



decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08060205. In that decision, DOHA waived collection of part (\$161.87) of the \$44,504.52 debt owed by the member to the government, and denied waiver of the balance of the debt (\$44,342.65).

### **Background**

The record indicates that the \$44,342.65 portion of the debt accrued when the member continued to receive active duty pay and allowances after his release from active duty on October 1, 2004. These mid-month and end-of-month payments continued through June 15, 2005, causing an overpayment of \$43,603.43.<sup>1</sup> In addition, federal and state taxes were erroneously paid on the member's behalf for November 2004 and December 2004, causing an overpayment of \$739.22. In denying waiver, DOHA's adjudicator found that the member should have at least questioned the accuracy of the pay he received on October 15, 2004, because it was almost the same amount as his active duty pay, especially since he was only entitled to receive \$197.66 at his release from active duty. In addition, the adjudicator considered the member's argument that he thought that payments he received through June 15, 2005, were for vacation pay. The adjudicator found that the member reasonably could not have believed he was entitled to receive active duty pay and allowances as vacation pay when his leave and earnings statements (LES) reflected that he used all his leave and was paid for one day of lump sum leave. In addition, he failed to document or articulate any basis as to why he reasonably believed he was entitled to receive active duty pay in the amount and frequency he received during the period of overpayment, especially when he was not performing active duty during that time.

In his reconsideration request, the member states that he is only requesting waiver of \$5,500.00. He states that \$5,500.00 represents the amount his state would have paid him had he been able to claim unemployment from December 12, 2004, through May 14, 2005. He encloses the decision of his state's unemployment agency.

### **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. The fact that the erroneous payment is the result of administrative error is not a sufficient basis, in and of itself, for granting a waiver. Waiver is not appropriate when a recipient knows, or reasonably should know, that payment is erroneous, or when a recipient of any unexplained payment of pay or allowances does not attempt to obtain a reasonable explanation from an

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<sup>1</sup>The member received \$2,370.26 on October 15, 2004. Since he was only entitled to receive \$197.66 (which represented one day of pay and allowances, clothing allowance and one day lump sum leave), he was overpaid \$2,172.60. He then continued to receive active duty mid-month and end-of-month pay and allowances in the amount of \$41,430.83.

appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds for eventual repayment in the event that repayment should be necessary. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.3 through ¶ E4.1.5.

We agree with the adjudicator that the member did not reasonably explain his right to continue to receive mid-month and end-of-month active duty pay and allowances for eight months after his release from active duty. *See* DOHA Claims Case No. 08020403 (February 8, 2008). In addition, our decision in this case is limited to the member's request for waiver of repayment of the debt under 10 U.S.C. § 2774. Under this statute, there is no basis for waiver of the active duty pay and allowances erroneously received by him after he left active duty. The member's dispute with a state concerning his right to unemployment compensation after he was released from active duty does not affect the member's duty to set aside the erroneous payments of active duty pay and allowances to which he knew he was not entitled.

### **Conclusion**

The member's request for relief is denied, and we affirm the June 24, 2008, decision. In accordance with Instruction ¶ 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