

The record further shows that due to his PCS, the member began receiving dual overseas housing allowance (dual OHA) effective December 20, 2006. It was later determined that he was not entitled to dual OHA, but should have received overseas housing allowance (OHA). This resulted in the member being underpaid \$6,175.24, from December 20, 2006, through November 30, 2008. The record also shows that the member was deployed away from his duty station during the period August 2007 through March 2008. During this time the member was erroneously paid Family Separation Allowance at the temporary duty (FSA-T) rate. This caused an overpayment of \$1,583.33. Finally, due to an additional administrative error, the member erroneously received a retroactive payment in the amount of \$5,551.14, during the period December 1, 2008, through December 31, 2008. Thus, the total debt is \$27,121.56.

The member argues that he received two messages from Navy Personnel Command telling him that he was entitled to the BAH-D. He states that he used the payments for the support of his dependent; paying for monthly child support, travel to visit, daycare programs, registration and equipment for athletic programs, etc. He argues that he should not have to pay back the FSA as his command started those payments, and he believed he was entitled to them based on the information the command gave him. He agrees that the retroactive payment should be repaid because he was told by his command that he was probably going to be overpaid for December 2008. He has set aside the money to repay that payment.

The adjudicator in the appeal decision determined that the member reasonably may not have been aware he was not entitled to the FSA-T payments he received during the period August 2007 through March 2008, and acted in good faith in accepting the overpayment of \$1,583.33. The adjudicator determined since the member was aware he most likely was going to be overpaid for the retroactive payment during the period December 1, 2008, through December 30, 2008, it would not be against equity and good conscience to deny waiver of the overpayment of \$5,551.14. The member has stated he has this money set aside to repay the payment. Concerning the BAH-D, the adjudicator noted that the Defense Finance and Accounting Service (DFAS) recommended the entire amount (\$21,570.41) be waived. The adjudicator did not agree with that recommendation and noted that the statutory purpose of BAH-D is to help a member provide support for his dependents. In that regard, the adjudicator noted that the record showed that the member provided no documentation other than the Stipulated Attachment to Judgment dated March 26, 1999, which required the member to pay \$500.00 per month in child support. Therefore, the adjudicator determined that the case file showed the member provided \$12,500.00 in support to his dependent (\$500.00 per month from November 30, 2006, through November 30, 2008), and that would be the appropriate amount to waive. But she concluded that it would not be against equity and good conscience to deny waiver of the remaining \$7,487.09. The total amount denied waiver was \$13,038.23 (\$5,551.14 retroactive payment plus \$7,487.09), and the total granted waiver was \$14,083.33.

The member does not dispute the denial of waiver of the retroactive payment in the amount of \$5,551.14. However, he contends that he accepted the remaining \$7,487.09 in good faith. He argues that he relied upon the two official messages he received which told him he was authorized to receive those payments. He also contends that the remaining \$7,487.09 still at issue was used for its intended purpose, that of support for a dependent. Since he was informed he was entitled to the money, he believed he could, and did, spend all of it for his daughter. Since, at the time, he had no reason to believe he needed to maintain any documentation or

receipts, he did not. He argues that DOHA should not expect he would have such documentation now, and they should waive the additional amount of the debt.

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 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. *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). 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.

The only amount in contention is the remaining \$7,487.09 of the BAH-D. All other amounts have either been waived (\$12,500 of BAH-D and \$1,583.33 of the FSA-T), or agreed that denial is appropriate (\$5,551.14 of the retroactive payment). During this timeframe the member was entitled to BAH-DIFF, and the adjudicator has calculated this amount and assured it was deducted from the debt. There is a well-established rule in waiver cases involving BAH, that waiver is appropriate to the extent, and only to the extent, that the overpayments were spent for the purpose intended. *See* DOHA Claims Case No. 09042701 (May 1, 2009); DOHA Claims Case No. 08082501 (August 28, 2008); DOHA Claims Case No. 07041305 (May 10, 2007); and DOHA Claims Case No. 06113001 (December 13, 2006). The adjudicator properly determined that the amount of court-ordered child support set forth in the judicial attachment to the member's order of divorce, and paid by the member, should be waived. The record contains no evidence of other amounts spent for the intended purpose of BAH-D.

Conclusion

Accordingly, the request for reconsideration is denied, and the appeal decision of August 12, 2010, is affirmed. In accordance with the Instruction, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

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Jean E. Smallin
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board