

KEYWORDS: waiver of indebtedness

DIGEST: Under 10 U.S.C. § 2774, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and allowances to a member or former member of the Uniformed Services if payment would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member.

CASENO: 09051302

DATE: 5/21/2009

DATE: May 21, 2009

In Re:)
) [REDACTED]) Claims Case No. 09051302
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and allowances to a member or former member of the Uniformed Services if payment would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member.

DECISION

A Navy service member requests reconsideration of the March 16, 2009, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claims No. 08102002. In that

decision, our Office granted waiver of \$1,328.40, and denied waiver of \$22,807.86, of the collection of the debt the member owes the government.

Background

The debt occurred when the member arrived at his new Permanent Duty Station (PDS), and an incorrect BAH-D rate was calculated for his pay. This overpayment began in January 2004 and the member attempted to correct the rate in March 2004. The member states that he went to his personnel support detachment (PSD) when he noticed his pay was more than he had been receiving. The member spoke to a named individual at the PSD, and that individual could not determine why his pay had increased. The named individual then contacted the Defense Finance and Accounting Service (DFAS) and was told to submit the discrepancy in writing, which the individual did via email. The named individual sent an email to DFAS stating that the member's BAH-D was incorrect, and requested assistance in correcting it. The member stated that he continued to follow up with the named individual at the PSD. The record reflects that the named individual continued to email DFAS for an answer to the BAH-D discrepancy. Finally, in April 2004, the member states that the named individual informed him that someone at DFAS had answered that he was receiving the correct amount of BAH-D. The member stated he reasonably relied on the answer from the experts and considered the matter closed. The error was not discovered by DFAS until April 2008, leading to the overpayment from the period of January 22, 2004, through March 31, 2008, for a total debt of \$24,136.26.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive a claim for an erroneous payment of pay and allowances to a member or former member of the Uniformed Services if payment would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. The legal definition of "fault" does not imply any ethical lapse on the part of the member or former member. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person; if such a person knows or should know that he is receiving money to which he is not entitled, he is at fault if he fails to bring the excess payment to the attention of the appropriate authorities. In such a situation, waiver is precluded. *See Standards for Waiver Determinations*, DoD Instruction 1340.23, ¶ E4.1 (February 14, 2006), codified at 32 C.F.R. Part 284, Appendix B.

For purposes of this request for reconsideration, we accept the member's statement that he alerted the PSD to the possible error. This is exactly what he should have done. However, our decisions and those of the Comptroller General have consistently held that there is no basis for waiver unless the official(s) providing the advice are identified and the member's version of the events is corroborated in the written record by pay and disbursing officials with evidence of his statement(s) to them and their statement(s) to him. *See* DOHA Claims Case No. 02120917

(December 20, 2002); DOHA Claims Case No. 01010906 (March 8, 2001); DOHA Claims Case No. 97042817 (July 1, 1997); and Comptroller General decision B-256417, July 22, 1994. In this case, we have the member's statement that the named individual at the PSD emailed DFAS with the error requesting correction. We also have the member's statement that he followed up with the named individual at the PSD who eventually told him that DFAS had answered the inquiry with the answer that his pay, specifically the BAH-D, was correct. Most importantly, we have a notarized sworn statement from that same named individual corroborating the statements of the member.

Previously, the adjudicator determined that only a portion of the debt could be waived, as the notarized statement of the named individual from the PSD corroborating the statements of the member was not a part of the record.¹ Such a statement is essential in this type of case, as we have consistently held that a member who suspects he is being overpaid cannot rely on vague assurances from disbursing clerks that his pay is correct.

Conclusion

The member's request for reconsideration is granted and the debt is waived in the full amount of \$24,136.26. 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: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board

¹ This file was returned on two occasions to DFAS requesting additional information. Complete documentation is absolutely essential to meet the strict requirements outlined in long-standing precedents of this Office and the Comptroller General.