

KEYWORDS: waiver of indebtedness

DIGEST: When a member knows or should know that his receipt of Basic Allowance for Quarters at the with-dependent rate is questionable, waiver of the amounts he erroneously receives is not proper.

CASENO: 98040201

DATE: 5/15/1998

This decision was affirmed by the DoD Deputy General Counsel (Fiscal) on January 26, 2001.

DATE: May 15, 1998

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In Re:)	
	[Redacted])	Claims Case No. 98040201
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Claimant)	
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CLAIMS APPEALS BOARD DECISION

DIGEST

When a member knows or should know that his receipt of Basic Allowance for Quarters at the with-dependent rate is questionable, waiver of the amounts he erroneously receives is not proper.

DECISION

We have been asked to render a decision regarding the request of a Navy member for waiver of a debt in the amount of \$73,032.63. The debt arose when the member received overpayments of Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA) during certain periods between April 14, 1990, and May 15, 1997.

Background

The member was separated from his spouse on September 18, 1988, and divorced on August 13, 1991. By court order, the member was required to pay child support in the amount of \$500 per month for each of his dependent children. On April 13, 1990, the member arrived at a

new duty station and was assigned family-type quarters which significantly exceeded the minimum standard for a member of his rank without dependents.¹ The quarters were redesignated as bachelor quarters for his use, and he received BAQ at the with-dependent rate (BAQ-D) and VHA while he occupied the quarters. In July 1991, the Chief of Naval Operations issued a memo regarding the redesignation of family quarters as bachelor quarters for unaccompanied members. It stated that if geographic bachelors occupied command or billet family quarters, they would forfeit BAQ. Shortly after that memo was issued, the member questioned his entitlement to BAQ-D and VHA. His entitlement to VHA was terminated as of the date of his divorce in August 1991.² The record indicates that he was advised by Naval authorities that he would continue to receive BAQ-D as long as his assigned quarters were the only ones available for him and he made them available to visiting senior officers.

Due to a change in the law which became effective December 5, 1991, members who live in government quarters and receive BAQ-D for payment of child support are entitled instead to the difference (BAQ-DIFF) between BAQ without dependents and BAQ-D. A member who was living in government quarters and receiving BAQ-D on December 4, 1991, was covered by a “grandfather” clause in the law and could continue to receive BAQ-D. Naval authorities determined that under the “grandfather” clause a member who paid child support in an amount at least equal to BAQ-DIFF for his rank would continue to receive BAQ-D until he became entitled to BAQ-D for another reason.

In August 1992, the member was transferred to a new duty station. He occupied family-type quarters which exceeded the minimum standard for an unaccompanied member of his rank and were redesignated as bachelor quarters for his use. The quarters were not available for joint occupancy, but Naval authorities determined that the member continued to be entitled to BAQ-D because of the “grandfather” clause.

Two years later, in August 1994, the member was transferred overseas and occupied family-type quarters which exceeded the minimum standard for an unaccompanied member of his rank and were redesignated as bachelor quarters for his use. Again, the member continued to

¹A member of his rank is entitled to quarters of 400 square feet. A member who is assigned to family quarters which exceed the minimum standard for his rank is not entitled to BAQ for payment of child support unless the only quarters available exceed the standard and are made available for joint occupancy. See paragraph 260301C of volume 7A of DoD Regulation 7000.14, the DoD Financial Management Regulation (Military Pay Manual).

²A member who is living in government quarters and is receiving BAQ solely for payment of child support is not entitled to VHA. See paragraph 8011 of volume 1 of the Joint Federal Travel Regulations.

receive BAQ-D based on the “grandfather” clause.³ Due to conflicting legal views, the commanding officer of the base where his quarters were located advised the member to request a decision from the Comptroller General as to his BAQ entitlement. The member decided not to seek a Comptroller General decision.

