

DATE: November 27, 2006

In Re:

[Redacted]

Claimant

)

Claims Case No. 06110906

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

A member was receiving basic allowance for housing at the dependent rate (BAH-D) on behalf of his mother. An overpayment arose when his mother's dependency status was retroactively terminated because the amount of the member's dependency allotment to her was insufficient. Waiver of the resulting debt is appropriate only to the extent that the allowance was spent for its intended purpose.

DECISION

The member requests reconsideration of the Defense Office of Hearings and Appeals (DOHA) decision in DOHA Claim No. 06101604, dated October 18, 2006, which allowed in part the member's application for waiver of an erroneous overpayment of basic allowance for housing at the dependent rate (BAH-D).

Background

The member was receiving BAH-D on behalf of his mother. The administrative report indicates that the member was subsequently required to increase his dependency allotment for his mother from \$900 to \$1,300 per month. When the member failed to increase the allotment, the dependency status for his mother was terminated and his entitlement to BAH-D was retroactively terminated effective April 20, 2005. ⁽¹⁾ As a result, the Defense Finance and Accounting Service (DFAS) determined that the member was overpaid \$16,775.96 from April 20, 2005, through December 31, 2005. The member was residing aboard a Navy ship, and during the period in question he was entitled to receive basic allowance for housing at the partial rate in the amount of \$100.44, reducing the overpayment to \$16,655.52.

The record shows that during the period of overpayment the member provided support for his mother in the amount of \$900 per month. Therefore, on appeal the DOHA adjudicator found that waiver of \$8,100.00 (\$900 x 9 months) was appropriate. The adjudicator denied waiver of \$8,555.52 because it was not used for the intended purpose.

In his request for reconsideration the member states that he understands the purpose of BAH-D and that one of the requirements for establishing dependency for his mother is that he provide greater than 50% of her income. He states that he was never informed that he was required to increase the support allotment. Therefore, he reasons that he should only be held liable for the \$3,600 (\$400 x 9 months), the required increase of the allotment during the period of overpayment. He also tries to distinguish his case from DOHA Claims Case No. 01112801 (December 11, 2001), cited by the adjudicator. He states that the member in that case was an administrative chief well-versed in pay and entitlements, whereas he is an operations chief well-versed in operations. He states that he was never deceptive or misleading in regard to his pay and entitlements and feels it is far reaching to expect an average sailor to know every detail about the pay system.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay and allowances to a member if collection would be against equity and good conscience and not in the best interest of the United States. However, a waiver cannot be granted if there is any indication of fraud, misrepresentation, fault or lack of good faith on the part of the member, or any other person having an interest in obtaining the waiver.

The gross amount of the erroneous payment is the amount proper for waiver consideration. In this case, the member was overpaid \$16,775.96 in BAH-D from April 20, 2005, through December 31, 2005. Since he was entitled to receive basic allowance for housing at the partial rate in the amount of \$100.44 during this period, DFAS reduced the overpayment to \$16,655.52. The adjudicator did not find partial fault on the member's part which, if found, would have precluded waiver relief. There is a well-established rule in waiver cases involving allowances such as BAH that waiver is appropriate only to the extent that the overpayments were spent for the purpose intended. See DOHA Claims Case No. 03022704 (March 5, 2003), DOHA Claims Case No. 03012711 (February 3, 2003), DOHA Claims Case No. 02122602 (January 12, 2003) and DOHA Claims Case No. 02111801 (December 2, 2002). Therefore, the adjudicator properly waived the amount of the erroneous overpayments that the member proved he used to support his mother. In his request for reconsideration, the member has not submitted any further evidence of additional support payments. It is reasonable to require a direct benefit in waiver cases involving BAH-D because the purpose of this entitlement is to help a member provide support for his dependents. See DOHA Claims Case No. 01112801, *supra*, and Comptroller General decision B-244478, Oct. 24, 1991.

The Board in DOHA Claims Case No. 01112801, *supra*, upheld DFAS's finding of no fault on the part of the member, an administrative chief. ⁽²⁾ The only issue relevant in determining the appropriate amount to waive was the amount the member expended in support of his dependent during the period of overpayment. The member's position had no relevance to the Board's decision. Thus, the member's attempt to distinguish his case from DOHA Claims Case No. 01112801, *supra*, fails.

Conclusion

The member's request for relief is denied, and we affirm the October 18, 2006, decision to deny waiver of \$8,555.52. In accordance with DoD 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

1. The decision to terminate the member's mother's dependency was in the discretion of DFAS. See paragraph 260101-D of Volume 7A of DoD 7000.14-R, DoD Financial Management Regulation, Military Pay Policy and Procedures - Active Duty and Reserve Pay. Our decision in this case is limited to waiver of the resulting debt under 10 U.S.C. § 2774.

2. The Board stated, "Despite the member's experience in administrative matters, apparently DFAS felt that this, by itself, did not amount to a partial fault precluding all waiver relief." *See* DOHA Claims Case No. 01112801 (December 11, 2001).