

DATE: June 8, 2022

In Re:)
 [REDACTED]) Claims Case No. 2021-WV-091712.2
)
Claimant)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

To be considered under the provisions of 10 U.S.C. § 2774, a service member’s application for waiver must be received within five years of the discovery of the debt.

DECISION

A former member of the U.S. Navy requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-WV-091712, dated December 10, 2021. In that decision, DOHA upheld the Defense Finance and Accounting Service’s (DFAS) determination that the member’s waiver request could not be considered because he did not submit his application within the five-year statute of limitations as set forth under 10 U.S.C. § 2774.

Background

The member enlisted in the Navy in June 2000. He received a General Discharge (Under Honorable Conditions) effective April 20, 2004. Three separate overpayments, totaling \$10,170.21, are included in his waiver request.

The first overpayment was a result of excess leave and a one-day leave penalty that was assessed upon him. During the period of October 2003 through April 2004, he earned 40 days of leave, but took 53 days of leave (which included a one-day leave penalty). The 12 days of excessive leave and the one-day penalty resulted in an indebtedness of \$1,218.60.

The record also shows that he was overpaid \$162.82 in April 2004. During the period April 1, 2004, to April 20, 2004, he was entitled to receive \$1,947.53 in net pay, but due to an administrative error, he erroneously received \$2,110.35.

Finally, he received an \$8,788.79 overpayment when his pay records were not updated in a timely manner to reflect his separation on April 20, 2004. He erroneously continued to receive active duty pay during the period May 1, 2004, through August 15, 2004, resulting in the \$8,788.79 overpayment.

The \$10,170.21 overpayment was posted to his military pay account on August 22, 2004. He acknowledged in writing that he became aware of the erroneous overpayment in late 2004 or early 2005 when he received a phone call from a DFAS employee. He indicated that he knew he was responsible to repay the overpayment. However, the record reflects that the member did not submit a written request for waiver until October 15, 2019, when he signed the DD Form 2789, *Waiver/Remission of Indebtedness Application*, which was received by DFAS in December 2020.

The DOHA adjudicator upheld DFAS's determination that the member's waiver request could not be considered because it was not received within the five-year statutory period set forth under 10 U.S.C. § 2774. Further, the adjudicator found that even if the waiver application had been submitted in a timely manner, the member had not established he had a reasonable expectation to remain in pay status in excess of the days of leave he had accrued, or that he had a reasonable expectation to receive military pay and allowances beyond his April 20, 2004 separation date. As a result, the adjudicator found that waiver would be denied on its merits.

In his request for reconsideration, the member argues that key elements in his rebuttal were overlooked by the adjudicator. He asserts that 10 U.S.C. § 2774 and 31 U.S.C. § 3702 require equitable consideration of his waiver request. He claims that recovery of the debt would bring discredit or embarrassment to the Navy because he could not think clearly at that time due to the death of his grandfather, his mental-health illnesses, and hospitalization. He had previously provided documentation of his mental-health history that reflect an onset in 2005. He states that he was unaware of the circumstances that caused the debt at that time.

Discussion

Under 10 U.S.C. § 2774, we have authority to waive collection of erroneous overpayments of pay and allowances to a member of the uniformed services 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* Department of Defense Instruction 1340.23 (hereinafter *Instruction*), *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, ¶ E4.1.2 (February 14, 2006). 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 part of the member.

However, 10 U.S.C. § 2774(b)(2) prohibits waiver of a claim if the member's application for waiver is received by the Component concerned, in this case DFAS, after the expiration of five years immediately following the date on which the erroneous payment was discovered. *See* Instruction ¶ E5.6.¹ The date of discovery is the date the debt was definitely determined by an appropriate official that an erroneous payment has been made. *See* DOHA Claims Case No. 2010-WV-110802.3 (August 11, 2011); DOHA Claims Case No. 06070704 (July 17, 2006); and 54 Comp. Gen 133 (1974). In this instance, the date of discovery is August 22, 2004.

In a December 18, 2020 letter, the member acknowledged that the debt was posted to his account on August 22, 2004, and that he became aware of the erroneous overpayment in late 2004 or early 2005 when he received a telephone call from a DFAS employee. However, he did not submit a written request for waiver until more than 14 years after discovery of the debt due to his mental capacity. Since the member failed to submit a written request for waiver during the five years after the discovery of the debt, we have no authority to consider it. Despite the member's mental health at the time, 10 U.S.C. § 2774 provides no exceptions to the five-year limit.

In the member's rebuttal, he raised 31 U.S.C. § 3702, which is a separate statute regarding military member claims and has no direct bearing on our waiver determination. If the member wishes to contest the validity of this debt or any other amount being collected from him by disputing it and proving his entitlement, he may do so by filing a military pay and allowance claim through the Navy and DFAS under 31 U.S.C. § 3702. Any appeal of the denial of his claim would be directed to DOHA. *See* DoD Instruction 1340.21 (May 12, 2004).

The member may also seek remission of his debt under the authority of 10 U.S.C. § 8271, and submit a NAVMC 11082, *Financial Statement -Remission of Indebtedness*, to the Secretary of the Navy. Remission of indebtedness is a separate remedy from waiver of an erroneous payment under 10 U.S.C. § 2774. Under 10 U.S.C. § 8271, in deciding whether a debt incurred on active duty should be remitted, the Secretary of the Navy has much broader discretion over whether or not the member's debt should be collected in full or in part. Under the remission statute, the Secretary of the Navy may consider the member's financial situation and the hardships imposed on him. The denial of a waiver under 10 U.S.C. § 2774 does not preclude a member from applying for the remission or cancellation of the debt.

¹We note that at the time the erroneous payment was discovered in this case, August 22, 2004, the time limit for applying for waiver was three years. Effective March 1, 2007, the time limit was changed to five years. *See* Pub. L. No. 109-364, Div. A, Title VI, § 671(a)(1), 120 Stat. 2083, 2270 (2006).

Conclusion

The request for reconsideration is denied, and we affirm the DOHA appeal decision, dated December 10, 2021. In accordance with Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board