

DATE: May 1, 2023

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In Re: )

[REDACTED] )

) Claims Case No. 2022-WV-072701.2

Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of military pay and allowances if repayment would be against equity and good conscience and not in the best interests 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. 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 U.S. Army requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-WV-072701, dated September 28, 2022. In that decision, DOHA waived \$5,636.40 of the overpayment and denied waiver of \$203,416.76

**Background**

The member served in the U.S. Air Force from August 1, 2001, through July 1, 2004, and was assigned to an air force base in North Dakota. On November 3, 2004, he married in North Dakota. On March 29, 2005, he enlisted in the U.S. Army in Ohio. Effective March 29, 2005, the member began receiving basic allowance for housing at the dependent rate (BAH-D) based on his spouse for the rate of the zip code of the location of her birth in Alaska. It is unclear from the record whether the member's spouse was living in Alaska at that time. Since the member

was separated from his spouse by orders to attend Army Basic Combat Training (BCT) and Advanced Individual Training (AIT) from March 29, 2005, through July 27, 2005, he began receiving family separation for housing (FSH) allowance. During the period March 29, 2005, through July 31, 2005, the member received a total of \$5,636.40 (\$4,619.73 in BAH + \$1,016.67 in FSH). During that period, the member's leave and earnings statements (LES) reflected that he was receiving BAH-D on behalf of his spouse.

On August 10, 2005, the member performed a permanent change of station (PCS) to Texas, and began receiving BAH-D based on his spouse's location at his duty location in Texas. The record further reflects that the member was assigned to various duty locations during the period August 2005 through April 2019. During this period, he continued to receive BAH-D for his spouse in the total amount of \$195,800.10. The member also received FSH during the period August 1, 2005, through April 30, 2019, in the amount of \$7,616.66. The record reflects that during that period, on March 20, 2017, the member completed a DA Form 5960, *Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAW) and/or Variable Housing Allowance (VHA)*. On that form, he certified his entitlement to BAH-D, and listed his spouse, and three children. His spouse was not the mother of those three children. However, the member's LES continued to reflect that he was receiving BAH-D on behalf of his spouse.

The record reflects that on April 29, 2019, the Army Criminal Investigation Command (CID) initiated an investigation into the member's 2017 permanent change of station (PCS) move from Texas to Oklahoma. The CID received information from the Office of Personnel Management (OPM) concerning the member's security clearance interview conducted in December 2017. During an initial interview conducted on December 7, 2017, the member told the investigator that his spouse was visiting her parents in Alaska and would return to Oklahoma. However, on December 13, 2017, when he was confronted with the fact that his spouse's name on his Oklahoma lease was different than his spouse named on his SF-86, *Questionnaire for National Security Positions*, he admitted that he was cohabitating with his girlfriend, and it was her name on the lease agreement. The CID investigation determined through an audit conducted by the Military Pay Office from 2005 through 2019, that the member's military pay account contained fraudulent and false documents and information, including documentation signed by the member claiming his spouse accompanied him during his 2017 PCS. When the CID interviewed his spouse, she stated that she married the member in 2004 but never resided with him or visited him at any of his military duty assignments. She never traveled with him from Texas to Oklahoma in 2017. She further stated that the member did not provide her with any financial support since he joined the Army in 2005. In the member's June 2019 interview with the CID, the member admitted that his spouse never resided with him during any part of his Army service. The member stated that he did buy items for his spouse as a form of support.

On June 12, 2019, the member was divorced. On June 19, 2019, the member submitted a DA Form 5960, noting that he was divorced and certifying his entitlement to BAH-D on behalf of his two children.

The CID report, issued on December 30, 2019, concluded that there was probable cause to believe the member committed Larceny of Government Funds, Pay and Allowance Fraud, and False Official Statement. As a result, the member's Military Pay Office determined that the

member was not entitled to receive BAH-D nor FSH because he did not incur the added expense for maintaining two separate households for himself and his spouse as a result of his military duties during the period March 29, 2005, through April 30, 2019. Therefore, he was overpaid a total of 209,053.16 (\$5,636.40 + \$195,800.10 + \$7,616.66).

On February 10, 2020, the Military Pay Office issued a DD Form 139, *Pay Adjustment Authorization*, addressed to the member's Command charging the member with a debt in the amount of \$209,053.16 for BAH and FSH. Under explanation and reason for the adjustment, the certifying officer listed the following:

This DD139 is based on determination overpayment falls under tainted claim.

Due U.S. \$200,419.83 in BAH. Soldier has been receiving BAH since 29 March 2005 through 30 April 2019 and per CID has failed to provide support to his dependents.

