

July 31, 2006

In Re:

[Redacted]

Claimant

)

Claims Case No.06071717

CLAIMS APPEALS BOARD 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 appeals the June 27, 2006, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims No. 06061927, which granted in part and denied in part, his application for waiver of \$4,011.00.

Background

The member was stationed in Columbia, South America, on an accompanied tour. Once in South America, he resided in an apartment on the local economy. His family elected not to join him, and he was paid basic allowance for housing (BAH) at the dependent rate based on their residence in North Carolina. He was also paid overseas housing allowance (OHA) at the single rate.

On March 31, 2006, the member was notified by a personnel officer via e-mail that effective January 1, 2006, he was no longer entitled to receive BAH for the location of his dependents in North Carolina. [\(U\)](#) He was also told that effective March 31, 2006, his BAH was stopped to prevent any further overpayment. He was also alerted that his total overpayment was \$4,011.00. Finally, he was advised on how to submit a waiver request.

In March 2006 the Defense Finance and Accounting Service (DFAS) discovered that the member was entitled to receive OHA at the dependent rate instead of the single rate during the period January 1, 2006, through March 31, 2006. DFAS determined that the member was underpaid \$234.00, but instead of applying this amount to the overpayment, it was paid to the member in May 2006.

In the Settlement Certificate, our Office agreed with DFAS and waived the portion of the overpayment occurring during January 1, 2006, through March 15, 2006. However, our Office denied waiver of the overpayment occurring during March 16, 2006, through March 31, 2006, in the amount of \$668.50. In addition, our Office agreed that it would not be against equity and good conscience to deny waiver of \$234.00, the amount the member was underpaid in OHA. Therefore, our Office denied waiver of the remaining \$902.50.

In his appeal, the member argues that although a personal administrative advisory notice was issued on March 28, 2006, the repercussions of the change in BAH as it pertained to his situation were not fully understood at the time. He states that he believed after e-mail notification that the changes to BAH were not applicable to PCS orders executed prior to January 1, 2006. He also states that he received payment for the period March 16, 2006, through March 31, 2006, on March 30, 2006, prior to the e-mail notification. Finally, he states he had no idea that he was entitled to receive OHA at the dependent rate until he was paid the \$234.00 in May 2006 and therefore, it would be against equity and good

conscience to deny repayment.

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, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In the present case the erroneous payments of BAH were made as a result of administrative error and there is no indication of fraud, misrepresentation, or lack of good faith on the member's part. However, 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 we employ to determine fault is whether a reasonable person knew or should have known that he was receiving payments in excess of his entitlements. 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. 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. 03071401 (July 18, 2003). Once a member receives information that brings the validity of the payment into question, he has a duty to hold the amounts received for eventual repayment.

Our Office properly waived the amounts during the period January 1, 2006, through arch 15, 2006. The member was unaware that these payments for BAH were erroneous prior to March 31, 2006. Although the member states that he did not believe the change in BAH policy applied to him and that the interpretation of the change was not officially clarified until ay 22, 2006, the fact remains that he was furnished with information on March 31, 2006, that would lead a reasonable person to conclude that he was being overpaid BAH. Under these circumstances, the member had a duty to hold the excess amount for eventual repayment. In addition, the member has not provided any information to substantiate his belief that he was entitled to the payments, that led him to believe the change did not apply to his situation because it "only applied to PCS orders issued on or after 1 January 2006."

In regard to the member receiving the money in his bank account on March 30, 2006, but not being notified by the pay office until March 31, 2006, it is not against equity and good conscience to recover the erroneous payment when the government makes prompt notification, as it did here. *See* DOHA Claims Case No. 03111712 (December 2, 2003) and DOHA Claims Case No. 98062401 (October 13, 1998), and cases cited therein.

Finally, it is not against equity and good conscience to deny waiver of the \$234.00 the member received in May 2006. The member was aware that he was indebted to the government at that time. As he states in his appeal, a personal administrative advisory notice was issued in ay 2006, the same month he received the payment, that clarified his entitlements. Therefore, when he received the payment of OHA, he knew he was indebted in the amount of \$4,011.00 for BAH.

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____ Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board

1. In the e-mail, the personnel officer cited to Personal Administrative Advisory Notice 26-06 which was issued on March 28, 2006, by the Defense Finance and Accounting Service (DFAS) to clarify recent changes in BAH and OHA changes. This notice stated that effective January 1, 2006, BAH is no longer payable when a member stationed in CONUS with dependents is issued accompanied orders overseas but elects to leave his dependents in CONUS due to personal reasons. Under these circumstances, the member's housing allowance is based on his new permanent duty station (PDS) overseas rate on the date of the member's arrival. If the member is authorized to live on the local economy overseas, he is entitled to receive OHA at the dependent rate, even if his dependents did not relocate.