

KEYWORDS: waiver of indebtedness

DIGEST: When a member is 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: 2011-WV-050306.3

DATE: 4/26/2012

DATE: April 26, 2012

In Re:))
[REDACTED])) Claims Case No. 2011-WV-050306.3
Claimant))

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is 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. Air Force requests reconsideration of the March 19, 2012, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-WV-050306.2. In that decision, DOHA waived \$12,647.33 of the \$19,890.83. This amount is not at issue in this reconsideration request. DOHA denied waiver of the balance in the amount of \$7,243.50.

Background

On March 4, 2008, the member was issued travel orders deploying him to Iraq. Pursuant to the member's travel orders, his wife relocated from location 1 to location 2, on March 12, 2008. As a result of his wife's relocation, the member was no longer entitled to receive basic allowance for housing (BAH) based on location 1. However, due to an administrative error, the member continued to receive BAH based on the rate for location 1, instead of location 2. This resulted in the member being overpaid BAH in the amount of \$16,581.23 from March 12, 2008, through March 30, 2009. In addition, the member erroneously continued to receive Continental United States cost of living allowance (CONUS COLA) at the location 1 rate, from March 12, 2008, through March 30, 2009, causing an overpayment of \$3,309.60.

In the appeal decision, the DOHA adjudicator waived \$12,647.33, which represents the amount the member was overpaid during the period March 12, 2008, through November 15, 2008. However, the adjudicator denied waiver of the remaining \$7,243.50, which represents the amount the member was overpaid during the period November 16, 2008, through March 30, 2009. The adjudicator denied this amount because the member became aware on November 18, 2008, that he was receiving erroneous BAH and CONUS COLA payments.

In his request for reconsideration, the member requests waiver in the amount of \$3,523.06 of the remaining \$7,243.50 indebtedness in order to allow him to pay back the government for his wife's move from location 1 to location 2. He states that he moved his wife based on finance personnel guidance given to him on three different occasions advising him that he could move his wife at government expense and retain his BAH and CONUS COLA at the location 1 rate. He states that if he had been given the correct advice, he would have moved his wife to location 2 at his own expense, thus maintaining his BAH and CONUS COLA at the location 1 rate. He states that if his wife's move to location 2 was not paid by the government, he would legally be entitled to BAH and CONUS COLA at the location 1 rate. He acknowledges that five months into his deployment he was advised that he was not entitled to BAH at the location 1 rate because his dependent relocated. He states that he immediately contacted the proper officials and offered to reimburse the government the cost of his wife's move to location 2. However, he was told that this could not be done because the move was completed and his cost was reimbursed.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments if collection would be against equity and good conscience and not in the best interest 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. *See* Department of Defense Instruction 1340.23 ¶ E4.1.2. In the present case, the erroneous payments were made as a result of an administrative error, and there is no indication of fraud, misrepresentation, or lack of good faith on the member's part. However, waiver is not appropriate when a member knows, or reasonably should know, that a payment is erroneous. In such a situation, the member does not acquire title

to the money and has a duty to set aside the funds for eventual repayment to the government. *See* DOHA Claims Case No. 07110102 (November 26, 2007) and DOHA Claims Case No. 05040601 (April 26, 2005).

The member's suggests that \$3,532.06 of the remaining debt should be waived as an equitable matter. However, under 10 U.S.C. § 2774, our authority is limited to the terms of the waiver statute. The member knew he was being overpaid as of November 18, 2008. Thus, the DOHA adjudicator properly denied waiver of the amounts he received during the period November 16, 2008, through March 30, 2009. When waiver is precluded, the member does not acquire title to the excess amount and has a duty to set aside the excess for eventual repayment to the government. *See* DOHA Claims Case No. 00070318 (October 6, 2000). Under the circumstances of this case, it is not against equity and good conscience for the member to repay the amounts he received after he became aware of the overpayment.

While it is unfortunate that the member was given incorrect advice by his finance office, as a general rule, the government is neither bound nor estopped by the erroneous advice or unauthorized acts of its officers, agents or employees even though committed in the performance of their official duties. The member's repayment of his wife's move to location 2 is a separate matter and has no effect on our consideration under the waiver statute. However, our decision under the waiver statute does not preclude the member from pursuing this matter as a claim.

Conclusion

The member's request for relief is denied, and we affirm the March 19, 2012, 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: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board