

KEYWORDS: waiver of indebtedness

DIGEST: When a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for repayment, even if the government fails to act after notification. The government has the right to recover such payments notwithstanding the dilatory recovery efforts of its agents.

CASENO: 2010-WV-111508.2

DATE: 8/09/2011

DATE: August 9, 2011

)	
In Re:)	
[REDACTED])	Claims Case No. 2010-WV-111508.2
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for repayment, even if the government fails to act after notification. The government has the right to recover such payments notwithstanding the dilatory recovery efforts of its agents.

DECISION

A member of the U.S. Army requests reconsideration of the June 14, 2011, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2010-WV-111508. In that decision, DOHA denied waiver of the government’s claim in the amount of \$21,937.03.

Background

The record shows that the member proceeded on permanent change of station (PCS) orders to Germany, and reported for duty in August 2004. The record further shows that the

member was married, but his spouse did not accompany him to Germany. The member was receiving basic allowance for housing at the dependent rate (BAH-D). The record also shows that his spouse entered active duty as a military member on September 2, 2004. Since the member was now married to another active duty military member, he was only entitled to receive basic allowance for housing at the partial rate (BAH-P). Due to an administrative error, the member erroneously received BAH-D from September 2, 2004, through December 28, 2006, causing an overpayment of \$21,937.03.

In the appeal decision, the member argues that the overpayment was an administrative error and, as such, not his responsibility. He stated that when he was notified in January 2005 by his "separated" spouse that she had joined the military, he immediately informed his chain of command. He stated that he continued to inform his chain of command of the discrepancy while he was in Germany, but no changes were made to his entitlement. The adjudicator determined that the member acknowledged there was an error when he was informed his spouse had entered military service. She also determined that he should have questioned his entitlements as soon as he arrived in Germany. She noted that at one time the record reflects that BAH was stopped, and a debt established, and then restarted. The adjudicator determined that the member knew, or reasonably should have known, that the payment was erroneous.

In the member's request for reconsideration, he argues that he did not know he was being overpaid. He states he was informed on no less than five occasions by finance representatives that he was entitled to the payments. He contends that his alleged overpayment was not based on fraud, misrepresentation, fault, or lack of good faith. He argues that because he was wrongly advised by finance officials, he had no knowledge he was erroneously receiving BAH. He believes collection of the debt would be against equity and good conscience, and not in the best interests of the United States. Finally, he complains that he has never received a full and accurate accounting of the alleged debt. For all these reasons, he believes the debt should be waived.

Discussion

The member seeks waiver of the debt under title 10, United States Code, § 2774. This statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23 (February 14, 2006) (hereinafter Instruction). Generally, persons who receive a payment erroneously from the government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing.

While an administrative error did occur, our Office has consistently held that the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the government. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right. If it were merely a matter of right, then virtually all erroneous payments made by the government to members would be excused from repayment. *See* Instruction, ¶ E4.1.1.

First, we answer the member's argument that the overpayment was not based on fraud, misrepresentation, fault, or lack of good faith. The legal definition of "fault" does not imply any ethical lapse on the part of the member. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person: if such a person knows or reasonably should know that he is receiving money to which he is not entitled, he is at fault if he fails to bring the excess payments to the attention of appropriate officials. In such a situation, waiver is precluded. *See* Instruction, ¶ E4.1.4.

Second, the member argued that he did give his relevant information to finance officials, but he was wrongly advised. In his request for reconsideration, the member contends that he was advised on five different occasions that he was entitled to the payment of BAH-D. However, our decisions and those of the Comptroller General have consistently held that there is no basis for waiver unless the official(s) providing the faulty advice indicating that the member was entitled to what he received are identified, and the member's version of the events is corroborated in the written record by pay and disbursing officials. *See* 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. In this case, the record only reflects the member's version of events. Moreover, there is no indication in the record that the member was providing support to his spouse during the time in question. Even if he was told he was entitled to BAH-D, it was not reasonable for him to expect to continue to receive it under those circumstances. There is a well-established rule in waiver cases like this one involving BAH, that waiver is appropriate 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); and DOHA Claims Case No. 07041305 (May 10, 2007).

The member contends that he has not received a full and adequate accounting of this debt. However, the record contains a Summary Record and Hearing Decision, dated October 7, 2008, in which DFAS validated the debt following the member's request to contest the debt, dated June 20, 2008.

The member's argument that he had no knowledge that the BAH-D was an overpayment is undermined by the initial setting of the BAH-D at the member's spouse's initial duty station after basic training. It is further undermined by the fact that the member's March 2005 Leave and Earnings Statement (LES) reflected that BAH stopped effective September 1, 2004, and a BAH debt was established on his account in the amount of \$4,396.21. Deductions started on his account in the amount of \$364.38 per month and continued until July 2005. The member's July 2005 LES reflected that BAH-D restarted effective August 31, 2004. The member properly brought this to the attention of finance officials. However, he should not have relied upon verbal assurances. He should have required finance to provide him a written explanation, because at this point he reasonably should have known that the payments were at least questionable. It is not against equity and good conscience and is in the best interests of the United States, for the above reasons, to require collection of the debt.

Conclusion

The member's request for reconsideration is denied, and we affirm the June 14, 2011, decision to deny waiver of the government's claim in the amount of \$21,937.03. In accordance with the Instruction, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signature///

Jean E. Smallin
Chairman, Claims Appeals Board

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James E. Moody
Member, Claims Appeals Board

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Member, Claims Appeals Board