Due U.S. \$8,633.33 in FSA. Soldier also has received FSA from 29 Mar -31 Jul 2005, 12 Nov 2005-5 Nov 2006, 27 Feb 2011-9 Jan 2012 and 13 Feb – Oct 2016.

TOTAL DUE U.S. \$209,053.16.

On February 12, 2020, the Defense Finance and Accounting Service (DFAS) notified the member of the indebtedness. On February 13, 2020, the member noted that he disagreed with the debt and would dispute the debt by requesting remission of it. The record reflects that the Military Pay Office found that the debt was valid because the member did not provide any documents that reflected that his spouse lived with him or that he was providing her with support during the period 2005 through 2019.

On April 8, 2020, the member sent his request for remission of the debt to the Military Pay Office. He stated that he was authorized all BAH and FSH that he received and that he used those allowances in accordance with regulatory guidance. He further requested that collection of his debt be suspended until the issuance of a remission decision in his case. On the member's DA Form 3508, *Application for Remission or Cancellation of Indebtedness*, the member stated that in contrast to the CID report's finding that he did not support his dependents, he has always supported his dependents to include his children. He attached a letter from his former spouse. In that letter, his former spouse stated that she was "seemingly harassed by the Army CID into coming in to conduct an interview" concerning the member. She stated that the member did provide her with in-kind support. She stated that if she had a complaint about receiving proper support, she knew to contact the member's chain of command.

On June 16, 2020, the Army Human Resources Command (AHRC) denied the member's request for remission. The AHRC cited Chapter 1 of Army Regulation 600-4, *Remission or Cancellation of Indebtedness*. In that chapter, a debt that is obtained or converted to own use through fraud or larceny may not be remitted. The ARHC cited the final investigation by CID in which it was determined that probable cause existed that larceny, fraud, and false official

statements had been committed by the member. The ARHC advised the member that he may apply to the Army Board for Correction of Military Records (ABCMR) for further review.

On September 29, 2020, the member requested waiver of his debt under the provisions of 10 U.S.C. § 2774. On the member's DD Form 2789, *Waiver/Remission of Indebtedness Application*, the member stated that BAH and FSH are entitlements based on having qualifying dependents and during the period of debt, he had qualifying dependents. He stated that he was not aware he was being overpaid. He stated that he was married during the period November 2004 through June 2019 and has children who reside with him as dependents.

On March 11, 2021, DFAS denied the member's request for waiver. DFAS considered \$209,053.16 for waiver, explaining an additional debt for \$13,287.49 had been established against the member for the erroneous payment of travel pay, but that debt was not ripe for consideration for waiver until the DFAS-Travel Mission Area Office completed their review. DFAS based its denial of waiver of the \$209,053.16 on the CID's findings that the member submitted fraudulent claims for BAH and FSH based on his marriage. DFAS found no evidence that the member provided support for his spouse during the period of overpayment. DFAS reviewed the member's former spouse's statement dated March 2, 2020, but based on a public records search for her, found no record of her ever residing with the member at his duty stations. DFAS addressed the member's assertions that he also supported his children. DFAS noted that the member had not provided any documents reflecting that any of his children resided with him during the period of overpayment. DFAS concluded that as a senior noncommissioned officer with the member's years of service, he should have questioned his entitlement to BAH and FSH based on his marriage when he knew that his wife did not reside with him. DFAS agreed with the member's Military Pay Office applying the Tainted Claim Rule, and cited DOHA Claims Case No. 05091301 (October 31, 2005), in which the Claims Appeals Board found that a member's fraudulent submission for payment of BAH on the basis of his marriage, vitiated any subsequent claim the member would have had to BAH-D on the basis of his child support payments. Applying the precedent to the facts in the member's case, DFAS found that the member's submission of several fraudulent claims for BAH, FSH, and travel pay entitlements based on his marriage and having dependent children who never resided with him, made waiver of the resulting debt inappropriate.

On May 2, 2021, the member, through his attorney, appealed DFAS's denial of his waiver request. In that appeal, the member requested waiver of \$158,797.13 in BAH-D and \$6,025.00 in FSH claiming his lawful entitlement to those amounts. The member submitted details concerning his moves and various duty assignments during the period of overpayment. The member acknowledged that during certain periods of time he was not entitled to receive BAH-D but instead should have been paid BAH at the single rate (BAH-S). He stated that in 2010 prior to his deployment to Germany, he met the woman who would later be the mother of his daughter born in October 2012. He stated that although he was not listed as the child's father on the birth certificate, he later acknowledged paternity of his daughter in May 2019. Therefore, beginning in 2012 he maintained that although he was not entitled to BAH-D, he was entitled to receive BAH at the differential rate (BAH-Diff) based on his support for his daughter. The member asserted that as a matter of equity, DFAS should not recoup money that he was legally entitled to received. The member pointed out that although he was investigated for BAH fraud

