

KEYWORDS: Waiver of Indebtedness

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.

CASENO: 2012-WV-040906.2

DATE: 09/25/2012

DATE: September 25, 2012

In Re:)	
[REDACTED])	
)	Claims Case No. 2012-WV-040906.2
)	
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. Army requests reconsideration of the August 22, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-040906. In that decision, DOHA upheld the Defense Finance and Accounting Service’s (DFAS) determination that the member’s request for waiver in the amount of \$6,789.06 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

On April 14, 2002, the member was released from active duty and assigned to the U.S. Army Reserves (USAR). His obligation of service with the USAR ended on April 6, 2006.¹ However, on March 15, 2005, the member separated from the USAR. At that time, the member was due at final separation payment in the net amount of \$874.99. Although the member did not receive a final separation payment, he received active duty pay on March 15, 2008, in the amount of \$1,542.91. Since he was only entitled to receive \$874.99, he was overpaid \$667.92 (\$1,542.91 - \$874.99). In addition, the member's pay account was not updated to show that he separated on March 15, 2005. Due to an administrative error, the member erroneously received active duty pay through May 15, 2005, causing an overpayment of \$6,121.14. Thus, he was overpaid \$6,789.06 (\$667.92 + \$6,121.14). DFAS discovered the overpayment in May 2005. The member's leave and earnings statement (LES) for May 2005 reflected the overpayment. DFAS notified the member that he had been overpaid by letter dated March 21, 2011. The member did not submit a written request for waiver until July 26, 2011.

In his original request for waiver, the member states that he first became aware of the debt by mail on July 13, 2011. He states that the letter reflected that it was his final notice. He further states that he was under the impression that he was getting paid due to his discharge for medical reasons. He also indicates that he received LES during the period of overpayment. In his reconsideration request, the member contends that he should not be held at fault for his pay account not being updated to show that he was separated. He states that the appeal decision suggests that he is responsible for not receiving notice of the indebtedness because he did not provide a new address when he moved. He questions why no further attempts were made to contact him after the notice went to the wrong address. He states that he was not contacted until he filed for disability. He further states that this debt did not appear on his credit history until March 2011, and he encloses a copy of it. He reiterates that he assumed the pay he received for two months after separation was for his medical condition because no one contacted him until 2011.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of overpayments of

¹This information is reflected on the member's orders issued January 24, 2002. The effective date of release from active duty is reflected as April 19, 2002, and the terminal date of reserve obligation is reflected as April 6, 2006.

pay and allowances to service members if collection would be against equity and good conscience and not in the best interest of the United States and if there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the waiver applicant. However, section 2774(b)(2) states that the Secretary concerned may not exercise his authority to waive any claim if application for waiver is received in his office after the expiration of five years immediately following the date on which the erroneous payment was discovered.² As explained by the DOHA adjudicator in the appeal decision, the date of discovery is the date it is definitely determined by an appropriate official that an erroneous payment had been made. *See* DOHA Claims Case No. 06070704 (July 17, 2006).

We have consistently held that the controlling date in determining timeliness of application for waiver is the date when the erroneous payment is discovered by the administrative office, and not when the waiver applicant is notified of the overpayment. Thus, for the issue of the time limitation under section 2774(b)(2), the waiver applicant's actual or imputed knowledge is irrelevant. *See* DOHA Claims Case No. 2010-WV-110802.3 (August 11, 2011); and DOHA Claims Case No. 06070704, *supra*. We find that the DOHA adjudicator reasonably concluded that the date of discovery was May 2005. Since the member did not submit a written request for waiver until July 26, 2011, we have no authority to consider it.

As pointed out in the appeal decision, even if we could consider the debt for waiver under 10 U.S.C. § 2774, waiver would not be appropriate. After the member separated on March 15, 2005, he was not entitled to receive active duty payments. We have consistently held that when a member knows or reasonably should know that he has received pay to which he is not entitled, he has a duty to retain such amounts for subsequent refund to the government, and to make prompt inquiry to the appropriate officials concerning his pay. The record reflects that the overpayment was reflected on the member's leave and earnings statement (LES) in May 2005. Specifically, the member's Master Military Pay Account (MMPA) records for June 30, 2005, which reflect information contained on his LES for the period April 1, 2005, through June 30, 2005, show that the indebtedness was reflected on his May 2005 LES. Although the member contends that he was unaware of the overpayment until June 2011, he should have known he was not entitled to receive active duty payments subsequent to his discharge on March 15, 2005. The amounts and timing of the payments he received after his separation were consistent with his prior active duty pay. Therefore, the member should have questioned the validity of the payments. We have consistently held that a member has the responsibility for knowing that he continued to receive payments from DFAS after discharge, since a reasonable person would be aware of the approximate balance in his bank account. *See* DOHA Claims Case No. 07022701 (March 1, 2007) and DOHA Claims Case No. 04022401 (February 25, 2004). Under the circumstances, the member did not acquire title to the erroneous payments and had a duty to return them when asked.

²We note that at the time the erroneous payment was discovered in this case, 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)(2), 120 Stat. 2083, 2270 (2006).

Although the member attaches a copy of his credit report reflecting that the debt owed to DFAS was opened in March 2011, as explained above, the controlling date is the date the erroneous payment was discovered by the administrative office. In this case, that date was May 2005, not the date DFAS may have reported the indebtedness to the credit reporting agency. In addition, the fact that there have been delays by the government does not alter the underlying debt. This Office has consistently held that the United States is not liable for the erroneous acts of its officers, agents, or employees, even though committed as part of their official duties. *See* DOHA Claims Case No. 2011-WV-041101.2 (December 20, 2011).³

Conclusion

We affirm the August 22, 2012, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board

³This decision was decided under 5 U.S.C. § 5584 because the applicant for waiver was a civilian employee. However, the standard for waiver under 5 U.S.C. § 5584 and 10 U.S.C. § 2774 is the same.