

KEYWORDS: waiver of indebtedness-knowledge

DIGEST: When a member knows or should know that he is being overpaid, he has a duty to set aside the erroneously paid funds for repayment.

CASENO: 07082004

DATE: 08/28/2007

DATE: August 28, 2007

In Re:)
 [REDACTED]) Claims Case No.07082004
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member knows or should know that he is being overpaid, he has a duty to set aside the erroneously paid funds for repayment.

DECISION

A Navy service member requests reconsideration of the July 23, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07053001. In that decision, DOHA sustained the Defense Finance and Accounting Service's (DFAS) denial of the member's request for a waiver of his indebtedness to the government for the overpayment of basic allowance for housing (BAH) and Continental United States cost-of-living allowance (CONUS-COLA) in the amount of \$9,645.00.¹

¹The total amount of the overpayments was \$12,259.17. DFAS had previously granted a remission of indebtedness for part of the debt: \$2,614.17 under 10 U.S.C. § 9837, and then considered possible relief of the balance of the indebtedness (\$9,645) under the waiver statute, 10 U.S.C. § 2774. We have no jurisdiction over remission issues, and this decision is not intended to disturb DFAS's decision on the remission. The member's

Background

The record shows that on September 30, 2005, the member received humanitarian temporary additional duty (TEMADD) travel orders to a different Navy Recruiting District (location 2) than his permanent duty station (location 1). The effective date of the orders was October 4, 2005, for 179 days. Since the member was on TEMADD orders, he was entitled to continue to receive BAH and CONUS-COLA based on the higher rate at location 1. He was paid correctly through March 5, 2006. On March 6, 2006, the member received humanitarian reassignment/permanent change of station orders to location 2. As a result, the member was no longer entitled to receive CONUS-COLA, and his BAH should have been calculated at a lower rate applicable to location 2. However, due to administrative error, his BAH continued to be paid at the higher rate at location 1, and he erroneously continued to receive CONUS-COLA. These erroneous payments continued until October 31, 2006.

In denying waiver, our adjudicator noted that the orders issued to the member in March 2006 were “humanitarian reassignment orders” and that section one of the remarks section of the orders stated that the service member was transferred to the new Navy Recruiting District in location 2. The adjudicator also considered the signed statement of a Navy finance representative who admitted that he initially told the member that if he was in a “TAD” status (a temporary duty status) in location 2, then his BAH should not change; however, the representative states that he provided this advice because the member told him that he was TAD and was supposed to report back to location 1. The representative also acknowledges emailing the member in June 2006 and, in effect, confirming that the BAH for location 1 was proper because he thought that the member was still on temporary duty at location 2 and the member had not told him otherwise. The representative also states that he did not know about the member’s reassignment to the new permanent duty station for humanitarian reasons until October 2006.

In his reconsideration request, the member stresses that he initiated efforts in April 2006 to clarify his BAH entitlement to avoid the problems that he now has. He contacted an official who he refers to as the “Chief Administrator” who told him in April and May 2006 that he did not know the answer concerning the proper BAH rate and would have to check on it. He denies that he advised the representative that he was on TAD orders or that he was going back to location 1 because his old command was closed and placed under a different command. He states that the representative’s statement is “completely false.” As we construe the member’s reconsideration statement, the member questions the credibility of the representative’s statement, and offers arguments for impeaching the representative’s veracity. For example, the member explains that after he placed calls to the Chief Administrator, the representative responded by assuring the member that “once we get the paperwork stating the overpayment that we will put in for a waiver and it will get approved and that he has done these many times and is very confident that he will get this approved.” The member also introduces new evidence, an email message

appeal and reconsideration request does not specifically address CONUS-COLA portion of the overpayment.

from the Chief Administrator on May 22, 2006, to various individuals (but not the representative) which retransmits the humanitarian reassignment orders of March 2006. It appears that the member offers this as evidence to impeach the representative's alleged statement to the member that the Chief Administrator told the representative that he never received a copy of the member's reassignment orders.

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. It is not against equity and good conscience to deny waiver when a reasonable person should have suspected that he was receiving payments in excess of his entitlement. *See* DOHA Claims Case No. 02030501 (April 18, 2002), cited in the appeal decision. *See also* DoD Instruction 1340.23 ¶ E4.1.4.

In this case, the member contends that DOHA's adjudicator erred because, in part, she relied on the representative's statement which he contends is false. In effect, the member is saying that if we accept his version of the communication between him and the representative that he now offers, we should waive the debt because the representative knew at some unspecified point well before October 2006 that the member had transferred his permanent duty station as of March 2006 and had a duty to properly advise the member that he was limited to the BAH and CONUS-COLA entitlements at location 2. However, the member's argument is unpersuasive.

On disputed questions of fact between a claimant and the administrative office, we accept the statement provided by the administrative office in the absence of clear and convincing contrary evidence. *See* DOHA Claims Case No. 02030501, *supra*, and the Comptroller General's decision in 57 Comp. Gen. 415, 419 (1978). The Board is reluctant to accept new evidence on a reconsideration request that a waiver applicant could have provided to DFAS and DOHA adjudicators at an earlier stage in the proceedings, but even if we accept the May 22, 2006, email, it does not help the member reach the clear and convincing standard of proof. Among other things, the representative was not named as an addressee on that email. We do not see any necessary inconsistency between the content of the representative's statement and the May 22, 2006, email and other documentation in the record. Furthermore, accepting for purposes of this request for reconsideration, that the representative did advise the member that they could apply for waiver once they received documentation of the overpayment of the BAH, the member should have been alerted to the likelihood that there was a problem with his pay. Considering such a statement, the Chief Administrator's failure to respond to the member, and the reassignment orders, the member should have set aside funds in the event that repayment would be necessary. *See* DoD Instruction 1340.23 ¶ E4.1.6.

Our decision here does not condone any failure by pay officials to respond promptly and accurately to the pay concerns of service members. However, based on the record and the member's reconsideration request, we conclude that the decision not to grant waiver is reasonable.

Conclusion

The member's request for relief is denied, and we affirm the July 23, 2007, appeal 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

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis
Member, Claims Appeals Board