

KEYWORDS: waiver of indebtedness: timeliness of request for reconsideration

DIGEST: Under Department of Defense Instruction 1340.23, a request to reconsider a decision made by the Defense Office of Hearings and Appeals (DOHA) on a waiver application under 10 U.S.C. § 2774 must be received by DOHA within 30 days of the decision (unless properly extended) and must be sent to the address specified in the Instruction. Moreover, the waiver authority provided by 10 U.S.C. § 2774 applies only to claims arising out of erroneous payments and not to payments that were valid when made.

CASENO: 2009-WV-062601.3

DATE: 2/25/2010

DATE: February 25, 2010

In Re:) [REDACTED]) Claimant)	Claims Case No. 2009-WV-062601.3
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**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under Department of Defense Instruction 1340.23, a request to reconsider a decision made by the Defense Office of Hearings and Appeals (DOHA) on a waiver application under 10 U.S.C. § 2774 must be received by DOHA within 30 days of the decision (unless properly extended) and must be sent to the address specified in the Instruction. Moreover, the waiver authority provided by 10 U.S.C. § 2774 applies only to claims arising out of erroneous payments and not to payments that were valid when made.

DECISION

A former soldier in the Army (claimant) requests reconsideration of the July 14, 2009, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 0906260. In that decision, DOHA's supervisory adjudicator considered the claimant's request under the provisions of title 10, United States Code, Section 2774 (10 U.S.C. § 2774) that the Department of Defense waive collection of his debt. She concluded that it was proper to waive part of the debt (\$2,101.45); not proper to waive another part (\$588.44); and the balance of the debt, \$16,836.29, cannot be considered for waiver under the provisions of this statute.

Background

In her July 14, 2009, decision, the supervisory adjudicator advised the claimant, among other things, that the waiver authority provided by 10 U.S.C. § 2774 applies only to claims arising out of erroneous payments and not to payments like the selective re-enlistment bonus (SRB) that were valid when made. She also specifically advised him that he had the right to request reconsideration of her July 14th decision, but that such a written request had to be received by DOHA within 30 days of issuance of the decision (which could have been extended up to an additional 30 days for good cause) and "must" be sent to: "Defense Office of Hearings and Appeals (DOHA), Claims Division-Reconsideration, PO Box 3656, Arlington, VA 22203-1995." That location was the same as the one set forth in Department of Defense Instruction (hereafter referenced as Instruction) 1340.23 (February 14, 2006). DOHA received no request for reconsideration within the above stated time period.

On February 17, 2010, DOHA received a letter on behalf of the claimant dated February 10, 2010. Attached to that correspondence was a copy of a letter dated August 4, 2009, requesting reconsideration of the July 14th decision. Although the August 4th letter bore the name of the DOHA supervisory adjudicator, it was erroneously addressed to: "DFAS-IN, Indianapolis, IN 46249."¹ The February 10th correspondence states that "[w]e were informed by the Department of Defense Finance and Accounting Service that our correspondence has been

¹The supervisory adjudicator is an employee of DOHA in Arlington, VA, not the Defense Finance and Accounting Service (DFAS) in Indianapolis, IN. Moreover, the recipient address in the August 4th correspondence is not directed to any particular office within DFAS, which is a very large organization. If the correspondence had been addressed to the same Waivers/Remissions office recipient address block used by the supervisory adjudicator on page 1 of her decision, it is possible that someone there could have recognized the supervisory adjudicator as an official at DOHA and forwarded the correspondence to DOHA in a timely manner. But the very general address appears to have further inhibited timely receipt.

directed to the appropriate department.”² However, our review of the record indicates that DOHA had never received the original or a copy of the August 4th correspondence either directly from the claimant or from DFAS.

The August 4th correspondence evidences a detailed review of the July 14th decision, and raises several issues, including: the validity of some of the finding of facts; an explanation for the claimant’s belief that he was owed the amount for which waiver was denied; and argument to support a waiver of collection of the bulk of the debt, \$16,836.29. This part of the debt is related to the recoupment of the SRB, which the Defense Finance and Accounting Service triggered because the claimant failed to serve under the re-enlistment for which he received the bonus.

For the reasons set forth below, the Board cannot grant the claimant the relief which he requests.

Discussion

As indicated above, the Instruction, which governs the processing of waiver requests under 10 U.S.C. § 2774, states that a “request for reconsideration must be sent to the DOHA at the address in section E8.5” of the Instruction. That address is: “Defense Office of Hearings and Appeals, Claims Division, P.O. Box 3656, Arlington, VA 22203-1995.” *See* Instruction, ¶ E8.12. This section also provides that “DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision [which may be extended up to another 30 days for good cause, but] no request for reconsideration may be accepted after this time has expired.” The Instruction has the force and effect of law, and is also codified in title 32 of the Code of Federal Regulations (C.F.R.), Part 284, and ¶ E8.12 is located in 32 C.F.R. Appendix F, ¶L. DOHA did not receive a request for reconsideration of the July 14th decision within the time frame and at the location contemplated by the regulation.

Moreover, as noted in the July 14th decision, the claimant is not eligible for waiver relief under 10 U.S.C. § 2774 with respect to the remainder of the debt at issue. Section 2774 requires an erroneous payment of pay or allowances, but the SRB was a proper payment when made. Although page 2 of the August 4th correspondence submitted on behalf of the claimant explains why he was not able to serve his re-enlistment, this does not make the SRB payment erroneous.

Finally, the Board notes that other forms of relief, such as a request to the Secretary of the Army under 37 U.S.C. § 303a(e), would appear to be more promising. It is our understanding

²No one in DFAS was authorized to provide the claimant with a reconsideration address that is different than the one contained in the Instruction and provided by the supervisory adjudicator. Nor was the claimant authorized to use such an address. Even if someone was unaware of the Department of Defense policy in this regard, a simple reading of the July 14th decision clearly indicated the proper address to which the request for reconsideration had to be sent. The address was clearly broken out in a separate, indented paragraph, which should not have been missed in a situation like this where the decision was closely reviewed.

that the Army Review Boards Agency, under the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs, makes recommendations to the Secretary under 37 U.S.C. § 303a(e) for Army service members. The claimant should direct other questions concerning his debt or leave account to DFAS.

Conclusion

In accordance with ¶ E8.10 of the Instruction, the decision of July 14, 2009, in DOHA Claim No. 09062601, is the final administrative action of the Department of Defense concerning the member's request for a waiver under 10 U.S.C. § 2774.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board