

KEYWORDS: waiver of indebtedness-dilatory recovery

DIGEST: When a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for repayment, even if the government fails to act after notification. The government has the right to recover such payments irrespective of the dilatory recovery efforts of its agents.

CASENO: 07073009

DATE: 8/6/2007

DATE: August 6, 2007

	)	
In Re:	)	
[REDACTED]	)	Claims Case No.07073009
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for repayment, even if the government fails to act after notification. The government has the right to recover such payments irrespective of the dilatory recovery efforts of its agents.

**DECISION**

A Navy service member requests reconsideration of the June 13, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07051503. In that decision, DOHA sustained the decision of the Defense Finance and Accounting Service (DFAS) not to waive the government’s claim against the member for overpayment of pay and allowances in the amount of \$16,993.48.

## **Background**

The record shows that on October 1, 2002, the member divorced. As a result, he was no longer entitled to receive basic allowance for housing at the dependent rate (BAH-D). Due to administrative error, he continued to receive BAH-D through November 30, 2006. During this period, the member was entitled to receive BAH at the single rate. Applying credit for the amount of BAH the member should have received (\$63,335.91) against the erroneous payments of BAH-D totaling \$80,329.39, the net amount of the debt owed by the member is \$16,993.48.

The record also indicates that the member was aware that finance officials were miscalculating his pay and that he was diligent in contacting appropriate officials regarding the erroneous payments. In the appeal decision, DOHA considered the member's argument that the overpayment was caused by the failure of appropriate officials (*e.g.*, the Navy's personnel support detachments and their supervisors) to act on the information he repeatedly provided and adjust his BAH accordingly. However, DOHA concluded that the member was aware from the beginning that he was being paid more BAH than what he was entitled to, and in such circumstances the mistakes of government officials in acting on this information should not defeat recovery of the overpayments.

In his reconsideration request, the member contends that it was error for DOHA to cite to decisions as precedent that were decided after his overpayments began. He argues that the primary issue is the length of time that the government's agents were neglectful and incompetent in stopping the overpayments. Even if he had placed the overpayments into an escrow account, it was unreasonable to expect him to be "the government's financial steward and keep track of their money, paying taxes on it, paying bank fees on it, paying accountants and tax preparers to account for it in the hopes that one day [the government] would get it right." He contends that this is "unreasonable and blatantly unfair," especially considering the four-year period involved and that he had to continue to rectify the problem during part of the time that he was in a combat zone. The member states that on two occasions he repaid money only to have it again overpaid to him. Finally the member argues that it is a form of "punishment" to collect "several months salary while [he is] serving in Iraq."

## **Discussion**

Under 10 U.S.C. § 2774 we have authority to waive a claim for an erroneous overpayment of pay or allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or the lack of good faith on the part of the employee. In interpreting the statute, there is a long-standing precedent, cited in the appeal decision, that it is not against equity and good conscience or inconsistent with the interests of the United States to collect an overpayment when the member knows that he is receiving pay to which he is not entitled. And while the member contends that it is error for an adjudicator to cite to decisions issued after the overpayments began in his case, it is not error when those precedents are illustrative of such a long-standing rule that predates the overpayments. The latest decision, DOHA Claims Case No.

07111908 (January 23, 2007), which also involved a waiver applicant who knew that he was being overpaid, specifically cited decisions issued by our Office in 1998 and 1997, and the Comptroller General in 1991, that explain this long-standing rule.<sup>1</sup>

We accept the member's explanation of events for purposes of this reconsideration decision. In so doing, we do not defend errors by government agents in not taking action to stop the overpayments of BAH when the member reported them. This situation is unfortunate considering the need for the member to continue to rectify his pay errors while serving his country in a combat theater of operations. However, the Board lacks the authority to compensate the member for the aggravation he incurred in an attempt to rectify his pay when he was aware from the beginning that he was not entitled to that much BAH. If the member had set aside the overpayment, he would not have had to worry about the effect of collection now. *Compare* DOHA Claims Case No. 97011404 (April 4, 1997). He also had use of the money for the period involved without having to pay interest from the various points when BAH was overpaid. The member has cited no precedent to support the relief he is requesting, considering the facts in this case. We are not aware of any precedent from the Comptroller General or in our prior decisions that allows the passage of time to overcome the awareness rule.

### **Conclusion**

The member's request for relief is denied, and we affirm the June 13, 2007, decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: William S. Fields

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William S. Fields  
Member, Claims Appeals Board

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<sup>1</sup>We added these citations after citing to the applicable regulation, DoD Instruction 1340.23 (February 14, 2006). The Instruction codifies this long-standing rule at paragraph E4.1.4. Even if it had not been based on well-established precedent, the Instruction itself is directly applicable to some of the overpayments of BAH that the member had received.