

DATE: December 23, 2014

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In Re: )  
[REDACTED] ) Claims Case No. 2013-WV-110404.2  
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 arising from erroneous payments 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. Navy requests reconsideration of the October 10, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-110404. In that decision, DOHA denied waiver of an overpayment in the amount of \$79,329.00.

**Background**

The member received \$82,986.80 in basic allowance for housing at the dependent rate (BAH-D) on behalf of her daughter during the period July 1, 2009, through December 12, 2011. Since her daughter was a midshipman at the U.S. Naval Academy (USNA) during this period, the member was not entitled to receive BAH-D on behalf of her daughter. As a result, the member became indebted for the erroneous payment of BAH-D. However, the member was due basic allowance for housing at the single rate (BAH-S) in the amount of \$3,657.80 during the period of July 1, 2009, through September 27, 2009. This amount was applied to the overpayment reducing the member's debt to \$79,329.00.

In the appeal decision, the adjudicator found that it was not reasonable that the member could have believed, based on general assurances from her Personnel Support Detachment

(PSD), that she was entitled to receive BAH-D while her daughter attended the USNA, especially since the USNA housed her daughter at no cost to the member. The adjudicator further explained that the purpose of BAH-D is to at least partially reimburse members for the expense of providing housing for their dependent. Therefore, although the member may have incurred expenses for her daughter's clothing, books, transportation, cell phone and other extracurricular activities, there is no entitlement or authority to grant BAH-D to offset those types of expenses. The adjudicator also found that since the member was aware that the Navy paid her daughter's tuition, room and board, medical expenses and other benefits afforded to military members, the member should have requested written documentation concerning her entitlement to BAH-D for her daughter while her daughter was a cadet at the USNA.

In her request for reconsideration, the member states that she disclosed to the appropriate officials that her daughter was attending the USNA, and she was assured that she was being paid correctly. She states that she included her mortgage statement in her original request for waiver in order to show that she did provide housing at her home of record for her daughter when her daughter was home on leave for Thanksgiving, Christmas and Spring break, and when the USNA was not in session.

### **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).

Under 37 U.S.C. § 403, members of the uniformed services who are entitled to basic pay are entitled to an increased basic allowance for housing for their dependents when not assigned to appropriate government housing. We have consistently held that the basic purpose of BAH-D is to at least partially reimburse members for the expenses of providing housing for their dependents, where government housing is not available, and not to grant the higher allowance as a bonus merely for the technical status of being married or a parent. *See* DOHA Claims Case No. 2012-WV-042406.2 (September 25, 2012); and 52 Comp. Gen. 454 (1973).

As a commander with the Navy with over 20 years of service when the overpayment started, the member should have been aware of the purpose of her entitlements. Although the member was erroneously advised by a member of the PSD staff that she was entitled to receive BAH-D while her daughter was at the USNA, the member should have requested written verification of her entitlement since she did not incur any expenses for her daughter's room and board.

During the period of overpayment, the USNA paid the member's daughter's tuition, room and board and medical expenses. In addition, as a midshipman, her daughter was entitled to commuted rations. We do note that the member has provided a statement from the Registrar of the USNA reflecting the dates for Thanksgiving leave, Christmas leave and Spring break while

her daughter attended the Academy. Although her daughter may have stayed at the member's home of record during these periods, this is still not a basis for waiver of the erroneous payments of BAH-D. In this regard, we note that midshipmen receive basic pay in their own right while they are enrolled in the Academy.<sup>1</sup> Therefore, during the periods of her daughter's leave from the USNA, her daughter was being paid by the Navy. *See* DOHA Claims Case No. 2013-WV-081303.2 (October 28, 2014).

In addition, there is no indication that the member used the erroneous payments of BAH-D for its intended purpose. During the period of overpayment, it appears that the member made mortgage payments for her home of record in the total approximate amount of \$16,327.00 (\$563.00 x 29 months). Also during this period, the member received a total of approximately \$89,000.00 for dual overseas housing allowance (OHA). The purpose of dual OHA is to offset the cost of housing in overseas areas for a member with dependents on an unaccompanied tour, when government quarters are not available at the permanent duty station and the member still maintains a household for a dependent while being forced to maintain a household for herself. The reported housing must be the actual residence that the member's dependent occupies. Therefore, we believe that during the period the member's daughter was on break and stayed at the member's home of record, the amount the member received for dual OHA clearly compensated the member for any expenses. Under the circumstances, the member is not permitted to reap a windfall in the form of erroneous payments of BAH-D when it is clear from the record that she did not use them for the intended purpose.

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the October 10, 2014, appeal decision. In accordance with the DoD Instruction 1340.23¶ 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: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board

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<sup>1</sup> Effective January 1, 2009, basic pay for Midshipmen was \$929.40 per month. Effective January 1, 2010, basic pay was \$960.90 per month. And effective January 1, 2011, basic pay was \$974.40 per month.