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In Re:

[Redacted]

Claimant

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Claims Case No. 02073010

## CLAIMS APPEALS BOARD DECISION

### DIGEST

1. A service member cannot reasonably expect to receive basic allowance for housing at the with-dependent rate (BAH-D) and family separation housing (FSH) for the period of time he was single between his divorce and subsequent remarriage.
2. When a service member receives a large, unexplained payment and promptly contacts his finance office to question the payment, he has a duty to retain the funds for eventual repayment to the government, absent official notice that the payment is correct.

### DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 02013008, dated June 17, 2002, which denied the request of a member for waiver of a debt which arose (1) when he received basic allowance for housing at the with-dependent rate (BAH-D) and family separation housing (FSH) while he was single; and (2) when he was subsequently paid a retroactive payment of BAH-D and FSH during a period for which he had already been compensated.

#### Background

In December 1996 the member was transferred to RAF Mildenhall, United Kingdom, for an unaccompanied assignment. As a result of his military duty assignment, the member was separated from his wife, who remained in Charleston, South Carolina. Thus, he was entitled to receive BAH-D and FSH. On April 22, 1999, while stationed at RAF Mildenhall, the member divorced his wife, and on May 30, 1999, the member subsequently remarried. His new wife also resided in Charleston, South Carolina.<sup>(1)</sup> During the period the member was not married, April 23, 1999, through May 30, 1999, he was not entitled to BAH-D nor FSH.<sup>(2)</sup> However, he continued to receive BAH-D and FSH from April 23, 1999, through May 30, 1999.<sup>(3)</sup> This administrative error resulted in a debt of \$1,224.62.<sup>(4)</sup>

The member states that in the beginning of June 1999 he visited his finance office to inform them of his divorce and subsequent remarriage. He states that the finance office told him he had to pay back the amounts he received for BAH-D and FSH during the 38-day period he was not married. The member states that he therefore expected a decrease in his pay. The member states that he continued to visit the finance office during the months of June and August 1999 because he had numerous pay problems. In July 1999, when the finance office updated the member's records following the member's remarriage, his BAH and FSH entitlements were stopped effective April 22, 1999. The finance office attempted to recoup the amount the member was overpaid and as a result, the member received \$0 for his end-of-month July 1999 paycheck. In August 1999, when his record was corrected, the member was given all his single rate BAH entitlements for the period April 23, 1999, through May 29, 1999, and his with-dependent rate entitlements were

restarted effective May 30, 1999, the date of his remarriage. However, the restarting of his with-dependent rate entitlements resulted in the member being paid again for the period ay 30, 1999, through June 30, 1999,<sup>(5)</sup> in the form of a large retroactive payment he received in his August 1999 paycheck. After receipt of the August overpayment, the member went back to his finance office to inform them of the error. This administrative error resulted in a debt of \$985.01. Thus, the member's total debt was \$2,209.63.

The member finds fault with the Settlement Certificate because he states that he did contact his finance office after reviewing his LES in August 1999 and noticing that his paycheck was in excess of \$4,000.<sup>(6)</sup> He does not think he should be held responsible for the overpayment because it was not his fault; and the overpayment was a result of his finance office's error. He also believes that he has been treated unfairly.

### **Discussion**

Section 2774 of title 10 of the United States Code provides authority for waiving claims for erroneous payment of pay and allowances to members or former members if collection would be against equity and good conscience and not in the best interest of the United States. Waiver cannot be granted if there exists any 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. Waiver is not appropriate if a member knows or should have known that he is receiving payments in excess of his entitlements. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996); DOHA Claims Case No. 01102309 (November 14, 2001). We have consistently held that when a member knows or reasonably could be expected to know he is receiving pay in excess of his entitlement, he has a duty to retain such amounts for subsequent refund to the government. A service member is not entitled to waiver as a matter of right whenever he receives an overpayment as a result of an administrative error. *See* DOHA Claims Case No. 00032701 (May 30, 2000).

In the case before us, both overpayments arose due to administrative error, but that alone does not entitle the member to waiver. *See* DOHA Claims Case No. 99060218 (July 26, 1999). The member received BAH-D and FSH after his divorce. Although the member did not visit his finance office until June 1999, more than a month after his divorce, he could not have reasonably expected to be entitled to receive BAH-D and FSH while he was single. The member's April Leave and Earnings Statement (LES) reflects that he received BAH-D and FSH at the same rates he was receiving for these allowances prior to his divorce.<sup>(7)</sup> In addition, when the member did visit his finance office in June 1999, he indicates that he knew he had to pay back the money he had received for BAH-D and FSH during the period he was not married.

The member also indicates that he was immediately aware of the second overpayment upon its receipt in August 1999. When a member is aware that he received an erroneous overpayment, he does not acquire title to the excess amount and should be prepared to return the excess disbursement to the government. *See* DOHA Claims Case No. 01102309, *supra*, and B-234731, June 19, 1989. A member cannot reasonably expect to retain such an overpayment, absent official notice that the payment was correct. In the present case, the member provides no evidence to support a reason to believe the overpayment was anything other than an administrative error. A reasonable person would conclude that the money would have to be returned to the government when the error was corrected.

### **Conclusion**

We affirm the Settlement.

/s/

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Michael D. Hipple  
Chairman, Claims Appeals Board

/s/

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Jean E. Smallin

ember, Claims Appeals Board

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/s/

Catherine M. Engstrom  
ember, Claims Appeals Board

1. Initially there was some confusion concerning the residence of the member's new wife. This was significant because it would have effected his entitlements to FSH. DFAS originally believed that she was residing with the member in the United Kingdom. However, it was later determined that his new wife remained in Charleston, South Carolina. Therefore, the member was entitled to receive FSH upon his remarriage.
2. The member was entitled to receive BAH at the single rate.
3. Effective January 1, 1998, BAH replaced Basic Allowance for Quarters and Variable Housing Allowance. *See* 37 U.S.C. § 403. Also effective January 1, 1998, FSH replaced Family Separation Allowance (FSA)-I. *See* 37 U.S.C. § 427.
4. Collection of this portion of the member's debt in the amount of \$1,224.62 did not begin until December 1999.
5. The member had already been paid his with-dependent rate entitlements for the period May 30, 1999, through June 30, 1999, in his scheduled paycheck because his with-dependent rate entitlements were not stopped until his record was updated in July.
6. The member received a mid-month payment of \$3,686.06 and an end-of-month payment of \$991.02.
7. The member's LES for April 1999 reflects that he received \$549.70 for BAH-D and \$348.90 for FSH.