

KEYWORDS: Waiver of Indebtedness

DIGEST: Under 10 U.S.C. § 2274, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and allowances made to members, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the member.

CASENO: 2012-WV-070303.2

DATE: 11/20/2012

DATE: November 20, 2012

In Re:)	
[REDACTED])	Claims Case No. 2012-WV-070303.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2274, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and allowances made to members, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the member.

DECISION

A member of the U.S. Air Force requests reconsideration of the October 9, 2012, appeal decision in DOHA Claim No. 2012-WV-070303. In that decision, this Office granted waiver of the government's claim in the amount of \$299.43, and denied waiver of \$9,183.50.

Background

The record shows that the member is a captain in the Air Force with over fifteen years of service. The member was receiving basic allowance for housing at the dependent rate (BAH-D) for his duty station. In January 2008 the member performed a permanent change of station (PCS) move to another duty station. After his PCS, the member erroneously continued to receive BAH-D at the higher rate for his former duty station, instead of the rate for his new duty station. As a result, the member was overpaid from January 18, 2008, through March 15, 2009, in the amount of \$9,482.93.

In the appeal decision, the DOHA adjudicator disagreed with the Defense Finance and Accounting Service's (DFAS) 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 receipt of BAH-D at the incorrect rate during the period January 18, 2008, through January 30, 2008, in the amount of \$299.43. The adjudicator explained that since the member relocated in January 2008, he reasonably may not have been aware that he was erroneously receiving BAH-D at the incorrect rate during the month he moved. However, the adjudicator denied the overpayment resulting from the member erroneously continuing to receive BAH-D at the incorrect rate during the period February 1, 2008, through March 15, 2009, because the member's leave and earnings statements (LES) reflected that he was still being paid BAH-D at the rate for his former duty station. Although the member stated that he made consistent efforts to ensure that his pay was correct with finance officials, the adjudicator noted that the member presented no supporting evidence or documentation of his conversations with the officials of what he said to them and their responses.

In his reconsideration request, the member states that he was unaware there was an error in his pay. He acknowledges that it is his responsibility to ensure the accuracy of his pay and review his LES. However, he states that reviewing his LES would not have alerted him to any discrepancy because he was assured by finance officials that his pay was correct. He requests a waiver of the remainder of the indebtedness or suggests at least a partial waiver because he was told that his pay was correct.

Discussion

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. *See* DoD Instruction (hereinafter Instruction) 1340.23 (February 14, 2006). 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, a member is considered to be at least partially at fault, and waiver is precluded when, in light of all the circumstances, it is determined that he should have known that he was receiving payments in excess of his entitlements. A member is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in

question. *See* DOHA Claims Case No. 2009-WV-040805.3 (August 12, 2010); and DOHA Claims Case No. 08100703 (October 23, 2008).

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. *See* DOHA Claims Case No. 08040301 (April 15, 2008); DOHA Claims Case No. 04100402 (October 26, 2004); and DOHA Claims Case No. 97071007 (July 21, 1997); and DOHA Claims Case No. 97042817 (July 1, 1997).

The member's LES for the period of overpayment clearly reflect that he continued to receive BAH-D based on the zip code for his prior duty station. In addition, as pointed out by the adjudicator, the amount of his BAH-D remained the same from January 2008 to February 2008. Therefore, the member possessed information that reflected an error in his pay. Although he may have been told by finance officials that his pay was correct, the member did not provide any documentation stating to whom he talked, what he asked or said, nor what he was told. Under these circumstances, we agree that collection of the remainder of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States.

Finally, regarding the member's suggestion that a partial waiver be granted because the government should share responsibility for the indebtedness, there is no basis for apportioning fault under the waiver statute. Partial waiver of the debt may not be granted on the basis that the member was only partially at fault and did not cause the error, since the waiver statute precludes waiver if there is an indication of fault on the member's part. *See* DOHA Claims Case No. 2011-WV-050304.2 (November 29, 2011);¹ and Comptroller General decision B-201814, Sept. 18, 1981.

Conclusion

The member's request for reconsideration is denied and we affirm the October 9, 2012, appeal decision to deny waiver in the amount of \$9,183.50. In accordance with the Instruction ¶ 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

¹ This decision was decided under 5 U.S.C. § 5584 because the applicant for waiver was a civilian employee. However, the standards for waiver under 5 U.S.C. § 5584 and 10 U.S.C. § 2774 are the same.

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board