

KEYWORDS: waiver of indebtedness-knowledge; waiver of indebtedness-erroneous debt

DIGEST: 1. 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.

2. In order to be considered for waiver, a payment must be erroneous at the time it is made. An advance payment that a member receives for payment of rent, which was valid when made, is not erroneous for the purposes of 10 U.S.C. § 2774.

CASENO: 07091101

DATE: 9/13/2007

DATE: September 13, 2007

_____)
In Re:)
[REDACTED]) Claims Case No.07091101
Claimant _____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

1. 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.

2. In order to be considered for waiver, a payment must be erroneous at the time it is made. An advance payment that a member receives for payment of rent, which was valid when made, is not erroneous for the purposes of 10 U.S.C. § 2774.

DECISION

A former member of the United States Navy requests reconsideration of the August 14, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07052903, in which DOHA denied or could not consider the member's request that the government waive collection of \$9,830.51 in overpayments of pay and allowances to him.

Background

The record shows that on July 2, 2005, the member was married. As a result, he was no longer entitled to receive basic allowance for housing at the differential rate (BAH-DIFF). However, due to administrative error, the member erroneously continued to receive BAH-DIFF through September 30, 2005, causing an overpayment of \$594.52. Additionally, in July 2005, the member requested advance pay, and in August 2005, he received an advance in the amount of \$6,213.00. The total amount of debt the member owed at that time was \$6,807.52, and the overpayments of advance pay and debt owed due to the requested advance of pay were repaid in full. The record also shows that in September 2005, the member was issued permanent change of station (PCS) orders from the United Arab Emirates (UAE) to a sea duty assignment with a report date no later than November 17, 2005. Since the member began his PCS leave and departed the UAE on October 1, 2005, he was no longer entitled to receive overseas housing allowance (OHA). However, DFAS determined that he erroneously received OHA through October 31, 2005, causing an overpayment of \$3,022.99.

On June 8, 2006, the member was discharged from the Navy. At that time he was entitled to receive a final separation payment in the net amount of \$3,089.70, representing eight days of pay and allowances, clothing allowance and accrued leave. After deducting the OHA overpayment, the net due became \$66.71. On June 15, 2006, the member erroneously received active duty pay in the net amount of \$867.15. After crediting the \$66.71 that was still owed to him, the member's debt was \$800.44. On October 18, 2006, the member requested the Defense Finance and Accounting Service (DFAS) to waive the \$800.44 indebtedness, and DFAS did so on January 9, 2007.

On April 9, 2007, the member requested waiver of the debts that had accrued to him for overpayment of BAH-DIFF, the advance of pay, and the advance of OHA for the period October 1, 2005 through October 31, 2005. These three debts totaled \$9,830.51.

In his request for reconsideration, the member agrees that he owed the debt for BAH-DIFF (\$594.52) and the erroneous payment of active duty pay and allowances on June 15, 2006 (\$867.15), but he requests a refund or waiver of the other debts. As we construe the member's request, he appears to argue that the August 2005 advance and October 2005 OHA payment went to cover rental fees that he incurred, and he did not profit from such payments. The member explains that his existing lease was due to expire on July 14, 2005, but he was told by his chain of command that he would have to remain in his UAE assignment until his replacement arrived.

He states that he was told to go to his landlord and obtain an extension of his lease until October 1, 2005. The extension cost was \$6,226.30. The extended lease expired on October 1, 2005, and he departed that day because he no longer had a place to live at his old duty station. The member believes that the DOHA adjudicator erred in finding that the member failed to provide a rental agreement covering the month of October 2005, and failed to provide any documentary evidence that rental fees were paid for October 2005.

DOHA's adjudicator concluded that the \$6,213.00 August 2005 advance could not be considered for waiver action under 10 U.S.C. § 2774, because, as DFAS had also noted in its initial determination, that payment was not an erroneous payment when made. The adjudicator also denied waiver for the debts that accrued from the BAH-DIFF overpayment and the erroneous OHA payment. In relevant part, both DFAS and our adjudicator noted that waiver of the indebtedness for the overpayment of OHA for the month of October 2005 (\$3,022.99) was not appropriate because the actual date of the member's PCS was October 1, 2005, and he should have realized that he would not be entitled to OHA once he departed from his old duty station.

Discussion

Preliminarily, the decision by DFAS to waive \$800.44, the amount still uncollected from the erroneous June 15, 2006, payment of active duty pay and allowances, is not in issue here, even though the member now indicates that he thinks it was a proper debt. Additionally, the member does not now dispute the collection of the BAH-DIFF overpayment.

Under 10 U.S.C. § 2774, we have authority to waive a claim of the government "against a person arising out of an erroneous payment of any pay or allowance" 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 member. As explained in the initial determination and appeal decision, the member has not demonstrated that the \$6,213 advance was in any way erroneous when made. DOHA's adjudicator cited and provided copies of prior decisions by this Office which state this rule. *See* DOHA Claims Case No. 98051310 (May 27, 1998).¹

Moreover, 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), which states this long-standing rule now codified in DoD Instruction 1340.23 ¶ E4.1.4 (February 14, 2006). DOHA's adjudicator made a reasonable finding that the member failed to provide a rental agreement covering the month of

¹The member's failure to demonstrate that the advance was erroneous is dispositive of the member's waiver request in this regard, but it appears to us that the advance was covered, for the most part, by the OHA that the member received. Based on information received from DFAS, for the period July 16-31, 2005, the member received \$1,340.64. For both August 2005 and September 2005, the member received \$2,681.28 each month. The total OHA payments during the extended rental period appear to be \$6,703.20.

October 2005, and failed to provide any documentary evidence that rental fees were paid for October 2005. The first paragraph of the member's reconsideration request specifically indicates that the extended rental period ended October 1, 2005.² Significantly, DOHA's adjudicator and DFAS could reasonably conclude that the member should have known that his departure from the UAE on October 1, 2005, would affect his entitlement to OHA at that location for the month of October 2005. The Board has not identified any information in the record which suggests that the member incurred any expenses after his extended lease expired. If the member believes that his OHA up to October 1, 2005, was not properly calculated so as to recover all of his eligible expenses, his remedy is to file a claim with DFAS for any additional amounts, not to ask our Office to fashion a relief through the waiver process.

Conclusion

The DOHA adjudicator's appeal decision of August 14, 2007 is sustained, and the member's request for waiver of each of the three portions of the three debts totaling \$9,830.51 is denied or not considered for the reasons stated above. 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: William S. Fields

William S. Fields
Member, Claims Appeals Board

²While the day of October 1, 2005, may have been intended as the last day of the rental period, the rent for it was paid well in advance and there is no indication of an expense for that day.