule rates for O-7 to O-10, which was set by the 2013 pay table at \$19,566.90 per month.

Due to an administrative error, the Defense Finance Accounting Service (DFAS) erroneously calculated the member's base pay to be \$20,937.90, a rate available only to an officer who served as a commander of a unified or specified combatant command, a position the member did not occupy at the time of retirement. On or about December 9, 2013, the member received a Summary of Retired Pay Account that clearly, but erroneously, identified his Active Duty Base Pay as \$20,937.90. It erroneously calculated his gross monthly retired pay to be \$20,152, with a cost of living allowance adjustment that led to the total of \$20,494. This error resulted in an overpayment of \$90,244 from December 1, 2013, through March 31, 2019.

The overpayment was discovered by DFAS in April 2019. The member was notified of the debt by letter dated April 5, 2019. The letter also reflected that as a result of the incorrect base-pay rate, his Survivor Benefit Plan premiums were overpaid in the amount of \$5,863.16. The overpayment was applied to the member's debt, reducing it to \$84,380.84. The letter also set out instructions for requesting waiver of the obligation to repay the debt.

On April 10, 2019, the member completed a request for the waiver of the debt. In that letter he stated that he first became aware of a pay issue when he received his retired-pay statement dated Saturday, March 30, 2019. He explained that he reached out to a contact at DFAS to ask why his pay was reduced. The contact relayed to the member that he no longer worked at DFAS-Retired Pay office, but had heard the issue involved an audit that showed DFAS had erroneously computed his retired pay as a commander of a unified or specified combatant command. The member stated the reason he was requesting waiver was because he had nothing to do with the overpayment or the computation of retired pay. He relied upon DFAS and trusted them to compute his retired pay accurately. He further stated, "I never once called DFAS or tried to influence anyone when I retired."

On May 3, 2019, the DFAS Indianapolis Director, who is the determining official for DFAS Waivers, after considering all relevant facts, denied waiver and informed the member that he could file an appeal with the Defense Office of Hearings and Appeals (DOHA). The DFAS Indianapolis Director found that the member's retired pay was not on the published pay table, but was a footnote to the pay table reserved for commanders of a unified or specified combatant command. He stated that the member was furnished with documentation that if reviewed, would cause a reasonably prudent person of the same rank and experience to be aware or suspect the existence of an error. He found that the member had not adequately explained why the retired-pay documents provided to him did not cause him concern or cause him to question his retired pay.

The member appealed by letter dated June 13, 2019. He disputed DFAS's assertion that he had been furnished with documentation that should have led him to question his retired pay. He indicated, "Nothing in what DFAS sent me would have tipped me off to their erroneous use of the Commander of a Specified or Unified Combatant Command base pay." He also stated, "Nothing in the Summary of Retired Pay Account that I received indicated that I was being paid based on the Commander of a Specified or Unified Combatant Command base pay."

After reviewing the member's appeal, the DFAS Indianapolis Director issued a recommendation and administrative report to DOHA dated July 29, 2019, concerning the member's request for waiver under 10 U.S.C. § 2774. The DFAS Indianapolis Director explained that given the member's rank and years of service, he should have known the rate of pay he was entitled to receive at retirement based upon publicly available information, and emphasized that this was especially true since the member received a higher rate of pay at retirement than he was receiving on active duty. The amount he received exceeded all pay scale amounts in the Executive Schedule pay table (except for the rate available only to an officer who served as a commander of a unified or specified combatant command). DFAS explained that an individual of the member's rank and years of service reasonably should have been aware that his last command assignment was not a unified or specified combatant command; that his retired pay was based upon an incorrect rate; and that the member should have questioned the rate since it exceeded the amount he received on active duty.

The member requested, and received, a 60-day extension to submit his rebuttal to the July 29, 2019 DFAS recommendation and administrative report. On September 25, 2019, the member was notified that his rebuttal was no longer due on September 27, 2019, and that DFAS was "indefinitely pausing [his] rebuttal period." On February 11, 2021, the rebuttal pause period was lifted. The member was notified by letter dated February 17, 2021, that the rebuttal was now due April 2, 2021. Per the member's request, the deadline for the rebuttal was extended to May 2, 2021.

