

DATE: July 17, 2014

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In Re: )

[REDACTED] )

) Claims Case No. 2013-WV-052806.2

Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 10 U.S.C. § 2774, 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. Army Reserve requests reconsideration of the May 5, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-052806. In that decision, DOHA denied waiver of an overpayment in the amount of \$3,145.88.

**Background**

In 2008 the member was promoted to the grade of an E-8. In 2010 the member was appointed as the Equal Opportunity Advisor for his unit, which was an E-7 position. At the time of his appointment, he was authorized to maintain his grade of an E-8. On June 21, 2011, a *Developmental Counseling Form*, DA Form 4856, was given to the member notifying him that he must be reassigned to a valid military unit vacancy (rank and skill), the Individual Ready Reserve or the Retired reserves. The member completed the DA Form 4865 and voluntarily elected an administrative reduction in order to remain assigned to the position for which he was over pay grade. He also indicated on the form that he would be submitting a request for exception to policy to maintain his grade as an E-8. However, the denial of the member's request for exception to policy was not issued until July 13, 2012, and at that time, his reduction in rank was made retroactive to the date of counseling. As a result, the member erroneously received military pay and allowances based on the rank of an E-8 instead of his reduced grade of

an E-7, causing him to be overpaid his basic pay and basic allowance for housing (BAH) from July 6, 2011, through July 8, 2012, in the amount of \$3,145.88.

In the appeal decision, the DOHA adjudicator found that since the member voluntarily decided to be reduced in rank to keep his position and he had not received an approval of his exception to policy request, he reasonably should not have expected to continue to remain an E-8 and continue to receive E-8 pay and allowances. The adjudicator also noted that there was no documentation in the file reflecting that the member was advised he was entitled to continue to receive pay and allowances as an E-8.

In his request for reconsideration, the member stated that he did not discover that his request for exception of policy was denied until July 2012. He attached email correspondence from two officers from Army G-1. In the correspondence, both officers address the member as a Master Sergeant. In one correspondence, the officer explains that there is no more action needed on the member's part and that the next step is probably G-1 deciding whether or not to approve the exception to policy. In another email correspondence the member is told to "stand by" on submitting his administrative reduction packet until G-1 determined the proper procedure for requesting the exception to policy. The member also attached his reduction orders dated July 13, 2012, which retroactively reduced him from a Master Sergeant to a Sergeant First Class effective June 21, 2011. The member argued that he never knew his reduction would be retroactive because he did not receive the denial of his request for exception to policy until July 13, 2012. He also stated that he was performing the duties of an E-8, had recently graduated from the Defense Equal Opportunity Management Institute (DEOMI) and his command was supportive of keeping him in the position as an E-8 until February 1, 2014.

### **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 this case, the member's version of events is supported by the written record. Specifically, the member signed the counseling form and submitted a request for exception to policy to maintain his grade as an E-8. He did not receive any advisement in the counseling form that his reduction in grade would be effective the date he signed the document. He did not receive his reduction order until July 13, 2012, and in the meantime, he continued to perform his duties in his position as an E-8. Further, in correspondence both officers from G-1 addressed him as a Master Sergeant. Nothing was given to him until July 13, 2012, that indicated his reduction in rank would be effective retroactive to June 21, 2011. Therefore, we believe the member accepted the overpayments in good faith, and all other conditions for waiver have been met. Accordingly, we waive \$3,145.88. *See* Comptroller General decision B-179937, Dec. 13, 1973.

## Conclusion

The member's request for reconsideration is granted and we hereby grant waiver in the amount of \$3,145.88. In accordance with DoD Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Gregg A. Cervi

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Gregg A. Cervi  
Member, Claims Appeals Board