

KEYWORDS: Wavier of indebtedness

DIGEST: Waiver is not appropriate when a member knows, or reasonably should know, that a payment is erroneous. The member has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government.

CASENO: 2016-WV-110301.2

DATE: 01/08/2018

DATE: January 8, 2018

In Re:)	
[REDACTED])	Claims Case No. 2016-WV-110301.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver is not appropriate when a member knows, or reasonably should know, that a payment is erroneous. The member has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government.

DECISION

A former member of the United States Army requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-WV-110301, dated September 29, 2017. In that decision, this Office waived \$34,269.16 of the debt, but denied waiver of the remaining \$122,679.78.

Background

The member completed the *Oath of Office – Military Personnel*, DA Form 71, and was appointed as an officer in the grade of a Second Lieutenant (2LT) in the Army on June 16, 2008. Due to an administrative error, the member was erroneously paid as a Captain (O-3) instead of as

a 2LT (O-1) during the period June 15, 2008, through October 30, 2013, causing him to be overpaid \$90,976.65. In addition, the member was erroneously paid basic allowance for housing (BAH) at the incorrect rate during the period June 15, 2008, through May 17, 2013, causing him to be overpaid \$31,703.13.

The member was also overpaid Variable Special Pay (VSP) during the period June 15, 2008, through October 30, 2015, causing him to be overpaid \$34,269.16. Therefore, the member was overpaid \$156,948.94 (\$90,976.65 + \$31,703.13 + \$34,269.16).

Although the Defense Finance and Accounting Service (DFAS) had previously denied waiver of the entire debt in the amount of \$156,948.94, the DOHA adjudicator determined that waiver was appropriate for the overpayment of VSP in the amount of \$34,269.16. Since this amount was waived by the adjudicator, it is not in dispute in the member's reconsideration request. However, the adjudicator sustained DFAS's denial of waiver of the \$122,679.78 overpayment because the member received documentation in the form of leave and earnings statements (LESSs) that reflected an error in his pay. Specifically, although his DA Form 71 and other documentation reflected that he was a 2LT (O-1), his LESSs reflected his grade as an O-3. The adjudicator found that the member should have questioned why his LESSs reflected his grade as an O-3 beginning in June 2008. Since he failed to do so, waiver was not appropriate.

In his reconsideration request, the member through his attorney, states that the adjudicator summarily ignored his severe depression during the period of overpayment because of lack of supporting medical documentation. He attaches a signed statement from his physician indicating that although he did not begin treatment until December 2010, he relayed symptoms of his depression dating back to two years prior to seeking treatment. The physician concludes that he does not think that the member would have had the knowledge or functioning level to adequately evaluate his pay issues. The member also contests the amount of pay and leave withheld from DFAS at his discharge. He also contests the amount of tax withholdings included in the balance of his debt.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of a claim for erroneous overpayments of pay or allowances against a member of the Uniformed Services 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. However, if a reasonable person is aware or should be aware, that he is receiving an erroneous payment, waiver is not appropriate. We have consistently held that if the recipient of an overpayment is furnished with documentary evidence or information which, if reviewed, would cause a reasonable person to be aware of or suspect the existence of an error, but fails to review such documents or otherwise fails to take corrective action, waiver will generally be denied. *See* DOHA Claims Case No. 2012-WV-062502.2 (September 20, 2012); and DOHA Claims Case No. 06110603 (November 16, 2006).

In this case, the record is absent any evidence that the member took any action to question his pay when his LESSs reflected he was being paid at the grade of an O-3. However,

we have previously held that waiver may be appropriate where the member can establish by clear and convincing evidence, in the form of medical records or other proof, that he was in such poor health that it was unlikely that he knew or could have known of the overpayment, or that he was otherwise unable to attend to his financial affairs. *See* DOHA Claims Case No. 04031001 (March 17, 2004); DOHA Claims Case No. 03102401 (October 28, 2003).

In his reconsideration request, the member submits a statement from his physician to support his contention that his severe depression prevented him from adequately evaluating his pay during the period of overpayment beginning in June 2008. However, the original statement by his physician submitted with his appeal of DFAS's denial of his waiver request reflected that the member began treatment for severe depression in December 2010, with his symptoms starting in October 2009, when he transitioned to a new duty assignment to begin medical school. Besides the new statement submitted by his physician stating that he does not think that the member would have had the ability to adequately evaluate his pay issues, there is nothing else in the record to indicate that the member was in such a condition as to render him unable to attend to his ordinary financial affairs. On the contrary, the member was able to complete his medical training and manage his ordinary financial affairs. Although the member acknowledged in his original waiver request that he should have paid closer to his finances while he was in medical school, he stated that he was able to pay all his bills, pay his rent and even save money. Therefore, we conclude that the additional documentation the member has submitted is insufficient to establish by clear and convincing evidence that during the period of overpayment he was in such poor mental health that it was unlikely that he know or could have known of the overpayment. Therefore, collection of the \$122,679.78 would not be against equity and good conscience, nor would it be contrary to the best interests of the United States.

We note that on April 28, 2015, DFAS advised the member that he may wish to pursue the remedy of remission of the indebtedness by applying to the Army's Human Resources Command. DFAS provided the member with specific information on how to submit the application.

As for the amount of pay and leave the Army withheld from the member at his discharge, he should contact the Army and DFAS about this matter. Finally, amounts withheld from the member's pay for taxes are forwarded to the appropriate agencies for the benefit of the member. Application of the tax laws to a member's pay is a matter solely within the jurisdiction of the taxing authority, and a member's tax liability does not permit partial waiver of an amount not otherwise appropriate for waiver. Therefore, the member is indebted for any amount paid to the taxing authority on his behalf. *See* DOHA Claims Case No. 2012-WV-121102.2 (May 2, 2013).

Conclusion

The member's request for reconsideration is denied and the appeal decision September 29, 2017, is affirmed. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board