

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: 08100703

DATE: 10/23/2008

DATE: October 23, 2008

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In Re: )  
      [REDACTED] ) Claims Case No. 08100703  
                  ) )  
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 September 8, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08072103. In that decision, DOHA waived \$1,050.87 of the \$5,711.87. This amount is not at issue in this reconsideration request. DOHA denied waiver of the balance in the amount of \$4,661.00.

## **Background**

On September 21, 2007, the member, a reservist performing active duty in the Marine Corps, was issued permanent change of station orders from his residence in Bronx, New York, to Camp LeJeune, North Carolina. He reported to Camp LeJeune on October 9, 2007. As a result, his basic allowance for housing at the dependent rate (BAH-D) should have been changed from New York to Camp LeJeune. However, due to an administrative error, the member continued to receive BAH-D based on the rate for New York, instead of Camp LeJeune. This resulted in the member being overpaid BAH-D in the amount of \$4,280.34 from October 9, 2007, through January 31, 2008. In addition, as a result of his PCS, the member was no longer entitled to receive Continental United States cost of living allowance (CONUS COLA). However, due to an administrative error, the member erroneously continued to receive CONUS COLA from October 9, 2007, through January 31, 2008, causing an overpayment in the amount of \$1,431.53.

In the appeal decision, the DOHA adjudicator waived \$1,050.87, which represents the amount the member was overpaid during the period October 9, 2007, through October 31, 2007. However, the adjudicator denied waiver of the remaining \$4,661.00, which represents the amount the member was overpaid during the period November 1, 2007, through January 31, 2008. The adjudicator denied this amount on the basis that the member's leave and earnings statements (LES) reflected that his net pay had increased more than \$200.00 from September 2007 (prior to his PCS) to November 2007 (while stationed at Camp LeJeune). The adjudicator found that if the member had reviewed his LES, he would have discovered the error and prevented its perpetuation.

In his request for reconsideration, the member states that his entire chain of command and prior command agree that the error was an administrative oversight. He argues that he should not be held accountable for the overpayment occurring in November 2007 for the same reason the adjudicator waived the overpayment occurring in October 2007. He did not receive his November 2007 LES until December 2007. He states that he has already paid \$1,400.06 on his debt to date and wants this subtracted from the total he owes.

## **Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of military pay and allowances if repayment would be against equity and good conscience and not in the best interest of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* ¶ E4.1.2. of Department of Defense Instruction 1340.23. In the present case, the erroneous payments were made as a result of administrative errors, 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 an error existed and taken steps to have it corrected. *See* DOHA Claims Case No. 07110102 (November 26, 2007) and DOHA Claims Case No. 05040601 (April 26,

2005). 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. 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. 07110102, *supra*.

The adjudicator's decision to deny waiver in the amount of \$4,661.00 was reasonable. In reaching her decision, the adjudicator relied on the member's statement about questioning his pay in November 2007 and being assured by the finance office that "the RED was changed and everything reflected North Carolina." The adjudicator found that had the member reviewed his September 2007 LES and November 2007 LES, he would have been aware that his net pay had increased from \$5,273.00 to \$5,501.00. The member was furnished with information that would lead a reasonable person to conclude that he was being overpaid. Although the member stated that he did not receive his November 2007 LES until December 2007, he should have reviewed his pay in November 2007, since he spoke to the finance office about his pay at that time. He should have questioned why his net pay increased after moving from New York to Camp LeJeune. When he moved to Camp LeJeune, he was entitled to BAH-D at a lower rate than New York and was not entitled to receive CONUS COLA. Under these circumstances, waiver is not appropriate.

The member should contact the Defense Finance and Accounting Service (DFAS) with questions about the balance of his debt.

### **Conclusion**

The member's request for relief is denied, and we affirm the September 8, 2008, 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

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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