

March 5, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03022704

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 basic allowance for housing differential (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 advised in writing that he was not entitled to BAH-S, but was later verbally advised that he was entitled to BAH-S. 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 verbal advice 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 responds to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 02120208, dated December 20, 2002, which denied in part a Marine Corps member's application for waiver of an erroneous overpayment of basic allowance for housing at the single rate (BAH-S) and basic allowance for housing differential (BAH-diff), while the member occupied government housing.

Background

The record shows that the member is a gunnery sergeant (E-7) in the United States Marine Corps. The member was

divorced in May 1999. Because he was not occupying government quarters, he was entitled to receive BAH-S. Because he was providing support for his dependent child, he was also entitled to receive BAH-diff.

On May 4, 2000, the member married another military member; and on June 1, 2000, he and his new spouse moved into government quarters. As a result, he was no longer entitled to receive BAH-S and BAH-diff. However, due to an administrative error, he erroneously received both allowances for the period June 1, 2000, through August 15, 2002, causing an overpayment to him of \$13, 785.60 in BAH-S and \$5,259.54 in BAH-diff.

When the member accepted government quarters on June 1, 2000, he signed a document stating "I accept Quarters and the withholding of Basic allowance, effective 1 June 2000." However, when he continued to receive the allowances, he made a verbal inquiry at his administrative unit and was erroneously advised that when a joint military couple occupies government housing, only one of them is required to give up the housing allowance. Since the member was a higher grade than his spouse, his allowance rate was higher, and he elected to keep his BAH. He made no additional inquiries to clarify the conflicting advice.

In Settlement Certificate, DOHA Claim No. 02120208, dated December 20, 2002, our office granted waiver with respect to the \$5,259.54 erroneous overpayment of BAH-diff, because the member reasonably may not have known that he was no longer entitled to that allowance after moving into government quarters, and he used it for the purpose for which it was intended--the support of his dependent child.⁽¹⁾ However, we denied waiver with respect to the \$13,785.60 erroneous overpayment of BAH-S, because it was not used for the intended purpose. On appeal, the member seeks reversal of our decision with respect to the overpayment of \$13,785.60 in BAH-S for the same reasons set forth in his original request for waiver.

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.⁽²⁾ 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 notified in writing that he was not entitled to receive BAH-S. Although the member was later erroneously advised verbally by his administrative unit 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 should 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).

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 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/
Jean E. Smallin
Member, Claims Appeals Board

1. The member provided a copy of his court order showing that he was required to pay the mortgage on the marital home as child support until the home was sold. He had an allotment from his pay to cover the mortgage through January 2001. He provided a letter from the mortgage company showing the mortgage was paid in full in April 2001. The member also provided a statement from the court showing his child support was paid from April 2001, through October 2002.
2. There is no indication in the record of any fraud, misrepresentation, or lack of good faith on the part of the member.