

DATE: March 20, 2007

In Re:

[REDACTED]

Claimant

)

Claims Case No. 07030904

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

The member requests reconsideration of the September 21, 2006, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 06022303. In that decision, our Office waived collection of \$2,073 .07 of the government's claim against the member and denied waiver of \$19,423.01. The member requests that we reconsider the denial of the \$19,423.01.

Background

On January 9, 2002, the member and his dependents were assigned government quarters. As a result, the member's entitlement to basic allowance for housing at the dependent rate (BAH-D) was terminated. He did not receive BAH-D from January 10, 2002, through April 14, 2003. However, due to an administrative error, the member's BAH-D was restarted effective April 15, 2003, and he continued to receive BAH-D through April 4, 2004. This administrative error resulted in a debt of \$16,064.74.

During the period January 21, 2003, through May 30, 2003, the member performed temporary additional duty (TAD) and was entitled to receive family separation housing (FSH) and career sea pay (CSP). On May 30, 2003, the member completed his TAD and returned to his permanent duty station. As a result, he was no longer entitled to receive FSH and CSP. However, due to an administrative error, he continued to receive FSH and CSP through April 2, 2004, causing an overpayment of \$5,431.34. Therefore, the member was overpaid \$21,496.08 (\$16,064.74 + \$5,431.34).

On appeal to our Office, the adjudicator found that because the member was on TAD during the period January 21, 2003, through May 30, 2003, and did not have access to his leave and earnings statements (LES), he reasonably may not have been aware that he was erroneously receiving BAH-D from April 15, 2003, through May 31, 2003. Therefore, the adjudicator found that waiver of \$2,073 .07 was appropriate. However, the adjudicator denied waiver of the remaining \$19,423.01. This amount represents the overpayment of FSH and CSP during the period June 1, 2003, through April 2, 2004, and the overpayment of BAH-D during the period during the period June 1, 2003, through April 4, 2004.

In his request for reconsideration the member states that after completing his TAD he hand-carried paperwork to his pay office to turn off his allowances. He did not have access to his pay until April 2004, but was assured that his allowances were terminated. The member does state that he should have requested a copy of his LES. However, he states that he believed he was being paid properly because he submitted all the required paper work. In addition, he states that

collection of the debt has caused his family severe financial stress.

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. In the present case, the erroneous payments of BAH-D, FSH and CSP 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 or suspected an error existed and taken proper action to have it corrected. If a member experiences a change in pay that would cause a reasonable person to question the correctness of his pay, waiver is usually not appropriate if the member fails to notify the proper authorities to obtain an explanation.

See B-256600, July 14, 1994.

Our Office properly waived the overpayment of BAH-D occurring during the period April 15, 2003, through May 31, 2003. However, when the member completed his TAD and moved back into government quarters, his pay should have decreased because he was not entitled to BAH-D, FSH or CSP. When his pay did not decrease, he should have questioned its accuracy. *See* DOHA Claims Case No. 00071806 (September 28, 2000). Although the member states that he did not have access to his LES, he does admit that he should have requested copies of his LES. Had he done so, he would have seen that at the beginning of the time in question he was erroneously receiving \$250 in FSH, \$280 in CSP and \$1,351.70 in BAH-D. In addition, the member had access to his bank records. When the member completed his TAD and returned to his duty station, he knew he was no longer entitled to FSH and CSP. Prior to performing TAD the member's monthly take-home pay was approximately \$1,760.00. In May 2003, his last month of TAD, the member's monthly take-home pay totaled \$3,945.96. In June 2003 after completing his TAD, his monthly take-home pay was \$3,975.48. When the member completed his TAD he should have expected a significant decrease in his monthly pay. The member had a duty to monitor deposits to his bank account, and when his pay did not drop significantly, he had a duty to notify finance officials and ask for a detailed explanation of his pay. *See* DOHA Claims Case No. 06111301 (November 15, 2006).

Finally, we note that financial hardship does not provide a basis for waiver. *See* DoD Instruction 1340.23 (Instruction) ¶ E.4. 1.7.

Conclusion

The member's request for relief is denied, and we affirm the September 21, 2006, decision. 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: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom

Member, Claims Appeals Board