

DATE: April 29, 2015

In Re:

[REDACTED]

Claimant

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Claims Case No. 2014-WV-063001.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The purpose of BAH is to partially reimburse a member for his housing expenses when government housing is not provided. Waiver is appropriate only to the extent that the member is using the funds for their intended purpose.

DECISION

A U.S. Marine enlisted member requests reconsideration of the March 19, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-063001. In that decision, our Office waived \$4,273.76 of the government's total claim of \$10,429.91, and denied waiver of \$6,156.15.

Background

While serving with the U.S. Marine Corps (USMC) at a recruiting station in New York, the member was in proper receipt of basic allowance for housing at the without-dependent rate (BAH W/O). On February 13, 2011, the member was married and became entitled to receive BAH at the with-dependent rate (BAH-D). His records were subsequently updated to reflect that he was married. As a result, he was issued a retroactive payment for BAH-D in the amount of \$3,069.00 in May 2011 for the period February 13, 2011, through May 30, 2011. The Defense Finance and Accounting Service (DFAS) later determined that since his spouse joined the Army on February 24, 2011, he was not entitled to receive BAH-D effective February 24, 2011. During the period February 24, 2011, through May 30, 2011, the member received BAH-D in the amount of \$3,307.70, but was only entitled to receive \$2,609.30 in BAH W/O during this period. Therefore, he became indebted in the amount of \$698.40 (\$3,307.70 - \$2,609.30) for the overpayment of BAH-D.

The member's pay records continued to reflect that he was entitled to receive BAH-D from June 1, 2011, through December 15, 2012. As a result, he erroneously received \$20,061.80 in BAH-D. DFAS later determined that he was only entitled to receive \$10,663.63 in BAH W/O during this period, causing an overpayment of \$9,398.17 (\$20,061.80 - \$10,663.63). Therefore, he was overpaid BAH-D in the amount of \$10,096.57 (\$698.40 + \$9,398.17).

In addition, during the period September 20, 2012, through October 29, 2012, the member received Family Separation Allowance (FSA) in the amount of \$333.34. DFAS later determined that since the member's spouse was on active duty in the Army, he was not entitled to receive FSA, because he and his spouse did not establish a joint household prior to her entering the military. Therefore, the total claim against the member was \$10,429.91 (\$10,096.57 + \$333.34).

Discussion

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to members or former members, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are met by a finding that the claim arose from administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

In the administrative report, DFAS recommended denial of the overpayment be sustained. However, in the appeal decision the adjudicator did not agree with full denial. The adjudicator noted that when the overpayment began, the member was a junior Marine with six years of service and had never been married. The adjudicator also noted that when he married in February 2011 and his spouse joined the Army, he immediately reported these matters to his unit personnel staff Non-Commissioned Officer (NCO), and the Defense Enrollment Eligibility Reporting System (DEERS) was updated accordingly. The member's request for waiver is supported by his command. Therefore, the adjudicator determined that the member had no reason to question his entitlement to BAH-D during the period February 24, 2011, through June 30, 2012. Due to information the member provided, the adjudicator waived a portion of the overpayment of BAH-D in the amount of \$3,940.42, believing that it was not against equity and good conscience, and all other conditions necessary for waiver had been met.

The adjudicator further believed that overpayment of the FSA should be waived. The date of the marriage was February 13, 2011, and the date of the entrance of the member's spouse into active duty was February 24, 2011. Therefore, the adjudicator determined that the member had shown that he and his spouse had established a residence and she was his dependent prior to her joining the Army. Accordingly, the adjudicator found waiver of the \$333.34 for the FSA to be appropriate, given that all other conditions necessary for waiver of this portion of the claim had been met.

When the member executed permanent change of station orders (PCS) to South Carolina on June 29, 2012, he was still in receipt of BAH-D. When the member arrived at his new

station, he informed the administrative staff of his spouse's military status. He states that he was informed that he qualified for a ninety-day waiver while he submitted a request for BAH in his own right. The adjudicator determined that the file contained no evidence that he submitted such a request, and that the member was residing in government quarters. Therefore, since there was no evidence that the member was using the BAH for its intended purpose, waiver was not appropriate.

In his request for reconsideration, the member submitted his request for BAH in his own right, dated July 11, 2012. The member included his lease agreement for off-post housing which he signed on June 29, 2012. The lease agreement called for rent to be paid at the sum of \$1,000.00 per month. He also included a statement from the local electrical company that service had been established at the address for which he was paying rent. The member's initial request for BAH in his own right was disapproved on July 23, 2012. The member submitted an appeal for BAH in his own right on August 17, 2012, and it was disapproved on January 3, 2013.

The member was on notice after he received the first disapproval that he should hold the money for repayment to the government. However, he had been notified that he was entitled to a ninety-day waiver to cover the time while he requested BAH in his own right since he was an E5 who had been granted BAH at his previous station. The ninety days would cover the time to request BAH in his own right, and if disapproved, to arrange for storage of his household goods. The administrative office did not tell him that he should have signed a statement of understanding (SOU) saying he understood he only had ninety days and then his BAH would be stopped. Also, he should have been receiving BAH W/O, not BAH-D. However, the member was paying \$1,000.00 rent per month plus electricity costs. Therefore, waiver is appropriate to the extent the member was making the payments for their intended purpose. *See* DOHA Claims Case No. 2012-WV-052402.2 (August 23, 2012); DOHA Claims Case No. 07032702 (April 6, 2007); DOHA Claims Case No. 04100401 (November 18, 2004); and DOHA Claims Case No. 03061301 (July 31, 2003). BAH W/O for an E-5 for the area in which the member was stationed was \$1,014.00. Therefore, on reconsideration this Office waives \$3,042.00 in BAH W/O which the member received during the ninety day period just discussed.

Conclusion

The Board amends the appeal decision in this case to increase the remaining amount waived. Of the remaining overpayment amount of \$6,156.15, this Office waives an additional \$3,042.00 and denies waiver of \$3,114.15. In accordance with DoD Instruction 1340.23 ¶ 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///

Gregg A. Cervi
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board