

KEYWORDS: Aviation Continuation Pay, ACP, overpayment, waiver of indebtedness

DIGEST: To be considered under the provisions of 32 U.S.C. § 716, a member's application for waiver must be received within five years of the discovery of the debt. Properly made payments of aviation continuation pay (ACP) are considered advances and are not eligible for waiver consideration under 32 U.S.C. § 716, because they are not erroneous payments when made.

CASE NO: 2018-WV-013001.2

DATE: 05/30/19

DATE: May 30, 2019

)	
In Re:)	
[REDACTED])	Claims Case No. 2018-WV-013001.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

To be considered under the provisions of 32 U.S.C. § 716, a member's application for waiver must be received within five years of the discovery of the debt.

Properly made payments of aviation continuation pay (ACP) are considered advances and are not eligible for waiver consideration under 32 U.S.C. § 716, because they are not erroneous payments when made.

DECISION

A former member of the Air National Guard (ANG) requests reconsideration of the February 7, 2019, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims Case No. 2018-WV-013001. In that decision, DOHA determined that the member’s request for waiver could not be considered because she did not submit her application within the five-year statute of limitations as set forth under 32 U.S.C. § 716(b)(2).

Background

The member separated from the ANG on November 1, 2002. She erroneously continued to receive pay and allowances after her separation through August 31, 2003. Additionally, when the member separated from the ANG she had not served the requisite amount of time set forth in her aviation continuation pay (ACP) agreement and recoupment of a *pro rata* portion of her ACP was required. As a result of these payments, a debt was posted to the member's military pay account on October 27, 2003. On March 29, 2004, the Defense Finance and Accounting Service (DFAS) notified the member by letter of the debt. DFAS sent the notification letter to the address she had provided in her military record.

On June 21, 2017, the member sought waiver of the debt. In her application for waiver, the member stated that she first became aware of the debt in 2008 when her Federal and state income tax refunds were deferred. DFAS determined that although the member became aware of the debt in 2008, she did not seek waiver of it until 2017, more than 13 years after the government's discovery of the debt. Since the member did not request waiver within five years of discovery of the debt, DFAS applied the five-year statute of limitations to the member's request for waiver.

The DOHA adjudicator determined that DFAS properly applied the five-year statute of limitations to the member's application for waiver. The DOHA adjudicator noted that even if the member's waiver application had been received within the five years, her request for waiver for the portion of her debt resulting from the continued receipt of pay and allowance would have been denied since she should have known she was no longer entitled to receive any pay after her separation. Additionally, the DOHA adjudicator noted the ACP portion of the debt was not subject to waiver because it was not erroneously received.

In her request for reconsideration, through her attorney, the member states that although the five-year statute of limitations passed before she submitted her waiver request, she was incapacitated due to alcoholism at the time she received the erroneous payments. She attaches medical records which she maintains supports her position that she was under a disability at the time the debt accrued. She further maintains that the statute of limitations should be tolled in light of her incapacity.

Discussion

Under 32 U.S.C. § 716, we have the authority to waive a claim for an erroneous overpayment of pay or allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or the lack of good faith on the part of the member. However, section 716(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 the five years immediately following the date on which the erroneous payment was discovered.¹ As explained by the

¹We note that at the time the erroneous payments were discovered in this case, October 2003, 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(b), 120 Stat. 2083, 2270 (2006).

DOHA adjudicator in the appeal decision, the date of discovery is the date it was definitely determined by an appropriate official that an erroneous payment had been made. This provision is implemented by Department of Defense Instruction 1340.23 (February 14, 2006) ¶ E5.6.

In this case, the record reflects that the debt posted to the member's military pay account on October 27, 2003, and DFAS sent the member a debt notification letter on March 29, 2004. As noted in the appeal decision, this letter was sent to the address the member had provided DFAS. Although the member has raised the issue of incapacity and claims she cannot be deemed to know about the indebtedness in 2003, for the issue of time limitations under 32 U.S.C. § 716(b)(2), the member's actual or imputed knowledge is irrelevant. *See* DOHA Claims Case No. 06070704 (July 17, 2006). The statute of limitations runs from the date that the erroneous payment was discovered by the administrative office, that is from the date it was definitely determined by an appropriate official, in this case, October 2003, that an erroneous payment had been made. Since the member's written waiver application was not received until June 17, 2017, we are statutorily precluded from considering it.

Even if the member's waiver request had been submitted prior to the expiration of the five-year statute of limitation, DOHA would still not have been able to consider the portion of the member's debt resulting from the recoupment of the unearned portion of the ACP she had been paid. While our office has the authority to consider certain claims of the United States for waiver under the provisions of 32 U.S.C. § 716, this statute specifically limits our authority to only claims which arise from an erroneous payment of pay and allowances. A claim arising from properly paid ACP, which later must be recouped because of a member's early separation, is not a claim arising from an erroneous payment which may be considered for waiver under 32 U.S.C. § 716. If the payment was correct when made, regardless of subsequent events, we have no authority to relieve a member of her obligation to repay the government. *See* DOHA Claims Case No. 2014-WV-090504.2 (April 29, 2015).

However, the member may wish to contact the U.S. Air Force concerning repayment of the portion of her debt attributed to the recoupment of the ACP. We note that under 37 U.S.C. § 303a(e), the Secretary concerned (in this case, the Secretary of the Air Force), has the discretion to determine if the member's repayment of the unearned portion of the ACP is appropriate based on whether repayment would be contrary to a personnel policy or management objective, would be against equity and good conscience, or would be contrary to the best interests of the United States. *See* the repayment provisions under the Department of Defense Financial Management Regulations (DoDFMR), Volume 7A, Chapter 2, paragraph 020304.

Conclusion

The member's request for relief is denied, and we affirm the February 7, 2019, appeal decision to deny waiver of the debt. In accordance with the Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense concerning the member's request for waiver under 32 U.S.C. § 716.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board