in April 2019, the DA Form 4833, *Commander's Report of Disciplinary or Administrative Action Taken*, stated that no disciplinary action was taken against him due to insufficient evidence as well as the passage of the statute of limitations. Therefore, the member maintained that the CID report's finding of probable cause for BAH and FSH fraud should have no bearing on his request for waiver. The member also submitted a statement in support of his waiver request from a retired CID agent. In the agent's statement, he explained that the CID's investigation of the member was not thorough, and if it was thorough, it would have resulted in a conclusion that the member was not entitled to receive \$44,000.00, not \$209,053.16.

After examining the member's appeal, DFAS issued a Recommendation and Administrative Report dated March 14, 2022. In that report, DFAS sustained the denial of the member's waiver request. DFAS found that the member presented no factual evidence to overturn their initial determination to deny waiver. DFAS stated that the member's appeal focused on the member's incorrect belief that he was entitled to receive BAH-D and FSH during the period of overpayment for dependents other than those he listed on the documentation he submitted to the Army to receive the entitlements. DFAS found that the member's request for a partial waiver of the debt in an amount he asserts he is entitled to receive is not appropriate for consideration under 10 U.S.C. § 2774, because DFAS is unable to offset a current debt with a future potential claim. DFAS also raised the Tainted Claim Rule and explained that its application to the member's future claim for entitlement during the period of indebtedness would likely result in a denial. DFAS cited DOHA Claims Case No. 2019-CL-031403.2 (October 29, 2019). In that case, DOHA declined to disturb DFAS's recoupment action against a member (by allowing the member's reclaim) after the U.S. Air Force and DFAS found the member had submitted false information in order to obtain BAH-D.

In the appeal decision, the DOHA adjudicator declined to follow DFAS's recommendation to sustain their denial of the total amount of the overpayment. The adjudicator waived the portion of the overpayment resulting from the member's erroneous receipt of BAH-D and FSH during the period March 29, 2005, through July 31, 2005, in the amount of \$5,636.40. The adjudicator found no indication that during that period the member was reasonably aware or should have been aware that he was not entitled to the payments. The adjudicator noted that member was otherwise entitled to receive BAH-D and FSH during this period while he attended Army BCT and AIT, but for the member's later actions. However, the adjudicator denied waiver of the overpayment in the amount of \$203,416.76 in BAH-D and FSH the member received during the period August 1, 2005, through April 30, 2019, on the basis that the member submitted inaccurate claims in order to receive the dependent allowances. In this regard, the adjudicator noted that during the CID's investigation, the member acknowledged that his spouse never resided with him during any part of his military service. From the record, the adjudicator then identified multiple instances, in which the member signed and submitted claims purporting to reflect that his spouse resided with him and he was supporting her, in order to obtain payment of allowances on behalf of his spouse. The adjudicator specifically detailed various instances in which the member submitted claims throughout his enlistment in the Army, including when he was a senior noncommissioned officer, that he knew to be false. Therefore, the adjudicator concluded that since the member's debt resulted from him knowingly submitting claims for allowances based on his spouse's support, when he knew she did not reside with him and had never resided with him during the period of the debt, it would not be against equity and good

conscience or contrary to the best interests of the United States to deny waiver of the erroneous payments the member received, during the period August 1, 2005, through April 30, 2019. Finally, in response to the member's argument that he was lawfully entitled to some form of BAH (partial, single, or dependent rate) through the overpayment period based on his children, the adjudicator stated that DOHA's waiver determination in the case did not preclude the member from submitting a claim to the Army for any pay and allowances he believes he is entitled to receive.

In the member's reconsideration request, through his attorney, the member requests waiver of the remainder of his debt for BAH-D and FSH in the total amount of \$114,493.43 (\$108,857.03 in BAH-D and \$5,636.40 in FSH). He maintains that he was entitled to receive this amount based on his dependent child, his son who was born in 2015. He states that DFAS incorrectly applied the Tainted Claim Rule to his request for waiver. He states that in his case, there are four separate claims at issue, BAH, FSH, temporary lodging expense (TLE), and dependent travel allowances related to his PCS moves. He asserts that while these claims tend to relate to his marriage, they are independent claims, were filed at separate times, and served different purposes. He maintains that DFAS erroneously lumped all his claims together instead of analyzing them independently, which led to inaccuracies in the CID report. The member states that only his claims for TLE and dependent travel are tainted by fraud, and these claims are not subject to his waiver request. He maintains that his claim for BAH is not tainted by fraud since he was entitled to receive some form of BAH. He states that the fact that he did not use the BAH-D for support of his spouse does not render his claim for it fraudulent. He further states that it is inequitable to recoup all of his BAH over the majority of his career. He states that in regard to his FSH, he was living with his girlfriend and his children when he was deployed to Korea. During his deployment, he supported his dependent son by paying rent, and therefore his claim for FSH was not fraudulent. Finally, he states that the statement by the DOHA adjudicator in the appeal decision, regarding pursuing the matter as a claim, is incorrect. He states that the statute of limitations under 31 U.S.C. § 3702(b) would bar his claim and any claim he would make would likely be denied as being tainted under the Tainted Claim Rule. He clarifies that he is not claiming he is entitled to waiver of his debt, but believes waiver is appropriate in his case.

