

July 18, 2002

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In Re:

Redacted

Claimant

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Claims Case No. 02062402

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

When a member is aware that she has received a payment that she is not entitled to, she does not acquire title to the excess amounts, and has a duty to hold the money for eventual repayment. If she does not do so, she is not without fault, and waiver cannot be granted.

### **DECISION**

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 02042213, dated May 10, 2002, in which we partially denied a member's application for waiver. The debt arose when she received BAH at the wrong rate after a permanent change of station (PCS).

### **Background**

The record indicates that the member performed a PCS from Bethesda, Maryland, to Cherry Point, North Carolina, in November 2000. After her PCS, the member erroneously continued to receive basic allowance for housing (BAH) from November 6, 2000, through May 31, 2001, at the higher Bethesda, Maryland, rate instead of the rate for Cherry Point, North Carolina. This overpayment totaled \$3,388.50. Further, in June 2001, she received a \$2,704.00 retroactive BAH payment, which was the amount for which she was entitled for BAH at the rate for Cherry Point, for the period November 6, 2000, through June 30, 2001. Therefore, she was overpaid \$6,092.50.

In DOHA Settlement Certificate No. 02042213, we granted waiver of \$3,388.50 of the member's overpayment. This amount represent the BAH payments the member received from November 6, 2000, through May 31, 2001. We denied waiver of \$2,704.00 that the member received as a retroactive BAH payment in the month of June 2001, because the member became aware that she was being overpaid BAH in June. Therefore, she had a duty to retain the overpayment for repayment to the Government.

The member now appeals our determination, arguing that the debt should be waived because she did not become aware of the error until the last week of June 2001 and that she immediately brought the error to the attention of her payroll officer. She further explained that she is caring for her dependent father and has requested that we waive the entire amount of her debt.

### Discussion

Under 10 U.S.C. § 2774, this Office may waive claims of the United States against members or former members of the uniformed services of the United States only when collection would be against equity and good conscience and not in the best interest of the United States. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). On the other hand, a waiver cannot be granted if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member or anyone else having an interest in obtaining a waiver. When a member is aware that she has received an erroneous overpayment, the member should be prepared to return the excess amount to the government. *See DOHA Claims Case No. 98051107* (July 28, 1998). A member cannot reasonably expect to retain such an overpayment, absent official notice that the payment was correct.

In the instant case, while we recognize that the erroneous payments were due to administrative error, and the member informed her payroll officer of the error, those facts, by themselves, do not provide a basis for waiver. *See DOHA Claims Case No. 02040402* (May 9, 2002).<sup>(1)</sup> It is clear from the record that the member received the erroneous payment on June 15, 2001. Detecting an error, the member immediately questioned the payment. At the end of June, 2001, she learned that had received the \$2,704.00 as retroactive BAH pay in error. While she did not understand what the payment was for, she admits she was aware that she was not entitled to the payment when she first detected the problem. When a member is aware that she is receiving an erroneous or questionable payment, she does not acquire title to the excess amount, and waiver is not appropriate. *See DOHA Claims Case No. 98051107, supra*. She has the duty to hold the erroneous payment until she is requested to repay it.

While we are sympathetic to the member's situation with her father, we note that financial hardship does not provide a basis for waiver. *See DOHA Claims Case No. 97042817* (July 1, 1997). The Defense Finance and Accounting Service (DFAS), at its own discretion, may take hardship into account in determining the monthly amount it collects from the member. The member may contact DFAS in that regard.

### Conclusion

We affirm the Settlement Certificate.

/s/ \_\_\_\_\_

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ \_\_\_\_\_

Jean E. Smallin

Member, Claims Appeals Board

/s/ \_\_\_\_\_

Jennifer I. Campbell

Member, Claims Appeals Board

1. The standards for waiver for civilian employees are the same.