On April 22, 2021, the member submitted his rebuttal through DFAS. It contained a 12-page letter with 16 attachments. In his rebuttal, he claimed that it was reasonable for him to believe that the amount he was being paid was correct, especially in light of new facts he received after his earlier submissions requesting waiver. He stated that after discussing the issue with other similarly situated members, he "recalled a phone call in December 2013 from a woman from DFAS who [he thinks] said she was from London, Kentucky. She told [him that he] was getting the special rate of pay and assured [him that he] was entitled to it." He asked DFAS for records of the call, but none were kept. He then asserted, "that it was the policy/statutory interpretation of DFAS and the Joint Staff that the Commander, United Nations Command/Combined Forces Command/United States Forces Korea billet had been designated as eligible to receive the 'special pay' rate of FN2 in the pay tables for unified commands." He provided documentation shared with him after he was notified of his debt by other similarly-situated members to support his claim, including a 2008 email in which another member questioned his rate of pay in writing and was assured it was correct. The member's rebuttal was forwarded to DOHA for adjudication on April 27, 2021.

On November 30, 2021, the DOHA adjudicator agreed with DFAS's recommendation of denial of waiver of the debt. She noted, as DFAS did, that the member with his years of service and rank should have at least questioned the matter regarding his entitlements, given that at the time he retired, he was receiving \$14,975.10 in monthly basic pay on active duty, and the retired monthly pay of \$20,937.90 was both significantly more than that amount, and higher than any amount on the pay table. She noted that each case must be considered on the basis of its own merits. The DOHA adjudicator then concluded that under the circumstances in the present matter, waiver was statutorily precluded.

In his reconsideration request, the member submits a December 28, 2021 letter requesting reconsideration of the DOHA determination to deny waiver in the amount of \$84,380.84. He asserts DFAS found it was reasonable for him to assume he was being paid correctly. Relying upon the DFAS Report of Investigation issued February 16, 2021, that stated in part, “he could reasonably assume that his pay was computed correctly,” he argued that it was in error for the adjudicator to conclude he should have known his pay was incorrect. He also asserts that it was to his detriment that he was required to follow a different process from other similarly-situated Flag and General Officers with the same type of retired-pay errors. He also states that waiver was granted to the other similarly-situated Flag and General Officers and that it is inequitable and unconscionable to deny him that same relief.

### **Discussion**

Under 10 U.S.C. § 2774, we have authority to waive collection of erroneous overpayments of pay and allowances to a member of the uniformed services if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* Department of Defense Instruction 1340.23 (hereinafter Instruction), *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, ¶ E4.1.2 (February 14, 2006). In the present case, the erroneous payments were made as a result of administrative error and there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member. However, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not a sufficient basis in and of itself for granting waiver. *See* Instruction ¶ E4.1.3.

A member is considered to be partially at fault, and waiver is precluded, if in light of all the circumstances, it is determined that he should have known that he was being overpaid. The legal definition of “fault” in waiver determinations does not imply any ethical lapse on the part of the member. It merely indicates that the member is not entirely without responsibility for any resulting overpayment, and that, therefore, the equitable remedy is not available to him. Thus, if a member is furnished with documentary records or information which, if reviewed, would cause a reasonably prudent person of the same rank and experience to be aware of or suspect the existence of an error, but the member fails to review the documents carefully or otherwise fails to take corrective action, the member is not without fault and waiver is precluded. *See* DOHA Claims Case No. 2012-WV-070303.2 (November 20, 2012); and DOHA Claims Case No. 08121001 (December 23, 2008).

In this case, the member was provided with documentation that incorrectly reflected the the member’s base pay to be \$20,937.90, a rate available only to an officer who served as a commander of a unified or specified combatant command. The member did not serve in such a position. Given the significant difference between his base pay at that time, which was \$14,975.10, and the new base-pay rate of \$20,937.90 upon retirement, he should have questioned that retired base-pay rate. Yet in his June 13, 2019 appeal he stated, "Nothing in what DFAS sent me would have tipped me off to their erroneous use of the Commander of a Specified or Unified Combatant Command base pay" and further asserted, "[n]othing in the Summary of Retired Pay

