

Date: May 19, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 97011401

CLAIMS APPEALS BOARD DECISION

DIGEST

1. A service member who marries another active duty service member is not entitled to basic allowance for quarters (BAQ) and variable housing allowance (VHA) at the with- dependent rate.
2. A service member who received allowances at the with-dependent rate while having certified that he had no dependents should have questioned his entitlements to basic allowance for quarters (BAQ) and variable housing allowance (VHA) at the with-dependent rate. Waiver request is denied.

DECISION

This is in response to an appeal of the U.S. General Accounting Office's (GAO) Settlement Certificate, Z-2942591-056, dated September 17, 1996, which denied waiver under 10 U. S. C. 2774 of a service member's debt to the United States resulting from erroneous payments of pay. Pursuant to Public Law 104-316, October 19, 1996, the authority of the Comptroller General to waive a claim of the United States against a person arising out of an erroneous payment of pay (salary) or allowances, including travel, transportation or relocation expenses and allowances, was transferred to the Director, Office of Management and Budget (OMB). The Director of OMB delegated his waiver authority involving all uniformed service members and civilian employees of the Department of Defense to the Secretary of Defense. The Defense Office of Hearings and Appeals exercises the authority of the Secretary.

Background

The record shows that the service member was married to another active duty member in August 1992. While he remained entitled to receive BAQ-Partial, which he had been receiving prior to his marriage, he erroneously received basic allowance for quarters (BAQ) and variable housing allowance (VHA) both at the with-dependent rate on behalf of his spouse.⁽¹⁾ As a result, he was overpaid \$10,203.70 from August 29, 1992, through March 15, 1994. Miscellaneous credits reduced the overpayment to \$9,923.42.

GAO sustained DFAS's denial of the member's request for waiver stating that there is no indication that the member advised the appropriate officials that his spouse was an active member and that, furthermore, the member certified he had no dependents.

On appeal, the member disagrees with GAO's reasoning for denying his request. The member submits a VHA certification he signed in September 1992 which identifies his spouse as a service member.

Discussion

We may grant waiver of a debt arising out of an erroneous payment of pay and allowances to members or former members if collection 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. See 10 U.S.C.2774 (1995). In the present case the erroneous payments 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 in that regard.

The standard employed to determine whether a member was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person should have been aware that he was receiving payments to which he was not entitled. See Standards for Waiver, 4 C.F.R. 91.5(b)(1996); DOHA Claims Case No. 97013101 (March 20, 1997) and Jeffrey S. Hopf, B-260184, July 28, 1995. We have consistently held that when a member knows or reasonably could be expected to know he is receiving pay in excess of his entitlement, he has a duty to retain such amounts for subsequent refund to the government.

The evidence submitted on appeal does indicate the member informed the Service in September 1992 that his spouse was a service member. However, the record reflects that the member was receiving allowances at the with-dependent rate from December 1992 until February 1994 and that he certified in September 1993 that he had no dependents. The allowances were documented on leave and earning statements he received. The discrepancy between his certification and the allowances should have prompted the member to question his entitlements, and until he received written verification of his entitlements, he should have retained the funds for subsequent refund to the government.

The settlement correctly denied the member's application for waiver since the member failed to inquire and is considered at least partially at fault.

Conclusion

We uphold the denial of the waiver request.

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Joyce N. Maguire

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member Claims Appeals Board

1. The Department of Defense Pay and Allowances Entitlements Manual specifies that a member is not entitled to BAQ on behalf of a spouse who is on active duty in a uniformed service of the United States and entitled to basic pay and allowances in own right. See DoDPM Para. 30224 (1992).