

DATE: July 15, 2024

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In Re: )

[REDACTED] )

Claimant )

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Claims Case No. 2020-WV-122123.3

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Title 10, United States Code, § 2774 provides authority for waiving claims for erroneous payments 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, provided there is 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.

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

**DECISION**

A member of the U.S. Air Force requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-WV-122123.2, dated December 5, 2023. In that decision, DOHA denied the member's request for waiver of a debt in the amount of \$15,262.72.

**Background**

The member, a Staff Sergeant, was accessed into the Air Force from the Air National Guard, effective September 9, 2014, as a First Lieutenant in the grade of an O-E1. However, due to an administrative error, his pay account erroneously reflected that he was entitled to receive pay as an O-1, instead of an O-E1. As a result of that error, he received pay as an O-1 during the period September 9, 2014, through March 31, 2015, causing him to be underpaid \$5,457.46 in

basic pay and basic allowance for housing (BAH). In March 2015, the member's pay account was updated to reflect that he was entitled to receive pay as an O-E1. As a result, he received \$14,495.60 in basic pay and BAH during the period April 1, 2015, through May 31, 2015. However, it was determined that the member was only entitled to receive \$12,199.20 in basic pay and BAH. As a result, the member was erroneously overpaid \$2,296.40 (\$14,495.60 - \$12,199.20). Since he was previously underpaid \$5,457.46, the amount due the member was reduced to \$3,161.06 (\$5,457.46 - \$2,296.40).

In June 2015, additional adjustments were made to the member's pay account. As a result of the adjustments, during the period June 1, 2015, through July 31, 2015, the member erroneously received \$30,622.98, when he should have only received \$12,199.20. Therefore, he was overpaid \$18,423.78 (\$30,622.98 - \$12,199.20). Since the member was still due \$3,161.06, that amount reduced his debt to \$15,262.72 (\$18,423.78 - \$3,161.06).

The Defense Finance and Accounting Service (DFAS) reported the member's total indebtedness as \$23,289.04. Therefore, the member requested waiver of his debt in that amount, and DFAS recommended that DOHA waive a portion of the debt. Specifically, DFAS recommended waiver in the amount of \$14,285.12, and denial of \$9,003.92. Upon review of the case file, the DOHA adjudicator found that the documentation in the case file did not support the amount of the debt as \$23,289.04. Therefore, on April 5, 2021, the adjudicator remanded the case file to DFAS to properly calculate the amount of the debt. In that remand, the adjudicator advised DFAS that after compiling a new debt computation and verifying the debt amount, DFAS should provide the member with the opportunity to submit a new waiver request with the proper debt amount reflected on the DD Form 2789, *Waiver/Remission of Indebtedness Application*. On November 29, 2023, after reauditing the member's debt and verifying the total debt to be \$15,262.72, DFAS resubmitted the member's waiver package to DOHA for consideration.

In the DOHA decision dated December 5, 2023, the adjudicator outlined in specific detail an accounting of the member's debt. The adjudicator denied waiver of the debt in the amount of \$15,262.72 because the member knew or should have known that he was being overpaid. In that regard, the adjudicator relied on a statement made by the member in a memorandum of record dated December 11, 2018. In that statement, the member stated the following:

A debt was generated against my pay record in early 2015 after I was underpaid and subsequently overpaid. This was noticed and my first recorded mention of this was in an e-mail to [REDACTED] on 4 Jun 2015.

In addition, the adjudicator noted that the member's leave and earnings statement (LES) for the month of June 2015 reflected a payment to the member in the amount of \$21,049.90 in basic pay, an advance debt of \$17,417.42, and a deduction in the amount of \$8,480.17 for a debt. The adjudicator concluded that although the member had been underpaid \$5,457.46 in March and April 2015, there was no indication in the record that he had a reasonable expectation of receiving a lump sum payment of \$21,049.90 for basic pay. The adjudicator acknowledged that the member promptly took action to repay the debt in July 2015. Although the member stated

that additional debts related to the original debt period were subsequently generated on his account, the adjudicator explained that the DOHA waiver decision only involved the debt in the amount of \$15,262.72, and if the member had additional debts or inquiries related to the original debt amount, he should address those concerns to his pay office and/or DFAS.

