

January 13, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 02122602

CLAIMS APPEALS BOARD DECISION

DIGEST

While living in private quarters, a member properly received basic allowance for housing at the single rate (BAH-S) for his housing expenses and also at the differential rate (BAH-diff) because he paid child support for his dependent. Considering his rank and years of service, he should not have expected to receive BAH-S after he moved into government quarters. He was initially told that he was not entitled to BAH-S, but continued to seek additional opinions on his entitlement to BAH-S until he received an erroneous favorable opinion. He then received BAH-S but did not spend it on current housing expenses, because quarters were provided to him. In the absence of a clear and unambiguous written opinion allowing payment of the BAH-S, he cannot be said to have reasonably relied on the erroneous favorable opinion and furthermore did not spend the BAH-S 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. 02111402, dated November 19, 2002, which denied an Army member's application for waiver of an erroneous overpayment of basic allowance for housing at the single rate (BAH-S) in the amount of \$13,541.25.

Background

The record shows that the member is a Chief Warrant Officer (W-2) in the United States Army with more than twenty years of service. Prior to February 27, 2001, he resided in off-base housing in the Fort Bragg area and was entitled to receive basic allowance for housing at the single rate (BAH-S). Because he was providing support for his dependent child, he was also entitled to receive basic allowance for housing at the differential rate (BAH-diff). ⁽¹⁾ The child resided with his mother during most of the year, but would stay with the member on holidays, weekends, spring break and

summer vacation.

Effective February 27, 2001, the member performed a permanent change of station (PCS) move to Kuwait, and was assigned to government quarters. As a result, he was no longer entitled to receive BAH-S. However, he continued to be eligible for, and to receive, the BAH-diff for the child support he was paying.

Upon his arrival in Kuwait, the member made inquiry at the Financial Services Office (FSO) as to whether he would be entitled to receive BAH-S as he had at his previous duty station. In response to that inquiry, he was correctly advised by the military pay clerk that he was no longer entitled to receive BAH-S. Because he was not satisfied with that answer, he then posed the question to the pay clerk's detachment sergeant, who in turn correctly advised him that he was not entitled to receive BAH-S. The member then escalated the issue to the FSO's noncommissioned officer-in-charge and officer-in-charge, and the latter erroneously advised him that he was still entitled to receive BAH-S. As a result, the member was erroneously paid \$13,541.25 in BAH-S from February 27, 2001, through March 1, 2002. The error was discovered when the member performed a PCS move to Germany on March 2, 2002.

In Settlement Certificate, DOHA Claim No. 02111402, dated November 19, 2002, the adjudicator denied waiver with respect to the \$13,541.25 because it was not used for the intended purpose. On appeal, the member acknowledges that, after a careful review of the applicable regulations, he now understands that BAH-diff served as his compensation for his dependent's housing and that he was not entitled to the BAH-S. However, he still seeks reversal of the adjudicator's decision for the following reasons: he used the overpayment to pay the mortgage on his house in the Fort Bragg area; the statutory and regulatory policy scheme governing military pay is inequitable in so far as it relates to divorced members; the government quarters he received in Kuwait were not suitable;⁽²⁾ and his waiver application is supported by the Defense Finance and Accounting Service (DFAS) and the Army.⁽³⁾

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 advised on two occasions that he was not entitled to receive BAH-S, but instead of following that advice, chose to escalate the matter to a higher level. He was actually receiving BAH-diff for his dependent child and was paying no housing expenses because of his assignment to government quarters in Kuwait. Although the member stated that he was later erroneously advised by the officer-in-charge of the FSO that he was entitled to receive BAH-S, we agree with the adjudicator's conclusion 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 obtained clear and thorough BAH advice in writing or continued to press for an explanation of the discrepancy in the advice he was receiving. 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). The member's decision to maintain housing in the Fort Bragg area, subsequent to a PCS move to another location, was a personal financial undertaking for which the government was not responsible.

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-S paid to the member was not spent for his housing expenses in Kuwait because his housing was provided to him. As noted above, his decision to maintain housing in the Fort Bragg area was a personal financial undertaking for which the government was not responsible.

The member's contention that an inequitable statutory and regulatory policy scheme lead to disparate treatment and that the enforcement of the intended policy is against equity and good conscience is not a matter appropriate for our review. Section 2774 is not intended to correct such a perceived injustice, and we have no authority to entertain an application for waiver on that basis. Moreover, we have no authority to change public laws or regulations affecting a service member's benefits. *See* DOHA Claims Case No. 99052709 (June 9, 1999), *aff'd*, Deputy General Counsel (Fiscal), February 9, 2001.

Likewise, we have no authority to grant a waiver with respect to the overpayment of BAH-S in this case based upon the member's representations that his quarters in Kuwait were inadequate. The adequacy of quarters is an administrative matter which should be pursued through proper military channels.

Finally, while financial hardship alone does not provide a basis for waiver, 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/
Jean E. Smallin
Member, Claims Appeals Board

1. While some payroll forms refer to basic allowance for quarters (BAQ-diff), BAQ has been replaced by BAH. BAH-

diff represents the difference between BAH-S and BAH-D, and therefore represents the dependent portion of BAH. The payment of BAH is governed by DoD Financial Management Regulation 7000.14-R, volume 7A, chapter 26.

2. The member states that government quarters in Kuwait were "half of a 35' trailer, open warehouses or tents" that had unsanitary water supplies.
3. The DFAS endorsement of the member's waiver request was based solely upon the fact that it had no way of contacting the officer-in-charge of the FSO in Kuwait to verify the member's statement with respect to the advice he had received. The Army's endorsement was based solely upon the fact that the member had inquired of the proper authority and was told that the payment was correct. Neither rationale alone provides a sufficient legal justification to support waiver in this case.