

February 3, 2003

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In Re:

[Redacted]

Claimant

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Claims Case No. 03012711

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Upon moving into government quarters a member was informed that his basic allowance for housing (BAH) would be stopped. When his subsequent leave and earnings statements (LESSs) showed that he was still receiving BAH at the dependent rate, he brought the matter to the attention of his financial services office (FSO) which erroneously advised him that he was still entitled to receive such payments. Considering his rank and years of service, he should not have expected to receive such payments after he moved into government quarters. Additionally, he did not spend the erroneous payments on current housing expenses, because quarters were provided to him. In the absence of a clear and unambiguous written opinion allowing such payments, he cannot be said to have reasonably relied on the erroneous advice and furthermore did not spend the amount received on its intended purpose. Therefore, waiver under 10 U.S.C. § 2774 is not appropriate.

### DECISION

This decision is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 01061512, dated July 6, 2001, which denied an Army member's application for waiver of an erroneous overpayment of basic allowance for housing (BAH) at the dependent rate, in the amount of \$6,080.98.

### Background

The record shows that the member is a Captain (O-3) in the United States Army, Medical Service Corps, with more than seven years of active duty service. He is now in the Army Reserve. Prior to June 30, 1999, the member was residing in off-base housing in the Fort Gordon, Georgia, area and was entitled to receive BAH. [\(1\)](#)

On June 30, 1999, the member was assigned to government quarters and was advised by housing officials that he would no longer be eligible to receive BAH. (2) The member informed his financial services office (FSO) of his move and requested that they stop his BAH. Shortly thereafter, he noticed from his Leave and Earnings Statements (LEs) that he was still receiving BAH, and contacted the FSO on two occasions in an effort to verify the payments. On both occasions, the member was erroneously advised that he was entitled to the payments. He did not pursue the matter any further. As a result, the member continued to receive BAH at the dependent rate during the period June 30, 1999 through April 30, 2000, causing an overpayment of \$6,126.17. Credit due the member in the amount of \$45.19 reduced the overpayment to \$6,080.98.

In Settlement Certificate, DOHA Claim No. 01061512, dated July 6, 2001, our office denied waiver of the \$6,080.98 debt.

### 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).

We have consistently held that the purpose of BAH is to help a member offset the cost of his housing expenses. Here the member was correctly informed that he was no longer entitled to receive BAH when he moved into government quarters. Although he was later erroneously advised on two occasions by a clerk in the FSO that he was entitled to receive BAH, in response to inquiries he initiated after the receipt of LEs which indicated the payments were still being made, we think that a reasonably prudent person of the member's rank and experience could not have believed that he was actually entitled to such payments while occupying government quarters. Under such circumstances, he should have continued to press for correction of the error or obtained clear and unambiguous advice in writing that such payments were proper. 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. 99033117* (April 15, 1999), citing *DOHA Claims Case No. 99012022* (March 11, 1999), *aff'd*, Deputy General Counsel (Fiscal), December 28, 2000.

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 may be appropriate to the extent that the member actually spent the payment for the purposes for which it was paid in reliance on clear and unambiguous written advice from the appropriate officials. *See DOHA Claims Case No. 02111801* (December 2, 2002). Here, the BAH at the dependent rate paid to the member was not spent for his housing expenses because his housing was provided to him.

Finally, while financial hardship alone does not provide a basis for waiver, the Defense Finance and Accounting Service (DFAS), 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/  
Michael D. Hipple  
Chairman, Claims Appeals Board

\_\_\_\_\_/s/  
William S. Fields  
Member, Claims Appeals Board

\_\_\_\_\_/s/  
Catherine M. Engstrom  
Member, Claims Appeals Board

1. Prior to his May 24, 1998 divorce, the member was receiving BAH at the dependent rate. Subsequent to his divorce, he was entitled to receive BAH at the single rate and BAH differential, but because of an administrative error, he was mistakenly paid BAH at the dependent rate from May 24, 1998 through December 31, 1998. Additionally, during the period May 24, 1998 through December 31, 1998, he was also mistakenly paid variable housing allowance (VHA) at an incorrect rate, creating an overpayment of \$45.51. However, payments due to him for BAH differential for the period January 1, 1999 through June 29, 1999, in the amount of \$90.70, completely offset this latter overpayment, creating a credit due him in the amount of \$45.19. The member's residual debt due to the erroneous overpayments of BAH at the dependent rate is the only matter at issue in this appeal.
2. The member was not entitled to receive BAH at either the single or dependent rate. Due to his child support obligation, the member was still entitled to receive BAH differential even after moving into government quarters.