

KEYWORDS: waiver of indebtedness; basic allowance for housing

DIGEST: When a member knows or should know that his receipt of Basic Allowance for Housing at the with-dependent rate is questionable, waiver of the amounts he erroneously receives is not proper.

CASENO: 07052910

DATE: 6/5/2007

DATE: June 5, 2007

_____)
In Re:)
 [REDACTED]) Claims Case No.07052910
)
Claimant)
_____)

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member knows or should know that his receipt of Basic Allowance for Housing at the with-dependent rate is questionable, waiver of the amounts he erroneously receives is not proper.

DECISION

A former Army service member appeals the August 23, 2006, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 06081808 in which the member had requested the government waive collection of his \$8,077.65 indebtedness to the government that resulted from the overpayment of pay and allowances. In the Settlement Certificate, our adjudicator waived \$1,961.79 of the government's claim, and denied waiver of \$6,115.86. Of the amount denied, the member now acknowledges his responsibility for \$2,204.71, but appeals DOHA's decision concerning the balance of the \$6,115.86, or \$3,911.15.

Background

The issue remaining in dispute focuses on whether it is appropriate to waive collection of Basic Allowance for Housing (BAH) overpayments for two periods of time. The first period is from May 29, 2002, through January 1, 2003. The second period is August 6, 2003, through September 30, 2003. Concerning the first period, the Administrative Report of the Defense Finance and Accounting Service (DFAS), dated August 15, 2006, states that the member separated from his spouse and was living in bachelor enlisted quarters (BEQ) from May 29, 2002, through January 1, 2003. During this period, the member should have received BAH at the partial rate, but due to administrative error, he received BAH at the higher with-dependent rate. As a result, he was overpaid \$3,427.38 (\$3,970.85 minus a credit of \$543.47). The member became entitled to BAH at the with-dependent rate starting January 2, 2003. On August 6, 2003, the member was divorced. As a result, he was no longer entitled to BAH at the with-dependent rate, but due to administrative error, he continued to be paid BAH at the with-dependent rate until September 30, 2003. This resulted in another overpayment of \$483.77 (\$1,334.42 minus a credit of \$850.65).

On appeal, the member contends that the government's evidence is insufficient to prove that he was divorced on August 6, 2003, because the government did not produce a copy of the Final Judgment and Decree signed by the Judge. The member also contends that the decisions our adjudicator cited as precedent involved people who were actually divorced, not someone like him who begins a divorce action but tries to reconcile, fails to reconcile, and then continues with the divorce. The member also claims that he was paying the BAH to his former spouse by allotment. Finally, the member contends that he was not living in the BEQ as indicated in the Administrative Report, but that he was in the "barracks" for only about one week in the first period described above. In rebuttal, DFAS states that the allotment was in the member's name; it began on October 1, 2002, and ended on July 31, 2003; the account to which the money was deposited was in the name of the member and his former spouse; but there is no proof that the former spouse received the money.

Discussion

Preliminarily, we recognize that there are discrepancies between the facts stated in the Administrative Report and rebuttal and the member's version of them. The longstanding rule for resolving such inconsistencies is that we accept the findings of fact presented by the administrative agency in the absence of clear and convincing contrary evidence. *See* DOHA Claims Case No. 03121101R (March 31, 2004). The member's assertion that he was in the barracks for only one week, combined with the suggestion that he otherwise occupied non-government quarters with his former spouse from May 29, 2002, through January 1, 2003, is merely an assertion that does not meet the clear and convincing evidence standard. Our consideration of the member's waiver request is not a substitute for the member's assertion of a proper claim with DFAS for BAH at the with-dependent rate. The member may file a claim with DFAS for BAH at the with-dependent rate, if he disputes the validity of the debt. The member would have to prove that he properly occupied non-government quarters and was otherwise

entitled BAH at the with-dependent rate throughout this time period. In any event, the Administrative Report and rebuttal provides a sufficient factual basis for our consideration of the member's waiver request.

Under 10 U.S.C. § 2774, we have authority to waive collection of erroneous overpayments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the member. The standard we employ in determining whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving more than his entitlement. A member who knows or should know that he is receiving payments in excess of his entitlements does not acquire title to the excess payments and should be prepared to return them. When the member moved into the BEQ, he should have known that his entitlement to BAH was questionable, whether he was trying to reconcile his marriage or intended to immediately divorce. *See* DOHA Claims Case No. 98040201 (May 15, 1998). The record does not contain clear and convincing evidence that the member spent the BAH with-dependent payments he received in the first period to support his dependent, and it is not against equity and good conscience to collect this overpayment from the member. *See* DOHA Claims Case No. 02072315 (September 17, 2002). Similarly, when he was divorced, he should have known that his entitlement to BAH at the with-dependent rate had ended. *See* DOHA Claims Case No. 02073010 (September 9, 2002).

Conclusion

The member's request for waiver relief is denied, and we affirm the adjudicator's decision in the August 23, 2006, Settlement Certificate.

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