

DATE: January 4, 2007

In Re:

[REDACTED]

Claimant

)

Claims Case No. 06122608

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

1. When a member is aware or should be aware that he has received an overpayment, he does not acquire title to the excess payments, and he has a duty to hold the money for eventual repayment. In such instances, waiver is not proper under 10 U.S.C. § 2774.
2. Financial hardship is not a factor for consideration in determining whether a waiver is appropriate under 10 U.S.C. § 2774.

DECISION

A U.S. Navy warrant officer requests reconsideration of the December 12, 2006, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 06120702. In that decision, DOHA waived collection of \$8,160.82 of the government's total claim against the member of \$11,021.98 that the member incurred due to the overpayment of pay and allowances. DOHA denied waiver of \$2,861.16. The member requests that we reconsider the denial of the \$2,861.16.

Background

The amount already waived is not in issue. The partial denial involved the overpayment of a cost of living allowance (COLA) from January 1, 2006, through June 30, 2006, on behalf of the member's dependents, who returned to the continental United States (CONUS) while the member was still stationed in Hawaii. ⁽¹⁾ The DOHA adjudicator found that the dependents returned to CONUS on December 28, 2005, and concluded that the member may not have been aware that he was erroneously receiving COLA during the period December 28-30, 2005. However, the adjudicator found that the member was aware or should have been aware, through his leave and earnings statements, that he was still erroneously receiving COLA on their behalf after December 2005.

On reconsideration, the member points out that he suspected that he was overpaid and explained the measures he had taken to make disbursement officials recognize the problem and discontinue the COLA payments. About six months passed before the disbursement officials corrected the problem. The member also suggests that his deployment has caused financial hardship.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of a claim for erroneous overpayments of pay or allowances against a member of the Uniformed Services if collection would be against equity and good conscience and not in the best interest of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack

of good faith on the part of the member. However, if a reasonable person is aware, or should be aware, that he is receiving an erroneous payment, waiver is not appropriate. 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, just as the member questioned it here. *See* DOHA Claims Case No. 06111302 (November 24, 2006).

The regulation under which we adjudicate waiver requests, Department of Defense Instruction 1340.23, provides specific guidance. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not a sufficient basis in and of itself for granting a waiver. *See* Instruction, ¶ E4.1.3. A waiver usually is not appropriate when a recipient is aware, or reasonably should be aware, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the Government, even if the Government fails to act after such notification. *See* Instruction, ¶ E4.1.4. Also, a waiver may be inappropriate where a recipient questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official (as the member explains that he was initially so advised in this case) that the payment is proper, if under the circumstances the recipient suspected or reasonably should have suspected that the advice was erroneous. *See* Instruction, ¶ E4.1.6.

In this case, the member suspected an overpayment and brought the error to the attention of proper authorities. However, as the Instruction indicates, such commendatory conduct to correct the government's mistake does not provide a basis for us to waive the overpayment. Moreover, while the member's deployment may have resulted in financial hardship, such hardship is not a factor for consideration in determining whether waiver is appropriate. *See* Instruction, ¶ E4.1.7. The member may wish to discuss the possibility of less severe payment options with the Defense Finance and Accounting Service.

Conclusion

The member's request for relief is denied, and we affirm the December 12, 2006, decision to deny waiver in the amount of \$2,861.16. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

-s-

Jean E. Smallin

Acting Chairman, Claims Appeals Board

-s-

William S. Fields

Member, Claims Appeals Board

-s-

Catherine M. Engstrom

Member, Claims Appeals Board

1. The COLA is paid to members assigned to high-cost outside the continental United States (OCONUS) areas to help them maintain the equivalent purchasing power of their CONUS-based counterparts. *See* Volume 1, Joint Federal Travel Regulations, App. J, pt. 1, paragraph A.

