

DATE: November 16, 2006

In Re:

[Redacted]

Claimant

)

Claims Case No. 06110603

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

A member requests reconsideration of a decision the Defense Office of Hearings and Appeals (DOHA) rendered in DOHA Claim No. 06100201 (October 10, 2006), to partially waive his debt in the amount of \$14,187.49. The debt arose from overpayments of pay due to an erroneous pay entry base date (PEBD).

Background

On December 12, 2003, the member was commissioned as a first lieutenant in the United States Army Reserve. On January 4, 2004, he entered active duty at Fort Lee, Virginia. However, the member's PEBD was erroneously established as December 12, 2000, instead of December 12, 2003. As a result of this error, the member erroneously received base pay as if he had over three years of service, as a first lieutenant and then as a captain, instead of less than two years of service, during the period January 4, 2004, through July 31, 2005, causing an overpayment in the amount of \$14,187.49.

Our Office agreed with the Defense Finance and Accounting Service (DFAS) and waived \$1,187.54, the portion of the overpayment accruing from January 4, 2004, through March 31, 2004. However, our Office denied waiver of the overpayment accruing from April 1, 2004, through July 31, 2005, in the amount of \$12,999.95, on the basis that the member was advised in arch 2004 that he was erroneously receiving base pay as if he had over three years of service. In addition, even though his years of service were changed in April 2004 from three years to zero years, his base pay remained the same. Since the member was receiving leave and earnings statements (LES), he should have noticed the change in years of service and questioned the fact that there was no adjustment in his base pay. Thus, the adjudicator concluded that if the member had questioned his base pay in April 2004 and brought the matter to the attention of the proper authorities, presumably the error would have been corrected, preventing most if not all of the overpayment.

In his request for reconsideration, the member argues that the adjudicator misapplied the reasonable person standard and the "awareness" standard in his case. He states that at the time of his commissioning, he had no prior military training or experience, received no instruction on LES, and had no idea what a PEBD was. He cites DOHA Claims Case No. 03050907 (May 15, 2003), where the Board denied waiver on the basis that a petty officer first class (E-6) with over fifteen years of service should not have believed that he was entitled to receive basic allowance for housing while living in government quarters. He argues that he should not be held to the same standard as someone with over fifteen years of service. He states that he was unaware that his pay was incorrect until after he notified finance officials in April 2005

about a large overpayment he received in January 2005. He also states that prior to receiving his April 2004 LES he was assured by DFAS through his class cadre that everything was correct. He states that he also questioned his pay again during in-processing at his new duty station in late April 2004. He concedes that he should have acted sooner when he received a large overpayment in January 2005. Thus, he believes that collection of the overpayment occurring during April 2004 through December 2004, should be waived.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment 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. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.2.

A member is considered to be at least partially at fault, and waiver is precluded when, in light of all the circumstances, it is determined that he should have known that he was being overpaid. The standard employed to determine whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving payments in excess of his entitlements. A member is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in question. *See* DOHA Claims Case No. 97032501 (June 9, 1997). It is a long standing rule that members have a duty to verify information on their LES. Once a member receives information that brings the validity of a payment into question and fails to take corrective action, waiver of the resulting overpayment is precluded because the member is at least partially at fault in the accrual of the debt. This rule applies to members of all ranks and military duties. *Id.*

In this case, the member was unaware of the erroneous nature of the overpayments for base pay prior to being advised in March 2004. Therefore, it was reasonable to conclude that the member accepted the overpayments from January 4, 2004, through March 31, 2004, in good faith, and waiver of the \$1,187.54 was appropriate.

However, in March 2004 while attending the Judge Advocate Officer Basic Course (JAOBC), the member was advised that he was erroneously receiving base pay as if he had over three years of service. Although he was advised in April 2004 that the error had been corrected, at that time, he was also in possession of sufficient information for a reasonable person to conclude that the validity of his base pay was in question. Even though in April 2004 his years of service were changed from three years to zero years, he continued to receive the same amount of base pay (\$3,421.50). Under these circumstances, the member should have expected a decrease in base pay. When his base pay remained the same, he had the duty to verify the accuracy of it. The member was again on notice that the validity of his pay was in question when he was promoted to captain in June 2004 because he continued to receive base pay as if he had over three years of service.

The member indicates that during in-processing at his new duty station the finance office did not tell him that there was anything wrong with his pay. There is no indication in the record that the member pointed out that he still was receiving the same amount of base pay after his years of service were corrected. The member should have known that once his years of service were changed from three years to zero years, his pay would be affected. Therefore, the member should have known that he was being overpaid and pursued the matter until he received a definite determination and complete explanation of his entitlement.

As for the member's contention that he should not be held to the same standard as the member in DOHA Claims Case No. 03050907, *supra*, we note that this case was not cited in the adjudicator's decision. In DOHA Claims Case No. 03050907, *supra*, the member (an E-6 with 15 years of service in the Navy) was receiving BAH while living in government quarters. There is no evidence that adjudicator held the member in this case to the same standard as an E-6 with 15 years. As stated in Instruction ¶ E4.1.8, we base our waiver determinations on the facts in each case. In cases involving the incorrect establishment of member pay dates, we have consistently held that when a member is in receipt of information that reasonably would alert him to an error, he has a duty to verify the accuracy of the information and to bring it to the attention of finance personnel. *See* DOHA Claims Case No. 03091201 (October 21, 2003); DOHA Claims Case No. 97032501, *supra*, and Comptroller General decision B-208752, Jan. 18, 1983. As stated in DOHA Claims

Case No. 97032501, *supra*, this rule applies to members of all ranks and military duties. In this case, after the member was aware that his years of service were corrected, he should have expected that the change would affect his pay. When his base pay remained the same, he had the duty to verify the accuracy of his pay.

Conclusion

For the reasons stated herein, we affirm the DOHA Claims No. 06100201 decision to deny waiver of \$12,999.95. In accordance with Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board