

DATE: December 13, 2006

In Re:

[REDACTED]

Claimant

)
Claims Case No. 06113001

CLAIMS APPEALS BOARD DECISION

DIGEST

Waiver of an overpayment of Basic Allowance for Housing at the dependent rate is appropriate only to the extent that the allowance was spent for its intended purpose.

DECISION

A member of the United States Marine Corps requests reconsideration of the October 31, 2006, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 06101609. The appeal decision sustained the initial decision of the Defense Finance and Accounting Service (DFAS) to deny the member's request that the government waive collection of an overpayment of allowances in the amount of \$1,785.56.

Background

The record shows that the member was transferred from California to a duty station in South America, and the orders authorized the travel of his dependents. The member arrived at the new duty station on January 12, 2006. The member received temporary lodging allowance (TLA) for his and his family's housing expenses through the State Department. However, due to an administrative error, he also received Basic Allowance for Housing at the dependent rate (BAH-D) for his dependent's housing expenses as if they were residing in the United States. As a result, the member was overpaid \$1,785.56 from January 12, 2006, through February 28, 2006. The record also indicates that the member properly received two temporary lodging allowance payments during this period: a payment for \$11,465.55 on February 22-23, 2006, and a second payment for \$5,538 on March 6, 2006.

In his request for reconsideration, the member raises concerns that he had raised previously. For example, the member states that he did not receive a copy of his leave and earnings statement (LES) from December 2005 to May 2006 despite the fact that he responded that he did receive them in answering Question 17.a of his Waiver/Remission of Indebtedness Application (DD Form 2789). He acknowledges that responding "YES" to that question was error on his part. The member also believes that the overpayment occurred because of a change in a pay and allowance advisory notice (PAAN 27-06) that was published over a month after the termination of his BAH and TLA payments, that, by definition, he would not have been aware of at the time he received the BAH-D and TLA payments.

The member more specifically challenges the finding made by DFAS and DOHA that he had received BAH-D. The member believes that, based on his discussions with unnamed persons representing Marine Force South, he had the right to expect BAH-II during the period of his temporary lodging, and it was his understanding that, in fact, he did receive BAH-II, not BAH-D. The member also argues that BAH-II covered certain expenses that were not covered in the TLA payments, such as the cost of laundry, internet, telephone, taxis, transportation, etc. The member requests that we review what he did get paid and thoroughly explain his entitlements. The member includes the table of fees for laundry services at the hotel where he and his family stayed during the period of temporary lodging.

Finally, the member argues that the waiver statute standard granting relief, when to do otherwise would be "against equity and good conscience," should be construed to mean that relief should be granted, as necessary, to avoid undue hardship. In his case, he argues that there would be undue hardship in repaying the debt because the BAH-II was a "planned part" of his income. The cost of living in the city where he lives is high, and COLA does not cover all expenses.

Discussion

Under 10 U.S.C. § 2774, we have 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 interest of the United States.

We see no error in the adjudicator's decision. The purpose of BAH is to partially reimburse a member for the expense of obtaining housing in the United States when housing is not provided to him. PAAN 27-06 did not indicate a change in the member's entitlement to BAH. The purpose of TLA is to partially reimburse a member for the costs involved in living in hotel-accommodations during a station change. The member has not demonstrated entitlement to both allowances.

Whether or not the member was entitled to BAH, our Office could still consider waiver in certain circumstances. There is a well-established rule in waiver cases involving allowances such as BAH, that waiver is appropriate to the extent, and only to the extent, that the overpayments were spent for the purpose intended. *See* DOHA Claims Case No. 06110906 (November 27, 2006) and decisions cited therein. For that principle to apply here, the member would have to prove that he had housing expenses in excess of the TLA he received. In this case, considering the amount of TLA the member received, and comparing that with the expenses itemized in the member's hotel bill (where he and his family were temporarily lodged) and other record evidence, the adjudicator reasonably concluded that there is no indication that the BAH was used for its intended purpose.

Financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction at ¶ E4.1.7. Whether or not collection would be against equity and good conscience is a matter to be considered in light of DOHA's prior decisions and (prior to 1997) those of the Comptroller General. A review of comparable decisions indicates that in this case collection would not be against equity and good conscience. *See* DOHA Claims Case No. 06110906, *supra*.

While the member believes that he actually received BAH-II, his LES clearly states that he was receiving BAH-D rather than BAH-II. If the member wishes to contest the calculation of his debt, he should contact DFAS for further information about his debt.

Conclusion

The member's request for relief is denied, and we affirm the October 31, 2006, decision to deny waiver in the amount of \$1,785.56. In accordance with DoD Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple _____

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields

Member, Claims Appeals Board

Signed: Catherine M. Engstrom _____

Catherine M. Engstrom

Member, Claims Appeals Board