As of June 1, 1995, the member’s obligation to pay court-ordered child-support ended, but the member provided evidence that he continued to support his children.⁴ In December 1996, the member was transferred back to the continental United States and occupied family-type quarters which significantly exceeded the minimum standard for an unaccompanied member of his rank which were redesignated as bachelor quarters for his use. The record indicates that all quarters available to the member exceeded the standard for his rank and that his quarters were not made available for joint occupancy.

Pursuant to the investigation of a complaint made to Naval authorities, payment of BAQ-D to the member was terminated effective May 15, 1997. Review by finance officials indicated that the member was not entitled to VHA while at the first duty station in question (between April 1990 and August 1992). Their review also indicated that because he occupied quarters which exceeded the minimum standard for his rank and were not made available for joint occupancy, he was not entitled to BAQ while at that duty station and therefore was not covered by the “grandfather” clause. He was therefore not entitled to BAQ-D during subsequent assignments, although he was entitled to BAQ-DIFF between August 1994 and December 1996.⁵ In August 1997, the DoD Office of General Counsel issued an opinion that the requirement that quarters in excess of the standard for the member’s rank be made available for joint occupancy is not satisfied by “visits or other temporary arrangements of short duration.” In October 1997, the member requested waiver. He also submitted a memo questioning the validity of the debt.

Discussion

Under 10 U.S.C. § 2774, we may waive a claim of the United States against a member or former member of the uniformed services for erroneous payments of pay and allowances if

³There is verification in the record that this assignment was a special duty assignment with diplomatic responsibilities. Therefore, it was later determined that although the member was not entitled to BAQ-D while there, he was entitled to BAQ-DIFF at that duty station. See paragraph 260301D of the Military Pay Manual. The final calculation of the member’s debt takes that entitlement into account.

⁴Because it does not effect the outcome of this waiver decision, we take no position at this time as to whether voluntary direct support of a dependent child would satisfy paragraph 260416 of the Military Pay Manual. For payment to the spouse of amounts in excess of court-ordered child support, see paragraphs 260406G and 260416E of the Military Pay Manual.

⁵See footnote 3, *supra*.

collection would be against equity and good conscience and not in the best interest of the United States. Waiver cannot be granted if there exists any indication of fraud, fault, misrepresentation, or lack of good faith by the member or former member. The standard we employ in determining whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving more than his entitlement. See Petty Officer Ricky Johnson, USN, B-256417, July 22, 1994; and Petty Officer First Class Patrick K. Reedy, USN (Retired), B-257862, Jan. 17, 1995.

The administrative report in the case before us states that the overpayments occurred due to disbursing error rather than misconduct on the part of the member, and we concur. However, the member is not without fault as the term is used in Comptroller General and DOHA decisions. The member had approximately 26 years of service when he arrived at the first duty station in question and is therefore deemed to be generally familiar with personnel and pay policies. As a general rule, members living in government quarters are not entitled to BAQ. In fact, the member did question his entitlement to BAQ-D while living in government quarters at the time of his divorce. While he was advised that he would continue to receive BAQ-D but not VHA, the issue of his entitlement to BAQ-D continued to arise at his subsequent duty stations--whether raised by him or by others--as his quarters in those duty stations were redesignated as bachelor quarters. In situations where a member suspects or reasonably should suspect that he is receiving pay or allowances in excess of his entitlement, Comptroller General and DOHA decisions indicate that the member has a duty to set the excess money aside for possible repayment. See DOHA Claims Case No. 97120901 (January 15, 1998).

In our view the member knew or should have known that his receipt of BAQ-D was questionable from the time he arrived at his new assignment in 1990 and especially when his divorce became final in August 1991. Moreover, he received further evidence that he was being paid in excess of his entitlement when he arrived at his overseas assignment in 1994 and the commanding officer of the base advised him to seek a decision of the Comptroller General due to conflicting legal views on the matter. In spite of the fact that the commander had drafted a request for a Comptroller General decision for him, the member chose to rely on the legal view that supported his continued receipt of BAQ-D rather than seeking a definitive resolution of the conflicting legal views and saving the difference for possible return to the government. Therefore, the member is not without fault as that term is used in our decisions, and waiver cannot be granted. See DOHA Claims Case No. 97013101 (March 20, 1997).

