

KEYWORDS: waiver of indebtedness; notification

DIGEST: Due to an administrative error, a member of the United States Navy received Aviation Career Incentive Pay (ACIP) to which he was not entitled, causing him to be overpaid. He was unaware he was being overpaid until he was notified on December 19, 2008. Under 10 United States Code (U.S.C.) § 2774, the amounts he was paid before notification were waived. However, the amounts he received after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

CASENO: 2010-WV-010503.2

DATE: 3/30/2010

DATE: March 30, 2010

In Re:)
 [REDACTED]) Claims Case No. 2010-WV-010503.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, a member of the United States Navy received Aviation Career Incentive Pay (ACIP) to which he was not entitled, causing him to be overpaid. He was unaware he was being overpaid until he was notified on December 19, 2008. Under 10 United States Code (U.S.C.) § 2774, the amounts he was paid before notification were waived. However, the amounts he received after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

DECISION

A member of the United States Navy requests reconsideration of the March 5, 2010, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-010503. In that decision, DOHA allowed, in part, waiver of the collection of the

overpayment of Aviation Career Incentive Pay (ACIP) in the amount of \$28,372.00, but denied waiver of \$420.00.

Background

The record shows that the service member was assigned to a position by official change of duty orders and reported for duty on July 1, 2005. Upon his change of duty the member states that he inquired of his personnel detail point of contact (detailer) whether he would continue to receive ACIP. The member states he was assured that he would continue to receive ACIP. The member states that he personally inquired of his detailer whether the designator needed to be recoded to 2102, and he was advised that it was not necessary. The member began his duty and continued to receive ACIP. The member states that he also reviewed his status on line at "Bupers on-line", and it reflected that he was in a flying status. On December 19, 2008, the member received an email from the ACIP Program Office stating that in order to receive ACIP, per BUPERINST 7220.29A, section 4e, he must be assigned operational flying orders, logged into a billet sequence code (2102 or 2302), and performing frequent and regular flying duties as prescribed by regulation. The member was neither assigned operational flying orders nor logged into a billet sequence code that signified flight status. The ACIP Program Office indicated they would notify the Defense Finance and Accounting Service (DFAS) to discontinue flight pay and to begin recouping the overpayments. They advised the member that he might submit a request for waiver of the indebtedness.

The member submitted a DD Form 2789, *Waiver/Remission of Indebtedness Application*, on February 23, 2009. DFAS recommended that since the member reasonably relied on the expertise of administrative personnel to pay him at the authorized rate, and he was unaware he was being overpaid, that the member accepted the overpayment in good faith prior to his notification of the error. The record reflects that the member's current orders on file indicate he is in a flying status. Based on that analysis, they recommended that \$28,372.00 of the claim be waived, and the remaining \$420.00 be denied due to the member's awareness on December 19, 2008, that he was not entitled to the pay. In the appeal decision, the DOHA adjudicator agreed with that analysis and supported the recommendation of DFAS. In his request for reconsideration, the member argues that the decision seems to be based on his statement in the record that "formal re-coding paperwork is in process . . ." but the DOHA review noted "the file is absent any documentation that recoding has been approved." The member attaches formal documentation to his reconsideration that recoding was complete on February 24, 2009. He argues that subsequent restructuring of billets by manpower officials at BUMED has aligned the billets properly to reflect their proper structure continuously since July 1996 when an additional navy physician (in flying status) was added to the unit.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous overpayments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. *See* DOHA Claims Case No. 05090603 (September 14, 2005), and DOHA Claims Case No. 07100201 (October 10,

2007). Once the member was notified on December 19, 2008, that he was being overpaid, he did not acquire title to any government overpayments he received from that point, and has a duty to return the excess amounts to the government. *See* DOHA Claims Case No. 00030709 (April 28, 2000). This Office agrees that the member acted in good faith in receiving the pay when he was not aware that he was not entitled to it. However, once the member learned that he was not entitled to it, waiver is not an acceptable remedy. Since waiver is an equitable remedy, the adjudicator correctly waived the overpayment the member received prior to notification and denied waiver of the amounts received after that time.

With his request for reconsideration, the member has submitted a document indicating that the Navy has restructured the billets in his unit to entitle him retroactively to the payments in question, including the amounts he received from notification through December 31, 2008. The submission constitutes a claim for the \$420.00 the member received during the latter period. Our decision involves waiver of a debt. The member may want to pursue a claim through proper channels.

Conclusion

The member's request for relief is denied, and we affirm the March 5, 2010, decision. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

///Original Signed///

Jean E. Smallin
Member, Claims Appeals Board

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