

May 15, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03050907

CLAIMS APPEALS BOARD DECISION

DIGEST

1. Due to administrative error a member continued to receive basic allowance for housing (BAH) after he moved into government quarters. Considering his rank and years of service, he should have known he was not entitled to BAH while he occupied government quarters. Therefore, waiver under 10 U.S.C. § 2774 is not appropriate.
2. Where a member has applied for disability compensation from the Department of Veterans Affairs (VA) and its approval would result in an adjustment which would eliminate all or part of an overpayment resulting from the under-deduction of taxes on his disability severance payment, DOHA will take no action relating to the waiver of that debt, pending a final action on the member's application by the VA. If the application is disapproved, the member can submit a new request for waiver of the debt.
3. Advance payments received by the member while on active duty were not erroneous when made and therefore not subject to waiver under 10 U.S.C. § 2774.

DECISION

This decision responds to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 02081208, dated September 24, 2002, which denied a former Navy member's application for waiver of an erroneous overpayment of basic allowance for housing (BAH) while the member occupied government housing. Additionally, it neither granted nor denied his request for waiver of a debt resulting from the under-deduction of taxes on his disability severance payment, and concluded that advance payments which were received while on active duty were not erroneous when made and not subject to waiver.

Background

The record shows that the member was a petty officer first class (E-6) with 15 years of service in the Navy. Prior to November 19, 1998, he lived in private quarters and properly received basic allowance for housing (BAH). As of that date, he was assigned to government quarters. He was no longer entitled to receive BAH, but erroneously continued to receive it through June 30, 2001, as a result of an administrative error. The erroneous overpayments of BAH totaled \$29,559.48. Throughout the entire period he was assigned to government quarters, the member received leave and earnings statements which clearly showed that he was receiving BAH. The member states that he raised the issue of the overpayments with his administrative unit on one occasion, and after a "short discussion" was assured that his pay was correct.

The member was discharged from the Navy on January 25, 2002. At that time, it was determined that he was entitled to receive \$81,559.05, which included credit for certain pay and allowances, a clothing allowance, lump-sum leave, and a disability severance payment. Deductions totaling \$14,145.98 reduced that amount to \$67,413.07. The \$29,559.48 overpayment of BAH was also withheld from the member's final separation payment, as was an additional \$3,300 representing advance payments he had received during the period August 16, 2001, through January 15, 2002. As a result, the member received a final net separation pay of \$34,553.59.

The member requested waiver of the \$29,559.48 erroneous overpayment of BAH. While processing that request, the Defense Finance and Accounting Service (DFAS) determined that taxes on his disability severance payment had been under-deducted and he was only entitled to receive a final separation payment of \$21,156.38. This resulted in an overpayment to him of \$13,397.21. ⁽¹⁾ The member also requested that this amount be waived.

In the Settlement Certificate, our adjudicator denied waiver with respect to the \$29,559.48 overpayment of BAH. She took no action with respect to the \$13,397.21 overpayment resulting from the under-deduction of taxes on the disability payment, pending final action on the member's application for disability compensation by the Department of Veterans Affairs (VA). Finally, she concluded that the \$3,300 withheld for advance payments received by the member while on active duty was not subject to waiver because the payments were not erroneous when made. On appeal, the member seeks reversal of the decision. He offers no new evidence.

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 legal definition of "fault" does not imply any ethical lapse on the part of the member. It merely indicates that waiver is not appropriate if a member knew or should have known that he was receiving payments to which he was not entitled. 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. If he knew or should have known that he was receiving such overpayments, he has a duty to bring the overpayments to the attention of the proper authorities. If he does not do so, he is considered to be partially at fault and waiver is not available to him. *See DOHA Claims Case No. 03022704* (March 5, 2003) citing *DOHA Claims Case No. 00031401* (May 10, 2000).

We have consistently held that the purpose of BAH is to help a member offset the cost of his housing expenses. A member who occupies government quarters does not incur such expenses. Here the member was on notice from his leave and earnings statements that he was receiving a payments for BAH to which he was not entitled and brought that fact to the attention of his administrative unit. Although he was erroneously advised verbally that he was entitled to receive BAH, 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 02111801 (December 2, 2002) citing DOHA Claims Case No. 99033117 (April 15, 1999). Therefore, denial of waiver with respect to the member's \$29,559.48 debt resulting from the erroneous overpayment of BAH was reasonable.

The member advised our office that he had applied for disability compensation from the VA. If his application is approved, then an adjustment can be made which will eliminate all or part of the \$13,397.21⁽²⁾ overpayment resulting from the under-deduction of taxes on his disability severance payment. If his application is disapproved, he can submit a new request for waiver of that debt. Under those circumstances, it was reasonable for the adjudicator to take no action relating to the waiver of that debt, pending a final action on the member's application by the VA.

Finally, the member requested waiver of the \$3,300.00 which was withheld from his final separation payment for the advance payments he received while on active duty. Because we have previously held that outstanding payments received during active duty should be withheld from a final separation payment, the member was not entitled to reimbursement for the collection of advance payments. Such payments were not erroneous when made and may not be considered for waiver. *See* DOHA Claims Case No. 98101314 (November 16, 1998) and DOHA Claims Case No. 98051310 (May 27, 1998).

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. This figure represents the amount of the original debt and does not include any penalties, interest, or charges. As the member notes, his most recent bill is for \$17,696.68.

2. *See* note 1.