

KEYWORDS: Waiver of Indebtedness

DIGEST: When a member is aware or reasonably 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 to the government.

CASENO: 2012-WV-112603.2

DATE: 02/11/2013

DATE: February 11, 2013

In Re:)
[REDACTED]) Claims Case No. 2012-WV-112603.2
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware or reasonably 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 to the government.

DECISION

A member of the United States Marine Corps (USMC) requests reconsideration of the appeal decision dated December 31, 2012, of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-112603. In that decision, DOHA denied waiver of an overpayment of Family Separation Allowance (FSA) in the amount of \$3,841.67.

Background

The member was erroneously paid FSA from July 20, 2009, through October 31, 2010, resulting in an overpayment of \$3,841.67. On December 12, 2008, the member was divorced. On July 20, 2009, he gained full custody of his dependent son. On July 31, 2009, the member signed a Dependency Application to initiate basic allowance for housing at the dependent rate

(BAH-D), effective July 20, 2009. However, due to an administrative error, the member's records were erroneously updated to reflect that he was also entitled to receive FSA. This error created the overpayment.

In the appeal decision the member stated that he did not believe that he was at fault. He stated that he accepted the IPAC (Installation Personnel Administration Center) personnel telling him that he rated the FSA, and they were the experts. Therefore, he was wrongfully misled. In his request for reconsideration, the member presents no new evidence, but continues to insist that he is not at fault as he had been misinformed that he would be entitled to FSA. He questions why he would question the subject-matter expert who informed him that he rated the entitlement. Additionally, he is not able to provide documentation from the individuals at the IPAC at the time as the advice was given four years ago.

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. The FSA entitlement is based upon a 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). The member's son was not separated from him by virtue of military orders.

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 an 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 the 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 funds for eventual repayment to the government. *See* Department of Defense Instruction 1340.23 (hereinafter Instruction) ¶ E4.1.6.

In this case, the member was attempting to initiate BAH-D, and admits that he was unfamiliar with the pay system and questioned his entitlement to FSA. This Office believes that the member should have continued to question his entitlement, despite the initial assurance from the IPAC that he should receive it. Had the member done so, this error would have been precluded. Nonetheless, our Office has consistently held that "the government is not liable for the erroneous or negligent acts of its officers, agents, or employees even though committed in the performance of their official duties. *See* DOHA Claims Case No. 96070222 (January 27, 1997), and DOHA Claims Case No. 07041204 (April 25, 2007).

Concerning the member's claim that he is unable to pay the amount back due to financial hardship; "financial hardship is not a factor for consideration in determining whether a waiver is appropriate." See Instruction ¶ E4.1.7. While financial hardship does not provide a basis for waiver, the Defense Finance and Accounting Service (DFAS), at its own discretion, may arrange a repayment plan which takes hardship into account.

While this Office understands the member's argument that the incident occurred a number of years ago, and he is unable to submit documents from the individuals who personally gave him the erroneous information, he has submitted no new information. Therefore, collection of the debt is not against equity and good conscience, and is in the best interests of the government.

Conclusion

The request for reconsideration is denied, and the appeal decision of December 31, 2012, 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///

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

Catherine M. Engstrom
Member, Claims Appeals Board

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Natalie Lewis Bley
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