

KEYWORDS: waiver of indebtedness

DIGEST: Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other persons having an interest in obtaining the waiver.

CASENO: 2009-WV-062203.3

DATE: 2/08/2011

DATE: February 8, 2011

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2009-WV-062203.3

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other persons having an interest in obtaining the waiver.

DECISION

A retired member of the United States Air Force (USAF) requests reconsideration of the December 30, 2010, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA

Claim No. 2009-WV-062203.2. In that case this Office denied the waiver of an overpayment in the amount of \$2,735.90.

Background

The record shows the member was stationed OCONUS, and correctly received a cost of living allowance (COLA), overseas housing allowance (OHA), and basic allowance for quarters (BAQ). On July 2, 2007, the member was issued permanent change of station (PCS) orders for retirement processing at an air base in CONUS. On July 17, 2007, the member departed the OCONUS base, and as a result was no longer entitled to COLA, OHA, or BAQ. However, due to an administrative error, the member continued to receive these allowances through August 31, 2007, causing a total overpayment of \$3,942.82. During this period the member was entitled to receive basic allowance for housing type II with dependent rate (BAH-II) in the amount of \$1,206.92, which was applied to the debt, thereby reducing the overpayment to \$2,735.90. The record also shows that on August 31, 2007, the member was discharged from the USAF, and retired effective September 1, 2007. During the period August 1, 2007, through August 31, 2007, the member was entitled to receive pay and allowances in the net amount of \$6,937.62. On August 15, 2007, the member received a mid-month payment of \$3,012.27. Since the member was still indebted \$2,735.90, his final separation payment of \$3,925.35 was applied to the debt, and as a result on September 1, 2007, he received \$1,189.45.

The member requested waiver of the overpayment of COLA, OHA, and BAQ in the amount of \$2,735.90. He submitted DD Form 2789, *Waiver/Remission of Indebtedness Application*, on September 3, 2008. The member argued that when he outprocessed from the OCONUS base, he completed all the requirements at the finance office and any error was not his fault. He was on leave the entire time before he retired at the CONUS base and could not have known there was a problem. He contends he was told he could take his permissive leave at his daughter's home as long as it was on his leave form, but he wasn't paid any money for that time. The Defense Finance and Accounting Service (DFAS) recommended that his request for waiver be denied, considering the member's rank and years of service. He was provided his Leave and Earnings Statements (LES), and he should have discovered that he was being overpaid COLA and OHA. Since the member failed to review his pay, he can be considered to be at fault, and therefore waiver is not appropriate. The member appealed the DFAS decision to our Office on December 30, 2010. The adjudicator noted the long-standing policy of this office that when a member is aware or reasonably should be aware he is receiving pay in excess of his proper entitlement, he has a duty to promptly bring it to the attention of the appropriate official, and to retain such amounts for subsequent refund to the government. As there is no indication that the member questioned his entitlements, the adjudicator determined he was partially at fault, which statutorily precludes waiver of the claim. The member requested reconsideration of that decision to this Board.

Discussion

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim 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 persons having an interest in obtaining the waiver.

In his request for reconsideration, the member expressed discontent that the adjudicator had found any fault on his part. He argues that the fault is attributable to the professional people, who should have done their jobs in the beginning. He contends that he is being penalized for someone else's mistake. Department of Defense Instruction 1340.23, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances* (hereinafter Instruction) ¶ E4.1.1 (February 14, 2006), states: "If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing." Under certain conditions waiver may be appropriate, but as the Instruction, ¶ E4.1.3, notes: "The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting a waiver."

The member states he did not have access to MyPay, while on permissive leave. However, the member was still being paid through direct deposit. This Office has consistently held that the fact that a member has his pay deposited directly into his bank account does not relieve him of the responsibility of monitoring his bank account, verifying his statements, and questioning any discrepancies. Instruction, ¶ E4.1.4, "A waiver usually 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, even if the Government fails to act after such notification." See DOHA Claims Case No. 09061901 (June 24, 2009); DOHA Claims Case No. 07110102 (November 26, 2007); DOHA Claims Case No. 07071705 (July 24, 2007); and DOHA Claims Case No. 03012711 (February 3, 2003).

Conclusion

The request for reconsideration is denied, and in accordance with the Instruction, ¶ E8.15, this is the final administrative action of the Department of Defense.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

///Original Signed///

Jean E. Smallin
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board