

KEYWORDS: waiver of indebtedness

DIGEST: Under 10 U.S.C. § 2774, waiver is not appropriate when a member is aware or should be aware that he is being overpaid.

CASENO: 09062401

DATE: 7/23/2009

DATE: July 23, 2009

<hr/>	
In Re:)
[REDACTED])
)
)
)
Claimant)
<hr/>	

Claims Case No.09062401

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, waiver is not appropriate when a member is aware or should be aware that he is being overpaid.

DECISION

A former member of the United States Air Force requests reconsideration of the June 11, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09040802.

Background

The record indicates that the member earned his law degree in 1997 and entered active duty with the Air Force in March 1999. He was appointed in the grade of captain with a date of rank (DOR) of September 26, 1999. In October 2006 he applied for voluntary separation from active duty and requested payment of voluntary separation pay (VSP) under the Fiscal Year 2007 Force Shaping Program–VSP Incentive. He subsequently received an e-mail from his local Military Personnel Flight (MPF) office advising him that his VSP had been denied. He states that having decided to separate and having accepted a civilian job, he submitted a second voluntary separation package without requesting VSP. He states his MPF told him his separation was approved. On November 30, 2006, the member was discharged from the service. On the day of his separation, the member states that he received a message from his local finance office indicating that DFAS directed a large payment to him upon separation. He states that he used the “Case Management System” feature of the “Virtual Military Personnel Flight” system to determine that a case had been opened for his record, directing the payment of VSP. During the period November 1, 2006, through November 30, 2006, the member was entitled to receive pay and allowances in the net amount of \$4,874.00. However, due to an administrative error, the member erroneously received payments in the amount of \$66,959.11. Since the member was only entitled to receive \$4,874.00, he was overpaid \$62,085.11. The overpayment was for VSP.¹

In the DOHA appeal decision, the adjudicator found, based on the conflicting information the member received prior to his separation concerning his entitlement to VSP, that he should have questioned his entitlement to it until he received a response in writing. Since he failed to do so, waiver of collection of the overpayment is not appropriate.

In his request for reconsideration, the member states that the DOHA adjudicator ignored his principal ground for relief: that his receipt of the VSP was proper. He states that he was appointed to the Ready Reserve. He states that despite repeated inquiries on his part, the Air Reserve Personnel Center (ARPC) failed to assign him to a reserve unit for more than a year, and then did not do so until after notifying him that he would be discharged in January of 2009. He contends that the ARPC’s action in granting him an honorable discharge prior to the three year point should not be construed as a lack of willingness on his part to perform the three years of service in the Ready Reserve. He states that the adjudicator also ignored the equitable grounds for relief he identified in his waiver request. He contends that he was the victim of an unlawful reprisal in 2004 and a subsequent involuntary separation action which deprived him of a reasonable opportunity to apply for VSP. He requests specific findings on each basis for relief raised in his waiver application and states that he retains the right to seek a judicial remedy.

¹The Defense Finance and Accounting Service (DFAS) examined the member’s pay account and determined that the indebtedness was caused by the recoupment of VSP. DFAS concluded based on the member’s separation code, FBK, he was not entitled to VSP.

Discussion

Since the matter originally came to us as an appeal from the Defense Finance and Accounting Service's (DFAS) denial of the former member's waiver request, our authority in this matter is restricted to a consideration of whether the member's debt may be waived under 10 U.S.C. § 2774. Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience and not in the best interest of the United States. To be considered for waiver, payments must be erroneous when made. Waiver is not appropriate if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound by equity and good conscience to make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.1. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. *See* Instruction ¶ E4.1.6.

According to the record, the member states that in October 2006, he applied for voluntary separation from active duty and requested VSP. He states that he subsequently received an e-mail from his local MPF office advising him that his VSP had been denied. He states that he submitted a second voluntary separation package without requesting VSP. He states his MPF told him his separation was approved. On the day of his separation, the member states that he received a message from his local finance office indicating that DFAS directed a large payment to him upon his separation. He states that he used his on-line personnel case management system to verify that he would receive payment of VSP. He subsequently received the payment on December 4, 2006. The adjudicator found that the member should have at least questioned his entitlement to VSP since he had received conflicting information concerning his entitlement. There is nothing in the record that reflects that the member tried to resolve the ambiguity surrounding his entitlement to this payment. Since the member presented no documentary evidence that he questioned his entitlement, the DOHA adjudicator upheld DFAS's determination to deny waiver. We find no error in the appeal decision. *See* DOHA Claims Case No. 09042401 (May 19, 2009).

In his request for reconsideration, the member contests the validity of the underlying debt. He asserts that the VSP is proper, and therefore not an erroneous payment. However, we note that the record reflects that DFAS has validated the debt. In that regard, when a member applies to us to waive the collection of his debt, he is requesting relief from a legal debt as a matter of equity because he believes he is not at fault in the matter. Accordingly, a member does not support his waiver application when he contends that he is entitled to the payment as a matter of law.

However, we note that section 1175a of Title 10 of the United States Code, gives the authority to the Secretary concerned, under regulations approved by the Secretary of Defense, to

provide VSP to eligible members who are voluntarily separated from active duty as set forth under the statute. The authority to separate a member in conjunction with VSP applies for the period October 17, 2006, through December 31, 2012. The implementing regulations are found, in part, under Chapter 35, Volume 7A of the Department of Defense Financial Management Regulation (DoDFMR). Under the statute and regulation, the Secretary concerned may prescribe other requirements for a member's eligibility than those specifically listed in the statute, which may include requirements relating to years of service; skill; rating; military specialty; or competitive category, grade, or rank; remaining period of obligated service; or any combination of these factors. Eligible members are not automatically entitled to receive VSP based solely upon request. See ¶ 350906 of Ch. 35, Vol. 7A of the DoDFMR.²

Our decision in this matter does not preclude the member from pursuing other available remedies. If the member wishes to contest the validity of the debt, he may pursue the matter as a claim under DoD Instruction 1340.21 (May 12, 2004). Under DoD Instruction 1340.21, the member must prove, by clear and convincing evidence, on the written record that the United States is liable to him for the amount claimed. We note that under the regulation, the Secretary concerned has significant discretion on whether to approve VSP. In situations like this, we are obligated to give considerable deference to military authorities to resolve "uniquely military matters," such as personnel decisions. See *Chappell v. Wallace*, 462 U.S. 296 (1983); and Comptroller General decision B-259696, Jan. 25, 1999.

Conclusion

The member's request for relief is denied, and we affirm the June 11, 2009, appeal decision to deny waiver of \$62,085.11. In accordance with DoD Instruction ¶ E8.15, this is the final administrative action of the Department of Defense concerning the member's waiver request.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

²Paragraph 350906 states: "Approval for VSP. The Secretary of the Military Department shall determine each year the number of military members to be separated, and provided separation pay and benefits during the fiscal year beginning in such year. Eligible members shall not be automatically entitled to receive VSP based solely upon request. The Secretaries of the Military Departments shall review all applications for voluntary separation and approve only those that meet the needs of the Military Departments. A member whose request is approved shall be separated from active duty."

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board