

This decision was affirmed by the Deputy General Counsel (Fiscal), Department of Defense, on February 9, 2001.

In Re:

[Redacted]

Claimant

June 9, 1999

Claims Case No. 99052709

CLAIMS APPEALS BOARD DECISION

DIGEST

An Air Force member erroneously continued to receive Basic Allowance for Quarters (BAQ) at the without dependent rate, along with BAQ at the differential rate (BAQ-DIFF) even after he moved into government quarters. He was receiving BAQ-DIFF as a result of a support obligation. The fact that the member was initially misinformed as to his entitlements does not provide a basis for waiver, since a reasonable person who is a major with substantial active duty service would have set the money aside while he sought further clarification from appropriate authorities. When a member is or should be aware that he has received an overpayment, he does not acquire title to the excess amounts, and he has a duty to hold the money for eventual repayment.

DECISION

The member appeals the January 21, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98083123, in which DOHA disallowed the member's application for a waiver of an indebtedness of \$7,903.24. The member became indebted in this amount as a result of erroneous payments of Basic Allowance for Quarters at the "without dependent" rate (BAQ-W/O) after he was assigned to government quarters and prior to discovery of the error on March 15, 1998.

Background

The member, a major now with nearly 19 years of active service, was assigned to government quarters effective March 27, 1997. He stated that he was advised that he was entitled to continue to receive BAQ-W/O because he was providing

support for his dependent child.⁽¹⁾ However, during the same period, the member also received Basic Allowance for Quarters at the "differential" rate (BAQ-DIFF) which was the difference between Basic Allowance for Quarters at the "with dependent" rate (BAQ-W) and BAQ-W/O. The record also indicates that the amount of the child support paid by the member was equal to the BAQ-DIFF rate.

Effective December 5, 1991, when a member is assigned government quarters and he qualifies for BAQ solely because he pays child support, he is entitled to BAQ-DIFF for payment of child support if he meets all appropriate criteria.⁽²⁾ Under regulation, a member who was assigned to single-type government quarters and who was entitled to BAQ solely on the basis of the member's payment of child support as of December 4, 1991, was permitted to continue to receive BAQ-W until such time as he became entitled to receive BAQ-W for some other reason. *See* paragraph 260416C, *supra*, and DOHA Claims Case No. 98040201 (May 15, 1998).

The member contends that he was entitled to both BAQ-W/O and BAQ-DIFF, but he does not argue that he meets the requirements of the paragraph 260416C exception. Appealing through a member of the United States Senate, the member argues that he and other members on unaccompanied remote tours who have family support obligations and who are not the custodial parents of the minor dependents, are treated unfairly and inequitably compared to members who remain married because they receive less BAQ than the similarly situated married member on the same type of unaccompanied tour living in single-type quarters. The member also mentions that repayment would result in financial hardship.

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 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 primary contention of the member's appeal appears to be that an inequitable statutory and regulatory policy scheme lead to disparate treatment and that the enforcement of the intended policy is against equity and good conscience. Section 2774 is not intended to correct such a perceived injustice, and we have no authority to entertain an application for waiver on that basis. Moreover, we have no authority to change public laws or regulations affecting a service member's benefits.

The Settlement Certificate assumed that the member received incorrect advice, but found that the member should have continued to question his receipt of BAQ-W/O because he moved into government quarters. As a general rule, members living in government quarters are not entitled to BAQ. *See* DOHA Claims Case No. 98040201, *supra*. Moreover, when a member moves into government quarters, he should reasonably expect a decrease or termination of BAQ. *See Petty Officer Ricky Johnson, USN, supra*. In absence of other evidence, we agree with the Settlement Certificate that a person of the member's rank and experience should have questioned receipt of BAQ-W/O when he moved into quarters. The member's leave and earnings statements distinguished between the two types of BAQ. 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); and *Captain Douglas K. Basiger, USAF*, B-256000, July 14, 1994. Finally, the fact that repayment may cause hardship does not provide a basis for waiver. See DOHA Claims Case No. 98121616 (February 18, 1999); and DOHA Claims Case No. 97090809 (September 23, 1997).

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. The record indicates that the member completed the required "recertification" for BAQ on April 1, 1997, indicating that he lived in government quarters. It was reviewed on April 3, 1997, but the reviewer failed to identify the problem.
2. The current regulation is located in paragraph 260416 of Volume 7A of DoD 7000.14-R, *DoD Financial anagement Regulation, Military Pay Policy and Procedures - Active Duty and Reserve Pay (Military Pay Manual)*. This provision

is based on title 37 of the United States Code, Section 403(m) (37 U.S.C. § 403(m)).