The member not only requests waiver, but also questions the validity of the debt which gave rise to the waiver request. Although we make the following comments regarding the validity of the member's debt, we note that this is a waiver decision. Our decisions must be based on the applicable statutes and regulations as well as prior DOHA and Comptroller General decisions. We are unable to grant exceptions to those legal authorities. See DOHA Claims Case No. 96123013 (June 2, 1997).

Entitlement to BAQ in this instance is based on 37 U.S.C. § 403, Exec. Order No. 11,157,

§ 404, 29 Fed. Reg. 7973 (1964), and the above-cited paragraphs of volume 7A of DoD Regulation 7000.14, the DoD Financial Management Regulation (Military Pay Manual). We agree with the determination made by Naval authorities and the Defense Finance and Accounting Service that the member was not entitled to BAQ-D on December 4, 1991, because he occupied quarters which exceeded the minimum standard for his rank which were not made available for joint occupancy. Therefore, he was not covered by the “grandfather” clause. The fact that the member received incorrect information regarding his entitlement does not invalidate his debt, since the government is not liable for incorrect information provided by its officers, agents, or employees. See DOHA Claims Case No. 97012101 February 6, 1997); and Petty Officer John R. Blaylock, USN, 60 Comp. Gen. 257 (1981).

The member argues that he was required to accept quarters in excess of the minimum standard for his rank and that quarters meeting the minimum standard would have been inadequate for his position. The member has not provided evidence that he was required to accept quarters in excess of the standard without loss of his entitlement to BAQ. We note that the July 1991 Chief of Naval Operations’ memo referred to above stated that unaccompanied members in family quarters forfeited BAQ. With regard to the adequacy of quarters, the regulations governing the minimum standard allow for the same minimum standard for officers from O-3 through O-10. We are aware of no exceptions to the regulations based on the member’s position. See B-171196, Jan. 11, 1971.

The member disputes the opinion issued by the DoD Office of General Counsel that the requirement that quarters which exceed the minimum standard must be “made available for joint occupancy with other members” was not satisfied by the member’s making them available to other members on visits or other short periods of time. We agree with the Office of General Counsel that “joint occupancy” should be given its commonly understood meaning, which requires occupancy of a permanent nature.

As a senior officer with well over twenty years of Naval service, the member knew or should have known that members generally do not receive BAQ while living in government quarters, and that policy was emphasized in the July 1991 Chief of Naval Operations’ memo. Moreover, the Comptroller General has ruled that such redesignation does not affect a member’s entitlement to BAQ-D. See Colonel James W. Goodman, USAF, B-236018, Aug. 22, 1990. While the member argues that quarters of 400 square feet would not meet the needs of his position (as did Colonel Goodman) and that his position required him to accept the large quarters he occupied, the relevant criterion for resolving an allowance question is the cost to the government of providing the quarters. If the government is providing quarters which are significantly more expensive than the standard quarters for a member of his rank (as is the case when an unaccompanied member occupies family quarters), the member is not also entitled to BAQ.⁶ In the situation before us, the member was occupying quarters that significantly exceeded

⁶That criterion is discussed in Sergeant Luis C. Armendariz, USAF, 62 Comp. Gen. 37 (1982). In that decision, the member occupied single quarters which substantially exceeded the

the minimum standard of 400 square feet while receiving BAQ-D, which by 1997 amounted to over \$900 per month.

Conclusion

We deny the member's request for waiver of his debt of \$73, 032.63.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

Christine M. Kopocis
Member, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

standard for his rank. He claimed partial BAQ under 10 U.S.C. § 1009. The Comptroller General ruled that he was not entitled to partial BAQ because the government was providing him quarters which were substantially more expensive than standard quarters for his rank. While the situation is not the same as that of the member in this case, it is analogous as regards the cost of quarters.