

December 2, 2002

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In Re:

[Redacted]

Claimant

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Claims Case No. 02111801

## CLAIMS APPEALS BOARD DECISION

### DIGEST

When a member suspects that he is receiving overpayments, he does not acquire title to the excess amounts and has a duty to hold them until the validity of the payments is established. If the payments are determined to be erroneous, he has a duty to return them. In such a situation, waiver under 10 U.S.C. § 2774 is not appropriate.

### DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 02080216, dated October 22, 2002, which waived in part (\$22,537.00), and denied waiver in part (\$9,823.00), a Coast Guard member's application for waiver of an erroneous overpayment of basic allowance for housing at the dependent rate (BAH-D) in the amount of \$32,360.00. On appeal the member requests that we waive the remaining debt of \$9,823.00.

### Background

The record shows that the member, a chief petty officer (E-7), reported for duty to the Coast Guard Engineering Logistics Center (ELC), Baltimore, Maryland, on August 20, 1999. Prior to reporting, he had attempted without success to obtain Coast Guard or Department of Defense owned or leased quarters in the vicinity of his new duty station. He was eventually able to secure assignment to Army family quarters in Gunpowder, Maryland, beginning on August 19, 1999. Those quarters were obtained through the auspices of the U.S. Army Garrison, Aberdeen Proving Grounds, Aberdeen, Maryland. On April 6, 2000, the member was advised by the Baltimore Coast Guard housing officer that the Army had not received payments under the "Rent Direct" program because there was no Inter-Service Support Agreement (ISSA) or Memorandum of Understanding (MOU) between the Coast Guard and the Army to pay the Army for the quarters. As a result, the Coast Guard decided to start paying the member BAH-D, effective April 1, 2000, so he could pay the Army for his quarters. However, the Coast Guard later determined that the member was not entitled to BAH-D while occupying government quarters, and terminated the allowance, establishing an ISSA in its place. Because the member's BAH-D was based upon the location of his permanent duty station<sup>(1)</sup> rather than the location of the quarters,<sup>(2)</sup> the amount of BAH-D received by the member exceeded the amount which he had to pay the Army for his quarters. Thus, for the period in question, April 1, 2000 to April 30, 2002, the member received \$32,360.00 in BAH-D, but only had to pay the Army \$22,537.00 for his quarters.

On April 7, 2000, the member sent an email inquiry to the Baltimore Coast Guard housing officer asking whether he would receive BAH-D at the Aberdeen, Maryland, rate or the higher Annapolis, Maryland, rate. He also asked whether he could keep the difference between the amount based on the Annapolis rate and the amount he paid to the Army if he

was paid the Annapolis rate. He asserted that if he was not permitted to keep the difference, then he preferred that the Coast Guard conclude an ISSA with the Army.

In response to his email inquiry, the Baltimore Coast Guard housing officer advised the member that he would receive BAH-D at the higher Annapolis rate, but that the Army Aberdeen Housing Office had not yet responded to her inquiry as to how much they were going to charge for the housing. She advised the member that he would be able to keep the difference in the amounts paid under the two rates, if there was any. However, she also stated that unless the member's quarters were inadequate, it was her belief that the Army would charge the exact BAH-D rate. The member advised his supervisors of the differences in the rates, but made no further effort to follow up on the email response from the Baltimore Coast Guard housing officer. Likewise, he made no inquiry to the Army housing officials regarding the adequacy of the quarters.

In Settlement Certificate, DOHA Claim No. 02080216, dated October 22, 2002, the adjudicator waived the \$22,537.00 of the overpayment, which represented the actual amount which the member paid to the Army for his housing, but denied waiver with respect to the remaining \$9,823.00 because it was not used for the intended purpose. On appeal, the member seeks waiver of that additional amount.

### **Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay and allowances to a member or former member if collection would be against equity and good conscience and not in the best interest of the United States. Waiver is not appropriate if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). The standard we employ to determine fault is whether a reasonably prudent person knew or should have known that he was receiving payments in excess of his entitlements. Our decisions indicate that waiver is not appropriate when a member is aware that he is being overpaid or had no reasonable expectation of payment in the amount received. *See* DOHA Claims Case No. 00031401 (May 10, 2000) citing DOHA Claims Case No. 99121406 (January 19, 2000).

The member's email inquiry to the local housing officer is evidence that he suspected he would not be allowed to retain the difference between the amount he received in BAH-D and the amount he had to pay the Army for his housing. Although he was erroneously advised by the local housing official that he could retain any difference in the payments, that advice was premised on her stated belief that there would be no difference. Therefore, a reasonably prudent person of the member's rank and experience should not have been satisfied with such an ambiguous assurance, once it became evident to him that there was a significant difference between the amounts he was receiving in BAH-D and the amounts he was paying to the Army in rent. Under such circumstances, he should have continued to press for an explanation of the discrepancy. In the meantime, he did not acquire title to the questionable overpayments merely because the government made an administrative error, and should have held them until a final determination was made that they were his or until the government asked for repayment. *See* DOHA Claims Case No. 990331117 (April 15, 1999) citing DOHA Claims Case No. 99012022 (March 11, 1999).

Generally, the government is neither bound nor estopped by the erroneous advice or unauthorized acts of its officers, agents or employees even though committed in the performance of their official duties. However, in the case of erroneous payments such as this, waiver is appropriate to the extent that the member actually spent the payment for the purposes for which it was advanced in reliance on the erroneous written advice. *Compare* B-231146, Mar. 10, 1989. Because \$22,537.00 of the BAH-D was paid to the Army for rent--the purpose for which it was advanced--waiver of that amount was proper. Because the remaining \$9,823.00 of the BAH-D was not expended for the purpose for which it was advanced, waiver of that amount was not appropriate.

Finally, while financial hardship does not provide a basis for waiver, the Coast Guard, at its own discretion, may arrange a repayment plan which takes any hardship appropriately into account. *See* DOHA Claims Case No. 02072315 (September 17, 2002) citing B-252125, July 20, 1993.

### **Conclusion**

We affirm the Settlement Certificate.

/s/

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Michael D. Hipple  
Chairman, Claims Appeals Board

/s/

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William S. Fields  
Member, Claims Appeals Board

/s/

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Jean E. Smallin  
Member, Claims Appeals Board

1. ELC, Baltimore, Maryland, which is in the Annapolis, Maryland, Military Housing Area.
2. U.S. Army Garrison, Aberdeen Proving Grounds, Aberdeen, Maryland.