

KEYWORDS: Waiver of Indebtedness

DIGEST: When a member erroneously receives basic allowance for housing at the dependent (BAH-D) rate for his mother and he and his family are already assigned government quarters, he may obtain waiver under 10 U.S.C. § 2774 for amounts which he expends in detrimental reliance on the erroneous authorization, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In such cases, the burden is on the member to provide documentary evidence to substantiate actual, legitimate expenditures made pursuant to the erroneous authorization.

CASENO: 2016-WV-032402.4

DATE: 12/08/2016

DATE: December 8, 2016

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2016-WV-032402.4

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member erroneously receives basic allowance for housing at the dependent (BAH-D) rate for his mother and he and his family are already assigned government quarters, he may obtain waiver under 10 U.S.C. § 2774 for amounts which he expends in detrimental reliance on the erroneous authorization, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In such cases, the burden is on the member to provide documentary evidence to substantiate actual, legitimate expenditures made pursuant to the erroneous authorization.

DECISION

A member of the U.S. Marine Corps (USMC) requests reconsideration of the October 6, 2016, amended appeal decision of the Defense Office of Hearings and Appeals (DOHA) in

DOHA Claim No. 2016-WV-032402.3. In that decision, DOHA waived \$28,000.00, and denied waiver of \$70,861.70.

Background

Effective January 2001, the member's mother was granted secondary dependency status. The member later married and had a child. His wife and daughter became his primary dependents while his mother remained his secondary dependent.

In August 2010, the member and his primary dependents performed a permanent change of station (PCS) move overseas, and resided in government quarters. However, his mother did not accompany him because she was unable to obtain a diplomatic passport. His mother relocated to New Jersey and resided with the member's sister. While he and his family resided in government quarters, the member erroneously received basic allowance for housing at the dependent (BAH-D) rate based on New Jersey. As a result, the member was overpaid \$101,640.00 during the period August 11, 2010, through August 31, 2013.

Our office originally upheld the Defense Finance and Accounting Service's (DFAS's) denial of the member's waiver request because the member did not articulate a reason why he believed he was entitled to receive both government-funded housing for himself and his primary dependents, and also \$2,772.00 per month in BAH-D for his mother who resided in New Jersey. Further, the adjudicator noted that the member provided no documentation reflecting his support of his mother during the period of overpayment. In an amended decision, a DOHA adjudicator waived \$28,000.00, and denied waiver of \$70,861.70. The adjudicator accepted the documentation provided by the member reflecting he provided support for his mother in the amount of \$1,000.00 per month during the period March 1, 2010, through June 2013. The adjudicator denied waiver of the remainder of the debt because there was no indication that the member expended it for its intended purpose.

In his reconsideration request, the member states that the adjudicator should not have made the distinction between the waived amount of \$28,000.00 and the denied amount of \$70,861.70. He states that he acted in good faith in accepting the whole overpayment, not just \$28,000.00.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of military pay and allowances to members of the uniformed services if collection would be against equity and good conscience and not in the best interests of the United States. This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). The Standards for Waiver Determinations are found at Enclosure 4 of this Instruction. In relevant part, generally, persons who erroneously receive a payment from the government acquire no right to it and are bound in equity and good conscience to make restitution, no matter how careless the act of the government may have been.

In theory, restitution results in no loss to the recipient because the recipient received something for nothing. Waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. A waiver is usually not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Instruction E4.1.4. We have held that when a member is found to have been paid BAH in error, the excess amounts he expended may generally be waived only to the extent that the money was spent for its intended purpose, in other words, in detrimental reliance on the erroneous authorization. *See* DOHA Claims Case No. 03012711 (February 3, 2003).

For waiver to be appropriate in this case, the member must meet a two-part test. He must have received the payments to cover erroneously authorized allowances, and he must have spent the allowances in detrimental reliance on the erroneous authorization. *See* DOHA Claims Case No. 2012-WV-022905.3 (April 30, 2013). We have consistently held that the purpose of BAH is to help a member offset the cost of his housing expenses. *See* DOHA Claims Case No. 2012-WV-111401.2 (May 14, 2013). Here, the member was provided government quarters for himself, his spouse and child. Even though he may have been advised that he was entitled to receive BAH-D for his mother, we believe that he should have continued to question his entitlement, especially since there is no indication that he was authorized to receive both BAH-D and government funded housing. In addition, although he re-certified his mother as his dependent each year, this should have given him further reason to question why he was entitled to receive over \$2,700.00 a month in BAH-D for her when he was only providing \$1,000.00 a month for her support. In the absence of a clear and unambiguous written determination allowing payment of BAH-D while he was in government-funded housing, he cannot be said to have reasonably relied on erroneous advice. Therefore, the first prong of the test is not met. *See* DOHA Claims Case No. 03022704 (March 5, 2003); and DOHA Claims Case No. 02122602 (January 13, 2003).

As for the second prong of the test, the member has not presented any further evidence that he expended the remaining overpayment for its intended purpose. We have consistently held that when a member is provided government housing but erroneously receives BAH, he cannot be said to have spent the overpayment in detrimental reliance on an erroneous BAH authorization. Although the adjudicator waived \$28,000.00 in the amended appeal decision, in keeping with the equitable considerations contained in 10 U.S.C. § 2774, in the absence of any further evidence, we will not disturb the determination of partial waiver which was reached below. *See* DOHA Claims Case No. 00071805 (October 27, 2000); and DOHA Claims Case No. 99091601 (November 29, 1999).

Conclusion

The member's request for relief is denied, and we affirm the October 6, 2016, amended appeal decision to deny waiver in the amount of \$70,861.70. In accordance with ¶ E8.15 of the Instruction, 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board