

KEYWORDS: waiver of indebtedness

DIGEST: Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and 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 Unites States.

CASENO: 2009-WV-040805.3

DATE: 8/12/2010

DATE: August 12, 2010

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2009-WV-040805.3
)	
)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and 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 Unites States.

DECISION

A member of the United States Air Force Reserve requests reconsideration of the June 2, 2010, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2009-WV-040805.2. In that decision, this Office denied the member’s request for waiver of \$8,128.99.

Background

The record shows that the member was commissioned on July 7, 2006, after attending Officer Basic Training, with follow-on Temporary Duty (TDY) and Permanent Change of Station (PCS) orders. As a result of his orders, the member was entitled to receive basic allowance for housing (BAH), which he correctly received through August 6, 2006. However, on August 7, 2006, the member was assigned and occupied government quarters. Therefore, the member was no longer entitled to receive BAH. Due to an administrative error, the member continued to receive BAH from August 7, 2006, through May 15, 2007, causing an overpayment of \$10,387.30. The member requested waiver of \$8,128.99, and that was the amount that was considered.

In his reconsideration request, the member claims that he was advised by his finance office that while he was on TDY in Texas, he was still legally entitled to BAH for his home of record. The member argues that his home of record was in California, his training was in Texas, and his permanent duty station was in California. Since he was returning to his home of record, he was not required to give up that residence. He emphasizes that he affirmed and reaffirmed with the finance office that he was entitled to the BAH at his home of record while on TDY. He states that he would not have been able to meet his financial obligations with only his basic pay, with student loans being the most cumbersome. He argues that based on principles of fairness and equity the debt should be waived because many of the other Reservists on TDY for training at his Reserve station in California were single and stayed in quarters with no dependents. He states they received BAH entitlements at their homes of record, and it is not equitable to treat him differently because he brought his family with him. Finally, at the appeal level, the adjudicator noted that the statutory purpose of BAH is to offset the cost of a member's housing expenses, and there was no indication that the member had used the money for its intended purpose, as there was no lease agreement or mortgage payment records in the file. In his request for reconsideration, the member provides notice that, in fact, the property in California belongs to his mother and father and he had a verbal lease with them concerning the rent. He provides a notarized statement from his mother as proof of their arrangement.

In his reconsideration request, the member also claims reliance on a uniformed travel determination from the Per Diem, Travel and Transportation Allowance Committee (PDTATAC), dated March 31, 2006, Subject: MAP 18-06—BAH Rules for Reserve Members on Active Duty More than 30 Days. Attached to this PDTATAC determination is a memorandum from PDTATAC to the Defense Finance and Accounting Service (DFAS), containing the same date and subject, outlining three rules for implementation of the 30-day active duty threshold for Reserve Component members. The member relies upon the third rule which he believes states that Reserve Component members called to active duty for 140 or more days and authorized PCS with household goods (HHG) movement continue to receive housing allowances based on the PDS (permanent duty station). He argues that for him that would be his home of record in California.

Discussion

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and 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 arose from 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.

A review of the record indicates that new entitlements for BAH for Reserve members came into effect as the member was called to duty for training. It also indicates that orders for the member were sent to Arizona, sending him TDY to California for two weeks, and then to training in Texas. The “home of record” the member refers to is his parents’ home which he stayed in for two weeks while on TDY, and thereafter, according to the statement provided by his mother, “[he] provided a consistent and fair amount of money each month that coincided with my mortgage of this home to secure and hold this home as their primary residence for the duration of the period they were in Texas.” The mother offers to provide copies of checks should they be required.

DFAS does not construe the member’s BAH entitlement while stationed in Texas the same way as the member does.¹ Of course, the member is free to file a claim for BAH with DFAS if he believes that he has a legal entitlement to it. Our focus is limited to whether waiver of the indebtedness under 10 U.S.C. § 2774 is appropriate here. Preliminarily, however, we will address some of the contentions raised by the member which we believe may not be well-founded.

