

KEYWORDS: waiver of indebtedness

DIGEST: A member signed an agreement by which he was entitled to receive a lump sum payment of \$6,000.00, in return for an obligation to serve one year of active duty. However, the member was erroneously paid \$25,000.00. Although he immediately questioned the payment and was told he was entitled to receive \$25,000.00 for three years, he reasonably should have known that the advice was erroneous considering he had conflicting documentation (the agreement he signed) stating that he was only entitled to \$6,000.00. Under these circumstances, denial of the request for waiver of the resulting debt is appropriate.

CASENO: 2009-WV-080408.2

DATE: 3/31/2010

DATE: March 31, 2010

In Re:)
[REDACTED]) Claims Case No. 2009-WV-080408.2
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member signed an agreement by which he was entitled to receive a lump sum payment of \$6,000.00, in return for an obligation to serve one year of active duty. However, the member was erroneously paid \$25,000.00. Although he immediately questioned the payment and was told he was entitled to receive \$25,000.00 for three years, he reasonably should have known that the advice was erroneous considering he had conflicting documentation (the agreement he signed) stating that he was only entitled to \$6,000.00. Under these circumstances, denial of the request for waiver of the resulting debt is appropriate.

DECISION

A member of the Air Force requests reconsideration of the January 26, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09080408. In that decision, DOHA sustained the decision of the Defense Finance and Accounting Service (DFAS) to deny the member's request for waiver of his debt in the amount of \$57,000.00, resulting from the member being overpaid Incentive Special Pay (ISP).

Background

In December 2004, the member was under an active duty obligation (ADO) for initial Certified Registered Nurse Anesthetist (CRNA) training. He executed a Fiscal Year 2005 Certified Registered Nurse Anesthetist Incentive Special Pay Agreement (CRNA ISP) by which he agreed to incur a one-year ADO and receive ISP in the amount of \$6,000.00. However, the member received an ISP payment in the amount of \$25,000.00, causing an overpayment in the amount of \$19,000.00. The member erroneously continued to receive ISP payments in the amount of \$25,000.00 in 2006 and \$25,000.00 in 2007, causing an overpayment of \$50,000.00. However, the record reflects that the member was given credit for annual payments of ISP in the total amount of \$12,000.00 (\$6,000.00 per fiscal year) when he retroactively signed his CRNA ISP agreements for fiscal years 2006 and 2007. Since the member was indebted \$69,000.00, the \$12,000.00 was applied to the overpayment reducing it to \$57,000.00.

In his request for reconsideration, the member states that when he received the first payment of \$25,000.00, he immediately called his pay office to question it. He was told by a named pay official that he was receiving the correct pay for the contract he had signed for \$6,000.00. He was told that he was entitled to \$25,000.00 for a multi-year bonus because there was a new increase in bonuses for CRNAs in the Air Force. He states that the pay official never advised him to resend another contract since she would be changing the one that he had already sent in. He trusted what the pay official told him. He states that the change was validated by this pay official because she sent the changes to DFAS so that he would receive the multi-year bonuses. The member requests that the debt be collected from the medical special pay branch since they were at fault in the matter. He states that he made many detrimental financial decisions in reliance on the actions of the pay official who assured him he was entitled to the increased bonus.

Discussion

The receipt of erroneous information by one dealing with a government official which was relied upon by the recipient to his detriment does not establish a legal basis for payment since in the absence of specific statutory authority, the United States is not liable for the negligent or erroneous acts of its officers, agents or employees, even though committed in the

performance of their official duties. *See* DOHA Claims Case No. 97012101 (February 6, 1997); and Comptroller General decision 60 Comp. Gen. 257 (1981).¹

Under 10 U.S.C. § 2774, we have authority to waive the collection of erroneous payments of pay and allowances to a member if collection would be against equity and good conscience and not in the best interest of the United States. There must be no indication the erroneous payment was solely or partially the result of the fraud, misrepresentation, fault, or lack of good faith of the member. Generally, persons who receive a payment erroneously from the government acquire no right to the money. They are bound in good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the government may have been, the recipient received something for nothing. *See* DoD Instruction 1340.23 (Instruction), ¶ E4.1.1 (February 14, 2006). A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See id.*

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* Instruction ¶ E4.1.4. In addition, a waiver may be inappropriate in cases where a recipient questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous.

In this case, the denial of the member's request for waiver by DFAS and the DOHA adjudicator was proper, since the member knew or should have known that his entitlement to the ISP payments in the amount received was questionable. In this regard, the member stated in his original waiver application that he was expecting a payment of \$6,000.00 in February 2005. However, he received \$25,000.00. He stated that he called a named pay official, and she told him that he was entitled to the \$25,000.00, for three consecutive years. Even though the member was told he was entitled to the \$25,000.00, he had conflicting written documentation in the form of his CRNA ISP agreement by which he agreed to incur a one-year ADO and receive a one-year ISP lump sum payment in the amount of \$6,000.00.² The member should have known that his entitlement to ISP in the amount of \$25,000.00 was in question since he possessed written documentation that conflicted with the pay official's advice. Under these circumstances, the member has the burden of obtaining clear and thorough advice in writing from an appropriate official, or continuing to press for an explanation of the discrepancy in the information before him. *See* DOHA Claims Case No. 07110102 (November 26, 2007) and DOHA Claims Case No. 03071401 (July 18, 2003).

¹ Further, a member's entitlement to military pay is established by statute. Therefore, equitable considerations and common law government private employment contracts have no place in the determination of entitlement to military pay. *See* 60 Comp. Gen. at 258.

² On his CRNA ISP agreement for Fiscal Year 2005, the member selected option "2a" of the four options. Option 2a stated: "I am currently under an active duty obligation (ADO) for initial CRNA training. Subject to the availability of funds, I request a one-year CRNA ISP lump sum payment of \$6,000.00 (subject to applicable State and Federal taxes), for which I will incur a one-year ADO beginning on the effective date of my entitlement as indicated in CONDITIONS OF AGREEMENT, paragraph 1 above."

Although relief is not available to the member under 10 U.S.C. § 2774, the member may wish to consider the availability of relief under 10 U.S.C. § 1552, by pursuing the matter with the Air Force Board for Correction of Military Records.

Conclusion

The member's request of relief is denied, and we affirm the January 26, 2010, appeal decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board