### **Discussion**

Our authority in this case is restricted to a consideration of whether the member's debt may be waived under 10 U.S.C. § 2774. That statute provides for waiver of a claim of the United States against a member which arises out of the erroneous payment to a member of pay and allowances, including travel and transportation allowances. Waiver is available only when the collection of the claim would be against equity and good conscience and not in the best interest of the United States. Under 10 U.S.C. § 2774(b), waiver is not appropriate if there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim. Under the statute and implementing regulations contained in Department of Defense Instruction 1340.23 (February 14, 2006), the appropriateness for waiver turns on knowledge and conduct of the member who received the erroneous payments. The principal test is whether a member knew or reasonably should have known that an erroneous payment

occurred and failed to bring the matter to the attention of the responsible officials. The standard employed to determine whether a member was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving payment in excess of his entitlements.

Preliminarily, we must stress that DOHA has no authority over the establishment of a debt against a member. Under the *Debt Collection Act*, 5 U.S.C. § 5514, DFAS has the authority over the establishment of debts, including the calculation and amount of a debt, notifying the member of the debt, conducting due process hearings on the validity of the debt, the amount of the debt, and any resulting repayment plan established, and recoupment and collection actions.<sup>1</sup> By requesting waiver of his debt, the member has acknowledged its validity for the purposes of consideration under 10 U.S.C. § 2774. Waiver consideration at the appellate level at DOHA does not include an adjudication of the validity of a debt. The validity of the debt is an issue separate from waiver consideration because payments that are valid when made may not be considered for waiver under 10 U.S.C. § 2774. *See* DOHA Claims Case No. 05040601 (April 26, 2005).

Under 37 U.S.C. § 403, members of the uniformed services who are entitled to basic pay are entitled to an increased basic allowance for housing for their dependents when not assigned to appropriate government housing. We have consistently held that the basic purpose of BAH-D is to at least partially reimburse members for the expenses of providing housing for their dependents, where government housing is not available, and not to grant the higher allowance as a bonus merely for the technical status of being married or a parent. *See* DOHA Claims Case No. 2013-WV-110404.2 (December 23, 2014); DOHA Claims Case No. 2012-WV-042406.2 (September 25, 2012); and 52 Comp. Gen. 454 (1973).

In this case, the member submitted documentation to pay officials and disbursing officers reflecting his entitlement to pay and allowances. Under the circumstances, it is our view that the member must bear the responsibility for the errors in his pay that occurred, and accordingly be considered at fault in this matter, which under the provisions of 10 U.S.C. § 2774(b)(1), precludes waiver of any part of the claim. We agree with the DOHA adjudicator that the member should have known that he was not entitled to receive BAH and FSH on behalf of his spouse, who never resided with him, and he did not support financially. Considering the member's rank and years of service, he should not have expected to receive BAH-D for a spouse he did not support. The member continued to certify, on documents submitted to pay officials that his spouse travelled with him to his various duty stations when she never did, and his LES continued to reflect he was receiving BAH-D for a spouse who he did not support. BAH-D is not payable to members who are not supporting their families. Failure to support a dependent, on whose behalf BAH is erroneously being received, requires recoupment to the Government for periods of non-support. There is nothing in the record to substantiate that the member supported his spouse during the period of overpayment. *See* DOHA Claims Case No. 03022704 (March 5,

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<sup>1</sup>Volume 5, Chapter 12 of the Department of Defense Financial Management Regulation defines fraudulent claim as any intentional deception designed to unlawfully deprive the United States of something of value or to secure from the United States a benefit, privilege, allowance, or consideration to which a claimant is not entitled and specifies the process for addressing a fraudulent claim paid, including the procedures for collection and establishment of a debt.

2003). Under the circumstances, denial of waiver of the remaining debt for BAH-D and FSH in the amount of \$203,416.76 is sustained.

