

KEYWORDS: waiver of indebtedness

DIGEST: Under the provisions of the Department of Defense Instruction 1340.23, the Defense Office of Hearings and Appeals generally must receive a claimant’s request for reconsideration of an appeal decision within 30 days of the date of the appeal decision. Upon request, this period may be extended for an additional 30 days for good cause shown. In the absence of such a request, the decision becomes final 30 days after the date of the appeal decision.

CASENO: 2010-WV-042601.2

DATE: 9/21/2010

DATE: September 21, 2010

	)	
In Re:	)	
[REDACTED]	)	Claims Case No. 2010-WV-042601.2
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under the provisions of the Department of Defense Instruction 1340.23, the Defense Office of Hearings and Appeals generally must receive a claimant’s request for reconsideration of an appeal decision within 30 days of the date of the appeal decision. Upon request, this period may be extended for an additional 30 days for good cause shown. In the absence of such a request, the decision becomes final 30 days after the date of the appeal decision.

**DECISION**

A retired member of the U.S. Army requests reconsideration of the July 19, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-042601. In that decision DOHA sustained the determination of the Defense Finance and Accounting Service (DFAS) that the government’s claim for \$3,367.12 is not an erroneous payment and cannot be considered for waiver under 10 U.S.C. § 2774.

## Background

The record shows that in December 2006, the member completed a permanent change of station (PCS) move from Germany to CONUS. In connection with this PCS, the member was authorized to ship his household goods (HHG). The member shipped 3,303 pounds in excess of his authorized entitlement. Since the government paid the cost of the extra weight, DFAS determined on July 28, 2009, that the member was indebted to the government in the amount of \$3,463.32. The member appealed this determination on August 14, 2009, and DFAS forwarded the appeal to our Office on April 19, 2010. In requesting the debt be waived, the member cited significant financial difficulties this HHG move and recent events had caused his family. The adjudicator determined that under 10 U.S.C. § 2774, this Office has the authority to waive a member's liability for debts arising from erroneous payments of travel expenses, when collection would be against equity and good conscience and not in the best interest of the government. This waiver authority, however, applies only to claims arising out of an "erroneous payment." The adjudicator noted that it is the long-standing and standard practice of government agencies to ship the total weight of a qualifying member's HHG at government expense and to then collect any charges for excess weight from the member. When a HHG shipment is made under this system, the government bill of lading constitutes a contract between the government and the carrier, under which the carrier is entitled to be paid for its services. Therefore, the adjudicator determined that there was no "erroneous payment" for purposes of the waiver statute where the government in the first instance pays or bears the cost of a HHG shipment which exceeds the applicable weight allowance, in anticipation of collection of the overweight charges from the member in accordance with standard procedures. Thus the adjudicator further determined that the initial payment of excess weight charges by the government in accordance with this standard business practice is not "erroneous", and claims against members arising from such payments may not be considered for waiver under the provisions of 10 U.S.C. § 2774. *See* DOHA Claims Case No. 2009-WV-092502.2 (March 23, 2010); DOHA Claims Case No. 09061901 (June 24, 2009); and DOHA Claims Case No. 07090410 (September 6, 2007). This appeal decision was issued on July 19, 2010.

Significantly, at the end of the appeal decision, the adjudicator advised the member that he may request reconsideration of the decision, but that DOHA must actually receive his request within 30 days of the date of the decision. The adjudicator provided the specific address to which the member had to send his request, and also provided a fax number to which the member could send a signed copy of his request (followed by immediate transmission of the original by first class mail) to assure receipt by DOHA within the 30-day time limit. Our records indicate no receipt of a request for reconsideration until September 10, 2010, a point in time well beyond the 30 days after the appeal decision.

In his request for reconsideration, the member states that the DOHA appeal decision of July 19, 2010, is replete with numerous mistakes. He states there are just too many to mention, so he will just highlight a few. He states they range from the wrong reason for the request for waiver ("erroneous payment") to the wrong background (example: PCS from UK to Griffis Air Force Base). He expects a positive outcome after this Office reviews the appeal decision.

## Discussion

The member's request for reconsideration is untimely, and we are not authorized to consider it. While the 30-day requirement may be extended for an additional 30 days for good cause, the member made no timely request for an extension. His correspondence is silent on his failure to comply with the 30-day receipt requirement. No request for reconsideration may be accepted after this time has expired. *See* Department of Defense Instruction 1340.23 (hereinafter Instruction), ¶ E8.12 (February 14, 2006).

Even if DOHA had timely received the member's reconsideration request, waiver would not have been available in these circumstances under 10 U.S.C. § 2774, the statutory relief sought by the member. This Office has carefully reviewed the appeal decision of July 19, 2010, and we regret that we found some typographical errors. The adjudicator also apparently repeated a factual error regarding the member's spouse being ill that DFAS had incorrectly provided in its administrative report. Nevertheless, the result in the appeal decision is correct. In applying the waiver statute, an "erroneous payment" is a precondition to the application of the statute under 10 U.S.C. § 2774(a). If there is no erroneous payment, waiver cannot be considered. Accordingly, the focus is not on the member's debt, but on the payment made by the government to the carrier to transport the member's household goods. In situations like this where a member seeks relief from an indebtedness to the government for shipping household goods in excess of his weight allowance, the payment to the carrier by the government is not erroneous because the payment to the carrier was in anticipation that the member would reimburse the government any amount in excess of his entitlement. *See* the discussions in the decisions cited in the appeal decision as precedent.<sup>1</sup>

As to the member's contention that this Office has the wrong background facts, this Office believes there may be some confusion. The appeal decision is dated July 19, 2010, and clearly states that the member completed a PCS from Germany to a location in CONUS [redacted here for privacy reasons]. The reference to a member's PCS from the UK to Griffis Air Force Base is in one of the several DOHA Claims Cases that were referenced in the appeal decision, and copies of which were included as enclosures to the appeal decision so the member might compare his case to prior published decisions. Those DOHA Claims Cases were included because they illustrate particular legal principles such as the one described in the previous paragraph, not because their fact patterns are identical with the member's situation.

## Conclusion

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<sup>1</sup>However, if the loss or destruction of an item in shipment is attributable to a government-contracted carrier, that carrier is not entitled to receive transportation charges for that item. *See* Department of Army Pamphlet 27-162, ¶ 11-36, *Claims Procedures*. This could, arguably, lessen the total weight of a shipment and if enough items were lost or damaged, possibly bring an overweight shipment within the correct entitlement. The member would have to make a claim with the government, since it is the DD Form 1844, List of Property and Claims Analysis Chart, from which the unearned freight charges are deducted. The record shows that in the instant case the member stated he filed a claim for lost and damaged property with his insurance company, and so this process may never have taken place. Given that the carrier is entitled to due process in rebutting the evidence of loss or damage, it is unclear what remedy is available at this time. The member should contact his nearest Claims Office for guidance.

The member's request for reconsideration is untimely, and in accordance with the Instruction, ¶ E8.10, the July 19, 2010, appeal decision is the final administrative action of the Department of Defense in this matter regarding waiver.

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Michael D. Hipple  
Chairman, Claims Appeals Board

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Jean E. Smallin  
Member, Claims Appeals Board

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Natalie Lewis Bley  
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