

KEYWORDS: Waiver of Indebtedness

DIGEST: When a member is aware or should be aware that he is being overpaid, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 2012-WV-100403.3

DATE: 02/12/2013

DATE: February 12, 2013

In Re:)	
[REDACTED])	Claims Case No. 2012-WV-100403.3
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware or should be aware that he is being overpaid, 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. Navy requests reconsideration of the Defense Office of Hearings and Appeals (DOHA) amended appeal decision in DOHA Claim No. 2012-WV-100403.2, dated December 31, 2012. In that decision, DOHA waived an additional \$5,000.00 of the remaining \$9,505.57 overpayment, and denied waiver of \$4,505.57.

Background

The member was erroneously paid basic allowance for housing at the dependent rate (BAH-D) during the period November 24, 2010, through August 31, 2011, causing an overpayment of \$27,238.90. DOHA previously waived a portion of the member's indebtedness in the amount of \$23,200.00 related to the overpayment of BAH-D, and this is not at issue in this decision. In addition, the member was also erroneously paid family separation housing

allowance (FSA) in September 2011 on behalf of his dependent son retroactive to August 5, 2011, causing an overpayment of \$466.67. This amount is at issue in the member's request for reconsideration.

In the amended appeal decision, the DOHA adjudicator explained that the purpose of FSA is to compensate a member for added household expenses that arise by reason of his separation from his dependents as a result of his military assignment. The adjudicator found that since the member's son was not with him at the time of his deployment and the member was assigned government quarters at the time he received the retroactive FSA payment, he should have at least questioned his entitlement to it. Therefore, the adjudicator found that since he did not question the payment, waiver was not appropriate.

In his reconsideration request, the member continues to assert his entitlement to FSA. He states that he qualifies under the DoD Financial Management Regulations (DoDFMR) for FSA. He states that his son was with him when he came back on active duty in December 2009. He states that he has physical custody of his son. Therefore, he states that on February 3, 2010, when he departed for his temporary duty (TDY) enroute to his permanent duty station (PDS), he qualified for FSA.

Discussion

A member's entitlement to FSA is set forth in 37 U.S.C. § 427. The legislative history of FSA reflects that the purpose for the allowance is to compensate a member for the added household expenses that arise by reason of his separation from his dependents as a result of his military assignments. The extra expenses include such matters as home and automobile maintenance, increased child care costs, etc. *See* S. Rep. No. 88-387 (1963); DOHA Claims Case No. 09042401 (May 19, 2009); 60 Comp. Gen. 154 (1981); and B-199233, Dec. 27, 1983. A member's entitlement to FSA is based upon his separation resulting from military orders and not the personal choice of the member and/or dependents. *See* ¶ U10414-A of Volume 1 of the Joint Federal Travel Regulations (JFTR).

Our authority in this case is limited to a consideration of whether the member's debt may be waived under 10 U.S.C. § 2774. Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In the present case, the erroneous payment of FSA was made as a result of administrative error and there is no indication of fraud, misrepresentation, or lack of good faith on the part of the member. However, waiver is not appropriate when a member knows, or reasonably should know, that a payment is erroneous. The member has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Department of Defense Instruction 1340.23 (Instruction) ¶ E4.1.6. 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. 2012-WV-0625002.2 (September 20, 2012); DOHA Claims Case No. 2010-WV-

111508.2 (August 9, 2011); DOHA Claims Case No. 07110102 (November 26, 2007); and B-248558, June 18, 1992. It is a long standing rule that members have a duty to verify information on their leave and earnings statements (LES). Once a member receives information that brings the validity of a payment into question and fails to take corrective action, waiver of the resulting overpayment is not appropriate.

In this case, the member acknowledges receiving LES during the period of overpayment. In this regard, the member's October 2010 and November 2010 LES reflect that he was receiving FSA in the amount of \$250 per month. However, his December 2010 LES reflects that FSA was stopped effective November 18, 2010, and a debt of \$100.00 was established on his account. From January 2011 through August 2011, the member did not receive FSA and this was reflected on his LES. However, the member's September 2011 LES reflects that he received FSA in the amount of \$466.67. The remarks section of his LES states that FSA began August 5, 2011. In addition, on his September 2011 LES, a debt for the overpayment of BAH was established on his account in the amount of \$24,093.47. Therefore, the member should have at least questioned his entitlement to FSA, especially since he was living in government quarters and his son was residing in another state with his aunt at the time he was deployed in August 2011. In fact, in prior filings by the member, he states that it was not feasible to bring his son to his permanent duty station (PDS) because his son was in summer school. Therefore, it was the member's personal choice not to move his son to his PDS. *See* B-221521, May 22, 1987.

The member continues to assert his entitlement to the FSA, beginning in February 3, 2010. As explained by the adjudicator in the appeal decision, the member should address this matter to the proper authorities. In this regard, if the member wishes to contest the validity of the debt by disputing it and proving his entitlement to the payment, he should direct his contention to the Navy and DFAS. We note that information on applying for FSA is found on DFAS's website. To apply for FSA, the member should submit a completed DD Form 1561, *Statement to Substantiate Payment of Family Separation Allowance (FSA)*, to his servicing personnel office. *See* <http://www.dfas.mil/militarymembers/payentitlements/fsa.html>.

Conclusion

The member's request for relief is denied, and we affirm the December 31, 2012, amended appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense concerning the member's request for waiver under 10 U.S.C. § 2774.

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