Account that I received indicated that I was being paid based on the Commander of a Specified or Unified Combatant Command base pay." However, he reasonably should have been aware his base retired-pay rate exceeded his entitlement, had he reviewed the DFAS summary of retired-pay account provided to him in 2013. Instead, the member focused his argument in his reconsideration request on the February 16, 2021 DFAS report of investigation completed by a military-pay technician that recommended that waiver be granted. That report indicated, "[t]he debt was caused by a misrepresentation of his orders and not the result of fraud or misrepresentation by the General. Based on the information presented to the General, he could reasonably assume that his pay was computed correctly." However, that military-pay technician failed to apply the correct legal analysis, identified above, which is required to make such a determination. The DFAS Indianapolis Director, as the determining official for DFAS Waivers, correctly denied waiver on May 3, 2019.

Our authority to waive a debt is limited by the waiver statute, 10 U.S.C. § 2774, the standards for waiver determinations in the Instruction, and case precedent. We have consistently held that when a member is aware, or reasonably should be aware, that he is receiving pay in excess of his proper entitlement, he has a duty to retain such amounts for subsequent refund to the government, and to make inquiry to the appropriate official. We have continually stressed in our decisions the importance of careful review by each member of statements provided by the agency; holding that a member has a duty to carefully examine them and report any error. *See* DOHA Claims Case No. 2009-WV-030404.2 (October 1, 2009); and DOHA Claims Case No. 98081701 (August 21, 1998). In this case, the member failed to meet his burden to establish he acted reasonably and responsibly in reviewing and questioning his base retired-pay rate, which exceeded his published entitlement.

In the member's April 22, 2021 rebuttal, he indicated he later recalled a telephone conversation in December 2013 with an unidentified person at DFAS in London, Kentucky, about him qualifying as an officer who served as a commander of a unified or specified combatant command. A long line of precedent has established two elements must be present to establish waiver due to erroneously relying upon the advice of another. First, the official(s) providing the advice are identified. Second, the member's version of the events is corroborated in the written record by pay and disbursing officials with evidence of his statement(s) to them and their statement(s) to him. *See* DOHA Claims Case 09051302 (May 21, 2009); DOHA Claims Case No. 02120917 (December 20, 2002); DOHA Claims Case No. 01010906 (March 8, 2001); DOHA Claims Case No. 97042817 (July 1, 1997); and Comptroller General decision B-256417, July 22, 1994. A member who suspects he is being overpaid cannot rely on vague assurances from disbursing clerks that his pay is correct. *See* DOHA Claims Case No. 09051302, *supra*. In this case, the member offered nothing more than his account of vague assurances given to him in a phone call with an unidentified official. The member failed to present evidence to substantiate the identity of the official providing the advice, nor did he present written statements by himself or any DFAS representative (or any other pay/disbursing official) corroborating the 2013 conversation. Given these facts, there is no basis for waiver based upon his reliance of assurances given during that 2013 telephone conversation.

Finally, the member asserts that he was prejudiced by following a different appeal procedure than his colleagues, who were ultimately granted waiver of their debts. First, the

Appeal Procedures for waiver are set out in 10 U.S.C. § 2774 implemented by Instruction 1340.23, enclosure 8. The member was afforded the same appeal rights available to any similarly situated soldier since at least 2006. There is no inequity in following the same procedures available to any other service member. Further, while the member cites to other Flag and General Officers that did receive waivers under these regulations, every case is adjudged according to its individual merits. *See* DOHA Claims Case No. 07100905 (October 16, 2007): and Comptroller General decision B-239895, Feb. 14, 1991.<sup>1</sup>

Therefore, under the circumstances, we find the member was not without fault in the matter, which statutorily precludes waiver. *See* DOHA Claims Case No. 2019-WV-042502.2 (November 25, 2019); and DOHA Claims Case No. 00070318 (October 6, 2000).

### **Conclusion**

The request for reconsideration is denied, and we affirm the DOHA Appeal decision, dated November 30, 2021. In accordance with Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board

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<sup>1</sup>These cases were decided under the authority of 5 U.S.C. § 5584 because the applicants for waiver were civilian employees. However, the standards for waiver under 5 U.S.C. § 5584 and 10 U.S.C. § 2774 are the same.