

KEYWORDS: waiver of indebtedness

DIGEST: Waiver of an overpayment of Basic Allowance for Housing at the dependent rate is appropriate only to the extent that the overpayment was spent for its intended purpose.

CASENO: 09042701

DATE: 5/01/2009

DATE: May 1, 2009

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In Re: )  
      [REDACTED] ) Claims Case No. 09042701  
                  )  
Claimant )  
\_\_\_\_\_)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Waiver of an overpayment of Basic Allowance for Housing at the dependent rate is appropriate only to the extent that the overpayment was spent for its intended purpose.

**DECISION**

A member of the United States Army requests reconsideration of the February 26, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09012805. The appeal decision waived \$8,624.16 of the government's claim and denied waiver of \$1,947.41 of the total claim of \$10,571.57.

**Background**

The record shows the member was receiving basic allowance for housing at the

dependent rate (BAH-D) on behalf of his dependents. On August 7, 2007, the member divorced. As a result the member was no longer entitled to receive BAH-D. The record shows the member continued to receive BAH-D from August 8, 2007, through January 31, 2008, causing an overpayment of \$10,571.57. During this period the member was no longer entitled to receive dual overseas housing allowance (Dual OHA). However, the member erroneously continued to receive Dual OHA from August 8, 2007, through January 31, 2008, causing an overpayment of \$10,479.70. During this period it was determined that the member was entitled to receive overseas housing allowance at the dependent rate (OHA-D) in the amount of \$12,429.22, which was applied to the Dual OHA debt, leaving the member entitled to receive \$1,949.52. However, instead of applying the \$1,949.52, amount to the BAH-D overpayment, the member was paid that amount in February 2008. Thus, there was still an indebtedness remaining of \$10,571.57 for the overpayment of the BAH-D.

The member requested waiver of the indebtedness. The Defense Finance and Accounting Service (DFAS) recommended waiver of the entire amount. The appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09012805, waived \$8,624.16 of the government's claim and denied waiver of \$1,947.41 of the total claim of \$10,571.57. This decision was based on the fact that the adjudicator found evidence in the record that the member provided support to his dependents only in the amount of \$8,624.16. Title 10 U.S.C. § 2774 provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. *See* DOHA Claims Case No. 02072315 (September 17, 2002), *affirmed by* Deputy General Counsel (Fiscal) (January 7, 2003); DOHA Claims Case No. 06113001 (December 13, 2006); and DOHA Claims Case No. 08082501 (August 25, 2008).

In the request for reconsideration, the member does not specifically request a 30-day extension of the deadline for requesting reconsideration of the appeal decision. However, his appeal is late, and the first issue that he raises in his reconsideration is that he only recently received the letter due to being TDY at a medical conference and acting as the aide-de-camp for his commanding general. He states he is only now able to write his appeal. He also notes that he has been dealing with this situation for 20 months. In the member's request for reconsideration he disagrees that he "failed to provide documentary evidence that the remainder of the overpayment was used for its intended purpose". He asserts that he has repeatedly provided information and documents many times and whenever asked. He points out that he would not have been in this situation if the responsible finance office had timely processed his paperwork, because no action was taken from August 2007 until July 2008. The member asserts that had he not been proactive and insisted that they check on his paperwork, no one would have discovered that no action had been taken. The member includes further bank statements. He points out that this has been an extremely difficult personal time. The member insists the money was used to support his children.

## **Discussion**

Preliminarily, we find that there was good cause for the member's failure to deliver his request for reconsideration to this office within 30 days of the appeal decision due to his military TDY.

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member or former member of the uniformed service if repayment would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or the former member. There is no evidence of those in the file before us. Waiver of collection has another requirement in this instance, and that is that the money be used for its intended purpose.<sup>1</sup> While DOHA appreciates the member's statements relating to his virtues as a soldier and officer, the record before us must contain clear evidence that the money was indeed sent to his dependents. The member sent additional bank statements with bank transactions for the period January 25, 2008, through April 21, 2008. Although these statements still do not show any child support payment for the period January 1 through January 31, 2008, this Board concludes that the payment on February 1, 2008, of \$1,078.02, shown on the member's February 2008 bank statement, was for January 2008. The Board therefore waives an additional \$1,078.02.

### **Conclusion**

Under Department of Defense Instruction 1340.23, ¶E8.12, DOHA must receive a request for reconsideration within 30 days of the appeal decision. The DOHA may extend this period for up to an additional 30 days for good cause shown. We consider good cause has been shown and therefore extend the period to request reconsideration. Having done so, the member acted in good faith in accepting an additional \$1,078.02, for a total of \$9,702.18 in overpayment, but it is not against good conscience and equity to deny waiver of the remaining \$869.39. In accordance with Department of Defense Instruction 1340.23, ¶E8.15, this is the final administrative action of the Department of Defense in this matter.

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<sup>1</sup>The purpose of BAH-D is to reimburse a member at least partially for providing quarters for his dependents when government quarters are not provided. Thus, as set forth in Chapter 10 of volume 1 of the Joint Federal Travel Regulations, a member who pays child support may be entitled to an amount of BAH (often BAH-Diff). If the member receives an overpayment of BAH, it is well established that waiver is appropriate only to the extent that the funds are expended for the purpose intended—*i.e.*, the support of the member's child or children.

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Michael D. Hipple  
Chairman, Claims Appeals Board

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Jean E. Smallin  
Member, Claims Appeals Board

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Natalie Lewis Bley  
Member, Claims Appeals Board

