

June 17, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03061247

CLAIMS APPEALS BOARD DECISION

DIGEST

A member who was separated from his spouse erroneously received basic allowance for housing at the dependent rate (BAH-D). Waiver under 10 U.S.C. § 2774 is appropriate only for amounts actually expended for support.

DECISION

This decision responds to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 02112201, dated March 27, 2003, which waived \$8,225.80 of \$12,973.11 in erroneous overpayments made to a arine Corps member. On appeal, the member requests that we waive the remaining debt of \$4,747.31.

Background

The record shows that the member, a Corporal (E-4) in the United States arine Corps, was married and receiving basic allowance for housing at the dependent rate (BAH-D). On March 31, 2000, he became legally separated from his spouse and was no longer required to provide support for her. [\(1\)](#) As a result, he was no longer entitled to receive BAH-D. However, because of an administrative error, he continued to receive BAH-D during the period ay 1, 2000, through May 15, 2002, resulting in an overpayment to him of \$12,042.60. Additionally, he was erroneously paid family separation allowance (FSA) during the periods April 25, 2000, through November 1, 2000, and August 12, 2001, through May 15, 2002, resulting in an overpayment to him of \$1,323.32. After a credit for partial BAH in the amount of \$392.81, his debt to the government as a result of the overpayments was \$12,973.11.

The member sought waiver of the \$12,973.11 debt claiming that he had been verbally advised by an attorney in his legal assistance office that he was still entitled to receive BAH-D after his separation from his spouse, and that upon arriving at a new duty station, he had been verbally advised by the finance office that he was entitled to receive FSA. Further,

while assisting him in completing a statement to substantiate the payment of FSA, the finance office personnel had completed the form with incorrect information.⁽²⁾

In the administrative report, the Defense Finance and Accounting Service (DFAS) recommended waiver of the \$1,323.32 debt resulting from the erroneous overpayment of FSA and \$900 of the debt resulting from the erroneous overpayment of BAH-D. In the Settlement Certificate, our adjudicator waived the \$1,323.32 debt for FSA and \$6,902.48 of the debt for BAH-D. She denied waiver with respect to the erroneous overpayment of the remaining \$4,747.31 of BAH-D. On appeal, the member seeks waiver of that additional amount, but offers no new evidence in support of his case. Waiver of the \$1,323.32 debt for FSA is not at issue in this appeal.

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. 03022704* (March 5, 2003), citing *DOHA Claims Case No. 00031401* (May 10, 2000).

As a general rule, 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 payments for support. *See B-203620*, Mar. 4, 1982. In such cases, it is incumbent upon the member to establish with specificity, by appropriate documentary evidence, the amount and nature of each expenditure. *Cf. DOHA Claims Case No. 03040701* (April 15, 2003) citing *B-271190*, July 17, 1996.

Here, waiver of \$6,902.48 of the \$11,649.79 overpayment of BAH-D was appropriate. The record contained sufficient documentary evidence in the form of the wife's statement, receipts, and bank records to conclude that a \$6,902.48 expenditure had been made by the member to meet expenses that could reasonably be characterized as support under the separation document. Conversely, the denial of waiver with respect to the remaining \$4,747.31 of the \$11,649.79 overpayment of BAH-D was also appropriate. There was not sufficient documentary evidence to substantiate that the \$4,747.31 had been expended by the member for support. *Id.*

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. At the time of his separation on March 31, 2000, the separation agreement did not stipulate that he was to provide support for his spouse. However, the separation agreement was later amended on September 25, 2000, to provide for such support. He was divorced in December 2001.
2. *Statement to Substantiate Payment of Family Separation Allowance* (DD Form 1561), dated August 16, 2001. (The member acknowledged that he signed the form without reading it.)