We note that the member cites our waiver case precedent in which members have been credited with BAH at the differential rate (BAH-Diff) for their support of dependent children. However, in those cases, the members were initially in proper receipt of BAH-D for spouse and children, until a divorce, and the resulting overpayments arose when the members continued to receive BAH-D, when they should have been paid BAH-Diff for support of a dependent child. In those cases, DFAS offset the amount of BAH-Diff from the erroneously paid BAH-D, and the members sought waiver of the resulting debt. *See* DOHA Claims Case No. 2010-WV-111502.3 (April 13, 2011); DOHA Claims Case No. 2010-WV-010504.2 (October 27, 2010); DOHA Claims Case No. 09042701 (May 1, 2009); and DOHA Claims Case No. 08082501 (August 28, 2008). In this case, the BAH-D the member received was erroneously paid to him on behalf of his spouse who he claimed lived with him and he supported, and although the member may now have eligible dependent children, the earliest record of the member claiming his children for BAH purposes was in December 2017, and he did not produce the proof of their dependency status at that time.

Although the member continues to assert that he is entitled to BAH in some form, and his arguments in his reconsideration request only relate to the validity of the debt, not the appropriateness of it for waiver, our authority in this matter and decision in this case pertains only to the availability of the equitable remedy of waiver. Our decision in this matter does not affect any other available remedies the member may wish to pursue. As explained by the DOHA adjudicator in the appeal decision, our decision under the waiver statute, 10 U.S.C. § 2774, does not preclude the member from pursuing any other available avenue to him of redress. In fact, the language contained under 10 U.S.C. § 2774(f) specifically states that consideration under section 2774 does not affect any authority under other law to litigate, settle, compromise, or waive any claim of the United States. We note that after the member received notification of his indebtedness, he immediately questioned the validity of the debt, and his Military Pay Office found it to be valid. We further note that the member already pursued the matter as a request for remission of the debt under the authority of 10 U.S.C. § 4837. Although the AHRC declined to remit his indebtedness, the AHRC advised the member that he had the right to request reconsideration of their decision through the ABCMR. It is unclear from the record if the member has petitioned the ABCMR for relief. Information on petitioning the ABCMR can be found on the Army Review Board Agency's website.

While a member may be able to prove some entitlement to funds through claiming his entitlement, the waiver statute is not intended as a convenient short cut for repairing possible government mistakes in the settlement of claims under 31 U.S.C. § 3702. As set forth in the DOHA appeal decision, the member has the right to pursue the matter as a claim in accordance with DoD Instruction 1340.21 (May 12, 2004). However, the member has the burden to prove, by clear and convincing evidence on the written record, that he is entitled to the amount claimed. If the member is not satisfied by the legal determination of the Army and DFAS on his claim, he has the right to appeal to DOHA as set forth under DoD Instruction 1340.21.



The member raises two issues concerning his pursuit of a claim under 31 U.S.C. § 3702, the statute of limitations contained and the Tainted Claim Rule. The six-year statute of limitations set forth under 10 U.S.C. § 2774(b), popularly known as the Barring Act, limits the general right of a claimant to submit a claim against the United States. Under subsection (b), jurisdiction to consider claims is limited to those that are filed within 6 years after they accrue. A claim accrues on the date when everything necessary to give rise to the claim has occurred. An active duty member's claim for pay and allowances is considered a continuing claim, *i.e.*, the claim accrues day to day, for the purposes of application of the Barring Act. Therefore, when considering a continuing claim, after a finding of entitlement based on the merits of it, DFAS will pay back six years of the claim from when the member filed or tolled the statute and bar any portion of the claim more than 6 years before the member's filing or tolling of the statute. *See* B-223734, Oct. 21, 1986. If, upon presentation of the claim by the member, DFAS denies all or part of it based on the Barring Act, the member has a right to appeal the application of the statute of limitations to his claim to DOHA. *See* DoD Instruction 1340.21 ¶ E6.2.1. As for the Tainted Claim Rule, in decisions issued by our predecessor, the Comptroller General, which we have followed in our own precedent, we have held that a fraudulent claim for housing or lodging expenses taints the entire claim for the time period for which fraudulent information was submitted and payments for that time period will be denied to a member. *See* 59 Comp. Gen 99 (1979). However, whether or not to apply the Tainted Claim Rule to any time period of a member's claim turns on the individual facts and circumstances of that member's specific case. Therefore, it would be inappropriate and premature for DOHA to comment in this case on the rule's applicability since the member has not yet submitted his claim under 31 U.S.C. § 3702.

## Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision, dated September 28, 2022. 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: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairperson, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board