

DATE: May 29, 1998

In Re:

[Redacted]

Claimant

Claims Case No. 98051813

CLAIMS APPEALS BOARD DECISION

DIGEST

A member assigned to government quarters that are not considered adequate to meet the needs of his family should receive a reduced basic allowance for quarters (BAQ) in accordance with the inadequacy assigned to the quarters. A member who receives full BAQ in such circumstances is considered at least partially at fault under the waiver statute and his debt may not be waived under 10 U.S.C. § 2774.

DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 98011504, February 3, 1998, which denied waiver under 10 U.S.C. § 2774 of \$2,465.42 of a former service member's debt to the United States resulting from erroneous payments received incident to his military service.

Background

The record indicates that the member was receiving basic allowance for quarters (BAQ) at the full ith-dependents rate. Effective January 10, 1997, he was assigned government quarters that were not considered adequate to meet the needs of his family. Due to administrative errors, which included his base office forwarding his quarters assignment paperwork to the incorrect office⁽¹⁾, the member continued to receive full BAQ through July 15, 1997, rather than a reduced BAQ. He was overpaid \$2,465.42. The member states that he questioned the accuracy of his pay on three different occasions and was assured it was correct. However, the Defense Finance and Accounting Service (DFAS) administrative report states that the member's commanding officer was unable to verify that the member questioned his entitlement to full BAQ. The member was notified of the overpayments when they were discovered by his base office in August 1997. Our Settlement Certificate denied the waiver request stating that a member of his rank with 23 years of military service could not have believed he was entitled to receive full BAQ while occupying government quarters. The Settlement found that he should have pursued the matter further, including requesting written verification of his entitlement, and until he received such documentation, he should have retained the erroneous funds for subsequent refund to the government.

On appeal, the member states that during much of the period of time for which he was overpaid he was seriously ill. He contends that his illness, absence from work, and prescribed medication impacted his actions that otherwise would have included more diligently pursuing the overpayment of BAQ. He was subsequently determined to be Not-Fit-For-Duty and was given a 40% disability rating and was separated in December 1997. The member contends that DFAS did not take his illness into consideration when making the determination on his waiver request. He reiterates the financial hardship to his family that will be caused by his repaying this debt. He believes that there are no rules set for granting waivers and that it is a discretionary function of the commanding officer, who in his case does not care to rule in his favor.

Discussion

Section 2774 of title 10 of the United States Code provides authority for waiving claims for erroneous payment 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. Generally these criteria are met by a finding that the claim arises from an administrative error with no indication of fraud, fault, misrepresentation or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver. See Standards for Waiver, 4 C.F.R. § 91.5.

The standard employed to determine whether a person was "at fault" in accepting an overpayment is whether, under the particular circumstances involved a reasonable person should have known or suspected that he was receiving more than his entitlement. See Petty Officer Ricky Johnson, USN, B-256417, July 22, 1994; and DOHA Claims Case No. 97052730 (July 10, 1997). A service member who knew that he was receiving payment in error has the duty to retain such amounts for refund. A service member is not entitled to waiver as a matter of right whenever he receives an overpayment as a result of an administrative error. See DOHA Claims Case No. 97012103 (June 26, 1997).

It is reasonable to believe that a Yeoman, whose responsibility is to insure that the officers are being paid their correct entitlements, is aware that upon receipt of inadequate quarters a service member forfeits at least a percentage of BAQ, in accordance with the inadequacy assigned to the quarters. It is also reasonable to believe that a member with over 20 years of service is aware of the rules governing this basic entitlement. In the present case, the member acknowledges that he was aware of the overpayments but states that he was told by appropriate officials that his pay was correct.⁽²⁾ The member should have retained the overpayments for eventual return to the government. It is unfortunate that the member's health was poor during the period in question; however, that does not provide a basis for waiver in this situation because of his knowledge of the overpayments. Additionally, financial hardship is not a sufficient reason to allow an applicant to retain amounts owed to the government. See DOHA Claims Case No. 97041401 (June 26, 1997); and Petty Officer First Class Patrick K. Reedy, USN (Retired), B-257862, Jan. 17, 1995.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. We note that the Navy has taken action to prevent similar errors in the future.
2. We note that there is nothing in the record that corroborates the member's version of the events, and there are no statements from any of the paying and disbursing officers to whom the service member spoke which explains what the member told them and they told him. See DOHA Claims Case No. 97041401 (June 26, 1997).