In his request for reconsideration, the member states that although he believes that there was a debt on his account, he has no doubt that the debt amount is incorrect. He states that while he was in Air Force Officer Training School from July 2014 through September 2014, he was not paid for an extended duration because of an administrative error during his transfer from the Air National Guard to the Air Force. He states that as a prior enlisted member with dependents, he was entitled to more than \$10,000.00 in combined compensation from July 2014 through August 2014, but this has not been accounted for to offset his debt. He further states that the debt amount for which he requested waiver is not the amount he already repaid, but additional debts discovered later. He attached his LES for June 2015, and notes that it reflects his total indebtedness as \$9,003.92. He states this amount was carried forward until July 21, 2015, when a series of debt notification letters were generated. He attaches copies of three checks he wrote to satisfy the total debt amount of \$9,003.92. He also states that collection of his debt was resumed without his knowledge, while the debt was supposed to have been suspended, during December 2018. That resulted in \$2,312.73 being withheld from his pay. He concludes that he has been asked to pay for a debt amount that he did not incur and that is not correct. He states that any further collection from him can only be considered erroneous and unjust. He requests that DOHA either waive his debt or direct a full accounting of his entire pay record.

### **Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments and allowances made to members or former members 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. The implementing regulation for our waiver authority is set forth under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). Paragraph E4 of the Instruction sets forth the standards for waiver. A waiver is not a matter of right but is available to provide relief as a matter of equity if the circumstances warrant. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. *See* Instruction ¶ E4.1. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting a waiver. *See* Instruction ¶ E4.1.3. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the Government, even if the Government fails to act after such notification. *See* Instruction ¶ E4.1.4.

Preliminarily, we must stress that DOHA has no authority over the establishment of a debt against a member. Under the *Debt Collection Act*, 5 U.S.C. § 5514, DFAS has the authority over the establishment of debts, including the calculation and the amount of a debt; notifying the member of the debt; conducting due process hearings on the validity of the debt, the amount of the debt, any resulting repayment schedule established; and recoupment and collection actions.<sup>1</sup> By requesting waiver of the debt, the member has essentially acknowledged the validity of that debt for the purpose of pursuing relief under the authority and consideration of 10 U.S.C. § 2774. Waiver consideration at the appellate level at DOHA does not include an adjudication of the validity of a debt. The validity of a debt, including the dispute of an amount of a debt, are separate issues from waiver consideration because payments that are valid when made may not be considered for waiver under 10 U.S.C. § 2774. *See* DOHA Claims Case No. 2022-WV-072701.2 (May 1, 2023); and DOHA Claims Case No. 05040601 (April 26, 2005). If the member wishes to contest the validity of the debt or any other amount being collected by him by disputing them and proving his entitlement, he may do so by filing a military pay and allowance claim with the Air Force under 31 U.S.C. § 3702.

In this waiver case, our determination in the matter concerns the narrow issue of whether the member's debt can be waived under 10 U.S.C. § 2774. The timeframe involved for the debt in question is September 2014 through July 2015. We note that the DOHA adjudicator properly reviewed the debt amount along with the member's LESs when the waiver package was received from DFAS. The adjudicator found error in the debt amount and remanded the case file to DFAS for a proper accounting of the member's debt. DFAS reaudited the debt and notified the member of the new amount, \$15,262.72. The member subsequently completed another DD Form 2789 on May 18, 2023. Upon resubmission of the member's waiver request to DOHA, the adjudicator detailed specifically the underpayments and overpayments that resulted in a reaudited total debt amount of \$15,262.72. The adjudicator then reviewed the facts of the case and, after applying the appropriate standards for waiver, found that the member knew or should have known that he was being overpaid. We find no error in the decision to deny waiver in this case.

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<sup>1</sup>Volume 16, Chapter 4 of the Department of Defense Financial Management Regulation sets forth information on the process of notification of a debt against a member and the rights a member has under the *Debt Collection Act*, to include requesting a hearing, making an informal dispute of a debt, and filing for a waiver and/or remission of the indebtedness.

## Conclusion

The member's request for reconsideration is denied, and we affirm the decision dated December 5, 2023. In accordance with DoD Instruction 1340.23 (February 14, 2006) ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Administrative Judge  
Chair, Claims Appeals Board

Signed: Richard C. Ourand, Jr.

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Richard C. Ourand, Jr.  
Administrative Judge  
Member, Claims Appeals Board

Signed: Charles C. Hale

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Charles C. Hale  
Administrative Judge  
Member, Claims Appeals Board