First, a home of record is initially the home state from which a member enters the military. The *Certificate of Release or Discharge From Active Duty*, (DD 214) that the member received when he was separated as an enlisted member at completion of officer training, states that the member’s home of record when he entered active duty in April 2006 was in Arizona, not California. After that time, a new home of record can be established by having ties with a new state; driver’s license, voters’ registration, taxes, intent to return, etc. But, there is no evidence in this record that California was the member’s home of record between July 2006 and May 2007. A two-week TDY is certainly not a basis for us to conclude that he established a new one.

Second, 1 JFTR ¶ U4129-E, prohibits reimbursement for lodging costs when staying with friends or family while on TDY. The Comptroller General has recognized that the purpose of the prohibition against reimbursing friends and relatives is to eliminate potential abuses from occurring in connection with claims involving lodging with friends or family. *See* DOHA Claims Case No. 04020503 (February 18, 2004), 60 Comp. Gen. 57 (1980), and B-199683, Feb. 24, 1982. This does not apply directly to BAH payments because they are determined without

¹ The last sentence of Rule 3 of the PDTATAC memorandum states that “Reserve component members called to active duty for 140 or more days and authorized PCS HHG movement continue to receive housing allowances based on the PDS (duty location).” It appears that the member construes the words PDS as his Reserve unit’s location in California, while DFAS construes PDS as the duty location to which a member is given PCS entitlements with authorized PCS HHG transportation (citing 1 JFTR U10428F and Table U10E-16). While this Office could consider appeals involving the proper interpretation of these authorities, such action is not appropriate at this time.

regard to the amount a specific member pays for rent, a mortgage, property taxes, etc. However, it would apply to any claim made while on TDY, and it would be relevant evidence in any determination of whether the member used the erroneously paid BAH for housing expenses for the member and his dependents.

In considering whether to grant waiver relief, the Board may look at whether the erroneously paid BAH was used for its statutory purpose, *i.e.*, whether it was used to offset the cost of housing expenses for the member and his dependents. In this instance, the member failed to prove by clear and convincing evidence that the BAH erroneously received was being used for this statutory purpose. The claim by the member that his mother (not a recognized dependent) was paying a mortgage on her home in California, in part for the benefit of the member and his family, was first raised or supported on reconsideration, and is, therefore, self-serving and worthy of little probative value.² More objectively, the record reflects that family housing was provided by the government while the member and his dependents were in Texas. Additionally, the member had already made a statement regarding BAH—*i.e.*, that he would not have been able to meet his financial obligations with only his basic pay, with student loans being the most cumbersome problem. If there is any indication that money is not being used for its intended purpose, then collection of an overpayment would generally not be against equity and good conscience; nor would it be contrary to the best interests of the United States. *See* DOHA Claims Case No. 06071717 (July 31, 2006), and DOHA Claims Case No. 06113001 (December 13, 2006).

The member claims that he “affirmed and reaffirmed” with his finance office that he was entitled to BAH at his home of record while on TDY in Texas, but the record is devoid of statements from any individuals from the finance office confirming this advice. In prior decisions, we have emphasized the importance of written statements from the officials who provided the erroneous advice, including a detailed description by them of what they told the individual. *See, e.g.*, DOHA Claims Case No. 2010-WV-051201.2 (June 17, 2010); DOHA Claims Case No. 02120917 (December 20, 2002); DOHA Claims Case No. 97042817 (July 1, 1997); and Comptroller General decision B-256417, Jul. 22, 1994.

For these reasons, the member’s request for waiver of \$8,128.99 is denied.

Conclusion

The member’s request for reconsideration is denied, and we affirm the June 2, 2010, decision. In accordance with Department of Defense Instruction 1340.23, ¶ E 8.15, this is the final administrative action of the Department of Defense concerning the member’s waiver request.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

² In the Appeal Decision the adjudicator found that DFAS had requested the member to provide written documentation such as a lease agreement or mortgage payments to show that the BAH the member received was used for the intended purpose during the overpayment, but the member failed to provide this.

///Original Signed///

Jean E. Smallin
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board