

DATE: March 22, 2002

In Re:

[Redacted]

Claimant

Claims Case No. 02030502

CLAIMS APPEALS BOARD DECISION

DIGEST

1. A service member cannot reasonably expect to continue to receive Basic Allowance for Housing when he moves from family quarters where he paid rent to a landlord to one where he is not paying such rent because the government directly leases such quarters and provides the quarters to him at no charge.
2. A service member cannot reasonably expect to continue to receive a family separation allowance when he is no longer separated from his family.

DECISION

A member of the United States Army appeals the June 13, 2001, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 01051803, wherein our Office denied the member's request that the government waive collection of overpayments to him, or debts otherwise owed by him, in the amount of \$13,186.79.

Background

There are three issue areas involved. First, the record indicates that on December 8, 1998, the member was assigned to government quarters, and as a result, he was no longer entitled to receive basic allowance for housing at the with-

dependent rate (BAH-D).⁽¹⁾ However, due to administrative error, the member continued receiving BAH-D through June 30, 2000, causing a total erroneous overpayment in this regard of \$12,217.13. Second, the record also shows that during the period May 8, 1999, through September 30, 1999, the member was deployed to Macedonia. As a result, he was entitled to Family Separation Housing (FSH).⁽²⁾ Unfortunately, due to administrative error, FSH was not terminated when the member returned from deployment on September 30, 1999, and he was erroneously overpaid FSH in the amount of \$900 from October 1, 1999, to June 30, 2000. Third, the record shows that the member was indebted to the government in the amount of \$69.66, for the excess costs of his household goods shipment.

The member raises several points in this appeal. With regard to the BAH-D, the member emphasizes that he and his family never actually lived in government quarters. They moved from off-post housing owned and managed by German nationals to another set of off-post quarters also owned and managed by German nationals. The member states that after he moved to the second set of quarters, he learned that his new quarters were "government-contracted houses," a term that was meaningless to him because German nationals still ran the quarters. As a counter-point, the Defense Finance and Accounting Service (DFAS) administrative report notes that the member's move to the government contract quarters should have had some meaning to him because he no longer had to pay over to the landlord the monthly BAH-D payment he received (\$660.60 during 1998, \$684.30 during 1999, and \$704.70 during 2000). His housing suddenly was provided to him at no cost, but he continued to receive BAH-D for it.

The member also notes that while he received unauthorized BAH, the post housing and finance units were paying both the German house owners and him for 18 months and never caught the error, even though it was their duty to do so. He argues that he was unable to control this situation. He also points out that he never tried to defraud the government, and that all required paperwork had to be completed before he could move into new housing. He notes that in March 2000, DFAS advised him that he was being erroneously overpaid for BAH-D and FSH, but DFAS did nothing to stop it. The "bottom line," according to the member, was that "culpability" for accuracy of pay lies with finance unit personnel who are paid and promoted based on their performance, not with members who are not briefed and counseled in such matters.

The member agrees that it is true that if he and his wife had more closely monitored their account balances during the time in question, they would have seen additional money in their accounts over 18 months. However, they did not do so. They administered their finances by automatic deposits and debits. He notes that numerous "major" events transpired during their relocation.⁽³⁾ The member reasons that because finance officials had failed to make major changes in his pay account, pay problems were not brought to his attention.

Discussion

Under 10 U.S.C. § 2774, we may waive collection of a claim for erroneous overpayment of pay or allowances against a member or former member of the uniformed services if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. *See also Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). In the present case the erroneous payments of FSH and BAH were made as a result of administrative errors and there is no indication of fraud, misrepresentation, or lack of good faith on the member's part. However, a member is considered to be at least partially at fault and waiver is precluded when, in light of all of the circumstances, it is determined that he should have known that an error existed and taken steps to have it corrected. The standard we employ is whether a reasonable person should have suspected that he was receiving payments in excess of his entitlement. *See* DOHA Claims Case No. 00071806

(September 28, 2000) citing the Comptroller General's decisions in B-257862, Jan. 17, 1995, and B-256417, July 22, 1994. A member is not entitled to waiver as a matter of right merely because he was erroneously overpaid due to administrative error, and he is not relieved of the responsibility to verify the correctness of payments he receives. *See* DOHA Claims Case No. 00081801 (August 23, 2000).

In addition, the fact that an employee has pay sent directly to a bank does not relieve the person of the responsibility of verifying his statements and questioning any discrepancies. *See* DOHA Claims Case No. 97011408 (June 10, 1997), citing B-254328, Nov. 17, 1993. ⁽⁴⁾ Our decisions and those of the Comptroller General indicate that waiver is not appropriate when an employee or member has records which would indicate an overpayment (*e.g.*, leave and earnings statements (LES) and bank statements) and fails to review such documents for accuracy or otherwise fails to take corrective action. *See* DOHA Claims Case No. 01102309 (November 14, 2001), DOHA Claims Case No. 98081701 (August 21, 1998), and B-231924, Oct. 24, 1989.

Even if the member subjectively believed he had a right to FSH and BAH-D, by March 2000, as he began the process to be released from active duty, he no longer could have doubted the government's position; namely, that he was entitled to neither one. The government's erroneous continuation of such payments did not give him an entitlement to such payments. He had the duty to hold these payments aside for possible repayment. *See* DOHA Claims Case No. 99052709 (June 9, 1999), *aff'd* Deputy General Counsel (Fiscal), Department of Defense, February 9, 2001. Further, as DFAS correctly noted, the fact that the member moved to government-leased quarters and no longer had to pay rent directly to a landlord should have alerted him to look for a change in his BAH-D payments, whether he chose to look at his records or not. *Id.*; and DOHA Claims Case No. 00071806, *supra*. Similarly, once a member is no longer separated from his family, he cannot reasonably expect to receive FSH, and if the government erroneously pays him anyway, he is expected to set this money aside for possible repayment. *See* B-248558, June 18, 1992; and B-183460, May 28, 1975. The member returned to his family at the beginning of October 1999, and if he had reviewed his October 1999 LES he would have seen the FSH payment.

The Settlement Certificate found that no erroneous payment occurred with respect to the excess weight in the member's household goods. An erroneous payment is a statutory precondition to waiver under 10 U.S.C. § 2774. In the normal course of business, the government pays the charges billed by the household carrier, and thereafter, asks the member to reimburse it for any portion of charges representing an excess of the member's weight allowance. The Settlement Certificate cited established legal authority, and the member offers nothing to dispute these facts or the law.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Member, Claims Appeals Board

1. This was indicated by the code "BAH" in the member's Leave and Earnings Statements.
2. This was indicated by the code "FSH" in the member's Leave and Earnings Statements. FSH replaced Family Separation Allowance (FSA)-I, effective January 1, 1998.
3. Deployment to Kosovo would appear to be a "major" event, yet during the deployment the member states that he "initiated dialogue" to correct the government's failure to pay him FSH (\$100 per month). The member complains that he did not receive his first FSH payment, a catch-up payment, until September 1999, and even then, he says that he never received his leave and earnings statement for that month.
4. This decision involves a civilian employee's waiver request under 5 U.S.C. § 5584, but the same *Standards for Waiver* apply under both statutes.