

KEYWORDS: waiver of indebtedness

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.

CASENO: 07110102

DATE: 11/26/2007

DATE: November 26, 2007

\_\_\_\_\_)  
In Re: )  
      [REDACTED] ) Claims Case No. 07110102  
                  )  
Claimant \_\_\_\_\_)

**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**

A member requests reconsideration of the October 9, 2007, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07082402. In that decision, DOHA waived \$377.52 of the \$15,066.40 claim against the member and denied the remaining \$14,688.88.

## **Background**

In July 2006 the member left Buenos Aires, Argentina, for an assignment in Washington, D.C. He was no longer entitled to receive overseas housing allowance (OHA). Due to an administrative error, he continued to receive OHA from July 7, 2006, through March 31, 2007, causing an overpayment in the amount of \$38,678.96. During that period the member was entitled to receive basic allowance for housing (BAH) in the amount of \$23,612.56, which reduced the overpayment to \$15,066.40.

In the decision, our Office agreed with the Defense Finance and Accounting Service (DFAS), waived the portion of the overpayment occurring during July 7, 2006, through July 15, 2006, in the amount of \$377.52, and denied waiver of the overpayment occurring during July 16, 2006, through March 31, 2007, in the amount of \$14,688.88. The DOHA adjudicator found that since the member had performed a permanent change of station move from Washington, D.C., to Buenos Aires in 2003, he was familiar with the entitlements associated with being assigned to both locations. The DOHA adjudicator found that the member should have noticed that his housing allowance did not decrease after his return to Washington, D.C., in July 2006. In addition, a review of the member's leave earnings statements (LES) would have alerted him that he was being overpaid.

In his request for reconsideration, the member states that the appeal decision was arbitrary, was based on insufficient knowledge and was not supported by cited authority. The member states that he completed all his transfer paperwork with the pay clerk in July 2006. In August 2006 the member telephoned the pay clerk and the pay clerk confirmed the member's housing allowance changed from OHA to BAH. The member states that he checked his September 2006 LES which reflected that his housing allowance as BAH and showed a change in his pay. The member states that months later he detected the discrepancy and alerted proper officials. He states that the LES system is inefficient and the pay system is overly complicated. Therefore, he contends that it was unreasonable for the DOHA adjudicator to find he could have found the error by examining his LES or that he should have known that his pay should have decreased based on his experience from his prior move. He also tries to distinguish his case from the DOHA decisions cited as authority in the decision.

## **Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In the present case, the erroneous payments of OHA 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 that he was being overpaid. The standard we employ to determine fault is whether a

reasonable person knew or should have known that he was receiving payments in excess of his entitlements. Waiver is not appropriate when a member is aware that he is being overpaid or has no reasonable expectation of payment in the amount received. A member is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in question. *See* DOHA Claims Case No. 06071717 (July 31, 2006).

In this case, the DOHA adjudicator's decision to deny waiver in the amount of \$14,688.88 was reasonable. In reaching her decision, the adjudicator relied on the following statement the member made in his waiver request: "I saw that my allowance changed \$192.00 from July, which was my last month overseas." The adjudicator found that had the member reviewed his LES from June 2006 through September 2006, he would have been aware that although his July 2006 LES listed BAH in the amount of \$4,232.00, this was approximately the same amount he received in OHA in June 2006.

Although the member states that he completed all transfer paperwork in July 2006 with the pay clerk and was assured by the pay clerk in August 2006 that his housing allowance had changed from OHA to BAH, his August 2006 LES clearly conflicted with the information he received from the pay clerk. His August 2006 LES reflects that he was being paid OHA in the amount of \$4,327.00. In addition, even though his September 2006 LES reflected that he was paid BAH in the amount of \$4,424.00, he should have expected the amount he was receiving in BAH to decrease significantly from the amount he was receiving in OHA, especially since he had lived in Washington, D.C., and received BAH before being stationed in Buenos Aires and receiving OHA.<sup>1</sup> Further, his subsequent LESs (October 2006 through March 2007) clearly reflect that he was being paid OHA, not BAH. The member was furnished with information that would lead a reasonable person to conclude that he was being overpaid. Under these circumstances, the member had a duty to set aside the funds in the event that repayment should be necessary. *See* DoD Instruction 1340.23 ¶ E4.1.5.

The member objects to the authority cited by the DOHA adjudicator in the appeal decision, DOHA Claims Case No. 05040601 (April 26, 2005) and DOHA Claims Case No. 06113001 (December 13, 2006). These decisions were cited by the adjudicator to support the long-standing rule that a member who receives documentation in the form of LES has a duty to review the documentation and report any errors. The member states that his case is distinguishable because he immediately contacted appropriate officials when he discovered conflicting information. However, according to the record, the member possessed information, his LES, which conflicted with the advice he received from the pay clerk in August 2006.

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<sup>1</sup>The member's February 2002 through April 2002 LES reflect that he was being paid BAH in the amount of \$2,149.70 per month while stationed in Washington, D.C. In contrast, his April 2003 LES reflects that he was paid OHA \$4,474.70 while stationed in Buenos Aires.

## **Conclusion**

The member's request for relief is denied, and we affirm October 9, 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: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board