

DATE: July 24, 2013

In Re:)

[REDACTED])

) Claims Case No. 2013-WV-011503.2

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. Marine Corps requests reconsideration of the April 29, 2013, decision in DOHA Claim No. 2013-WV-011503. In that decision, this Office denied waiver of the government's claim in the amount of \$15,440.20.

Background

In June 2010, the member performed a permanent change of station (PCS) move from Hawaii to a new duty station in California. Although he was physically stationed at his new duty station, where he reported for duty in July 2010, he was attached to a battalion at another duty station. As a result of his assignment at his new duty station, he was entitled to receive basic allowance for housing at the dependent rate (BAH-D) for his duty station. However, due to an administrative error, the member erroneously received BAH-D based on the rate of the location where his battalion was attached. Since the BAH-D rate for the location of his battalion's attachment was a higher rate than his duty station, he was overpaid \$53,831.70 during the period July 12, 2010, through January 31, 2012. The Defense Finance and Accounting Service (DFAS) determined that during this period, he was entitled to receive BAH-D in the amount of

\$38,391.50, based on the location of his duty station. This amount was applied to the \$53,831.70, reducing the member's debt to \$15,440.20.

The member was notified of the overpayment by email on January 26, 2012. The DOHA adjudicator declined to follow DFAS's recommendation of waiver for the portion of the overpayment the member received prior to notification during the period July 12, 2010, through January 15, 2012. The DOHA adjudicator found that due to the member's rank and years of service, he should have at least questioned the rate of BAH-D reflected on his leave and earnings statement (LES). The adjudicator also determined that even though the member asserted that he questioned the proper authority about his BAH-D rate and was assured it was correct, the member did not provide any evidence corroborating his version of events.

In the member's reconsideration request, he attaches statements from individuals assigned to his battalion corroborating his version of events, specifically stating that at the time of the overpayment, it was the policy of his battalion's administrative staff to pay battalion members based on the location of their battalion's attachment and not their duty stations. This error was discovered in November 2011, when a new administrative chief identified it.

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).

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).

In this case, the member states that he contacted the appropriate officials about his BAH-D rate and was assured it was correct. The member's version of events is corroborated by the statements he has submitted in his reconsideration request. However, the member became aware he was being overpaid when he was notified by email on January 26, 2012. Therefore, the amounts the member received after notification may not be waived because the member did not acquire title to the excess amounts and has a duty to return them to the government. *See* DOHA Claims Case No. 2010-WV-010503.2 (March 30, 2010).

Conclusion

We hereby grant the member's request for reconsideration and waive overpayment in the amount of \$15,062.20, and deny waiver of \$378.00. 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

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board