

DATE: December 7, 2015

In Re:)
))
 [REDACTED]) Claims Case No. 2015-WV-042003.2
Claimant)
))

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A waiver 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.

DECISION

A retired member of the U.S. Army requests reconsideration of the September 15, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-042003.

Background

Due to an administrative error, the member received active duty pay and allowances after he retired on May 31, 2013. As a result, the member became indebted to the United States for the erroneous payments he received in the amount of \$15,179.72 from June 1, 2013, through July 15, 2013. When the member reviewed his checking account on-line in early July 2013 he noticed more money in it than he expected. He immediately contacted his unit to find out why he was still receiving pay and allowances, and he was told that his unit was unable to stop his active duty checks from being disbursed to him after his retirement.

In the appeal decision, the DOHA adjudicator upheld the Defense Finance and Accounting Service's (DFAS) denial of the member's request for waiver. The adjudicator noted that the member acknowledged that he had no reasonable expectation of pay and allowances after he retired on May 31, 2013. The adjudicator further noted that although the member

immediately contacted the appropriate officials once he discovered the erroneous payments made to his bank account, waiver is not appropriate when a member is aware he is being overpaid.

In his reconsideration request, the member states that the amount of the debt has significantly changed since its discovery. He states that the principal of the debt was \$15,179.72. However, with interest, penalties and administrative fees, the total amount of his debt is now \$19,618.40. He states that he questioned DFAS about a payment plan in June or July of 2014. However, administrative fees were added to his debt when collection was unjustly processed through a collection agency. He states that although he has made every payment to the Department of Treasury on time, the debt has caused his credit score to be significantly impacted. He requests that the administrative fees and agency administrative costs totaling \$4,321.50 be removed from his debt. The member further asserts that although he first became aware of a discrepancy in his bank account on July 2, 2013, after he contacted numerous pay officials, it was determined that he was still receiving pay and allowances. However, he states that he initially believed that the payments could potentially be the result of a decision from the promotion board reviewing his application. He states that the decision in his case was due by May 30, 2013, which was his originally anticipated mandatory removal date (MRD). He states that due to various individuals being out of the office because of the holiday, he was not able to confirm that the promotion board had not yet released a decision in his case until July 9, 2013. Therefore, he requests waiver of the first two erroneous payments he received on June 14, 2013, and July 1, 2013, totaling \$10,131.00.

Discussion

Under 10 U.S.C. § 2774 and 32 U.S.C. § 716, we may grant waiver of a debt arising out of an erroneous payment of pay and allowances 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 or any other person having an interest in obtaining the waiver. The standard employed to determine whether a person was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person should have been aware that he was receiving payments to which he was not entitled. *See* DOHA Claims Case No. 07022701 (March 1, 2007); DOHA Claims Case No. 04022401 (February 25, 2004); DOHA Claims Case No. 03041511 (May 7, 2003); DOHA Claims Case No. 03021006 (February 14, 2003); DOHA Claims Case No. 00022208 (May 26, 2000); DOHA Claims Case No. 99030801 (April 20, 1999); and DOHA Claims Case No. 98020428 (March 12, 1998).

In the present case, the erroneous payments were made as a result of an administrative error which delayed the processing of the member's military pay account as final until June 2013. In this regard, the member was ordered to active duty from October 1, 2012, through March 31, 2013. His active duty was subsequently extended through September 30, 2013. However, by orders issued on May 29, 2013, the member was released from active duty effective May 31, 2013, because he had reached his maximum authorized years of service. On May 31, 2013, the member received a final separation payment in the net amount of \$3,714.37, which represented 15 days of pay and allowances. He was not entitled to receive any further payments.

However, due to an administrative error, his pay account was not timely updated, and he erroneously continued to receive active duty pay and federal taxes, social security, Medicare and state taxes were erroneously paid on his behalf through July 15, 2013, causing the member to be overpaid \$15,179.75. Although there is no indication of fraud, misrepresentation or lack of good faith on the member's part, the member acknowledges he was aware that he was receiving payments after he retired, which he questioned to authorities. Although the member now states that he initially believed that the payments might potentially be the result of a decision from the promotion board, he still should have held the questionable payments until he received a definitive answer concerning his entitlement. He should have set aside the funds until their validity was determined. When the member is aware of an overpayment, we believe collection of the overpayment would 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. 98061501 (June 26, 1998).

Concerning the fact that the member was charged interest, penalties and administrative fees on the debt, we note that under section 901.9 of Title 31, Code of Federal Regulations, agencies have the authority to assess interest, penalties and administrative costs on debts owed to the United States pursuant to 31 U.S.C. § 3717. DOHA has no authority to waive these charges. However, under Annex 1, Chapter 3, Volume 4 of the Department of Defense Financial Management Regulation (DoDFMR), the head of a DoD component may promulgate regulations identifying circumstances appropriate to waive collection of interest, penalty and administrative charges in conformity with the Federal Claims Collection Standards. Therefore, the member should contact DFAS or the service concerned for the process for applying for waiver of the charges on his debt.

Conclusion

The member's request for relief is denied, and we affirm the September 15, 2015, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense under DOHA's waiver authority.

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