

KEYWORDS: Waiver of Indebtedness

DIGEST: Title 10, United States Code, § 2774 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 there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

CASENO: 2010-WV-100801.2

DATE: 3/15/2011

DATE: March 15, 2011

In Re:)
 [REDACTED]) Claims Case No. 2010-WV-100801.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Title 10, United States Code, § 2774 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 there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

DECISION

A retired member of the United States Air Force requests reconsideration of the January 21, 2011, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-100801. In that decision, this Office denied waiver of an overpayment of \$15,193.39.

Background

The record shows the member, a retired member of the United States Air Force, was divorced on April 15, 1985. As a result of his divorce, his spouse was awarded 39.03% of his retired pay as community property. From the time of his divorce in 1985 until 1996 the member provided his former spouse with personal checks each month to meet his financial obligations. In 1996, the member was late providing his former spouse with her monthly payment. At that time, she obtained an attorney and filed a lawsuit against the member for an application for property payments under the Uniformed Services Former Spouses Protection Act (USFSPA). This would allow the Defense Finance and Accounting Service (DFAS) to send the member's former spouse her monthly payment directly. The appropriate paperwork was received in DFAS and the member received a letter dated December 10, 1996, from DFAS (specifically, a paralegal from the DFAS-Cleveland Center) telling him that \$819.40 would be deducted from his pay per month and paid to his former spouse.

In June 2008, it was discovered that the amount paid to the member's former spouse was incorrect. The \$819.40 deduction had never changed despite the increases in the member's pay due to annual cost of living increases. An audit was conducted, and it was determined that due to this administrative error, the member's former spouse was underpaid \$15,193.39 from December 1, 2001, through December 31, 2007, which was six years from the year the audit was done. As a result, due to the Barring Act, the member became indebted for the \$15,193.39 for that six-year period during which his former spouse's entitlement was miscalculated.¹

In his response regarding the debt to DFAS and to our Office, the member contends that it is not his responsibility to ensure that his former spouse receives the monies due her. He argues that if the paralegal who wrote him the letter made a mistake, it is not his job to check on her work, it is her supervisor's at DFAS. The member states he did not review his Retiree Account Statements (RAS) because he depended upon DFAS to ensure his pay was correct. Also, he stated he would not have noticed the increase in his pay due to the cost of living allowances (COLA) as he was constantly increasing his insurance allotments during that period, which actually decreased his pay. If the member had reviewed his RAS he would have realized he was being overpaid due to the fact that the USFSPA deductions did not change despite the fact that his divorce decree clearly states his former spouse is entitled to a percentage of his disposable income. Both DFAS and the adjudicator in our Office noted that we have consistently held that it is ultimately the member's responsibility to review his RAS to ensure he is paid correctly and report any discrepancies to the proper officials.

The member has requested reconsideration. He again contends that it should not be his responsibility to ensure his former spouse receives the correct pay. He states that when he provided the pay directly to her from 1985 through 1996, he carried out the responsibility correctly with the exception of a few late payments. It was the late payments that caused his former spouse to elect to receive direct payments from DFAS. At that point, he argues DFAS is responsible, or, in the alternative, his former spouse and her attorney are responsible. At any rate, it was certainly not his fault. He also requests that the set-up of the direct payments be

¹ The statute of limitations for claims against the Government, generally six years, is contained in the Barring Act, 31 U.S.C. § 3702. There are provisions for waiver of the statute regarding service members' pay, etc. in 31 U.S.C. § 3702(e).

reviewed, as it is possible that his former spouse elected not to receive COLA at the time. For all these reasons, he requests waiver of the indebtedness of \$15,193.39 owed the Government.

Discussion

Title 10, United States Code, § 2774 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 there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

Department of Defense Instruction 1340.23 (hereinafter Instruction), *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances* (February 14, 2006), ¶ E4.1.4, states: “A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous.” The standard we employ to determine fault is that of a reasonable person, under the specific circumstances of the case, *i.e.*, would or should a reasonable person know that he is being overpaid. At that point, the person has a duty to bring the overpayments to the attention of the proper authorities.

The member’s argument for waiver in the case is that he has no responsibility for the error and he had no responsibility to review his RAS. Instruction, ¶ E4.1.3, states: “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.” As to the issue of the review of his RAS, the member admits that he was receiving RAS, but was not reviewing them. The member should have carefully monitored his RAS. We cannot stress too highly the importance of a careful review by each member of the pay documents provided by the employing agency. Pay documents are issued to members so they can verify the accuracy of their pay and allowances (in this case, retired pay); we have consistently held that a member who receives such documents has a duty to carefully examine them and report any errors. Since the member failed to do so, we must hold him partially at fault in the matter, which statutorily precludes waiver of the overpayment. *See* DOHA Claims Case No. 07090603 (September 11, 2007); DOHA Claims Case No. 07020509 (February 8, 2007); DOHA Claims Case No. 00100332 (December 28, 2000); and DOHA Claims Case No. 99112916 (January 19, 2000).

The member’s contention that his former spouse or her attorney should have been responsible for correcting the error has no merit. The responsibility rests with the member. The member requested waiver of his debt, and we have determined that waiver is not appropriate in this situation. If the member has questions regarding his former spouse’s receipt of COLA, he should address them to DFAS, since they pertain to the validity of the debt, not the appropriateness of the waiver.

Conclusion

The member’s request for reconsideration is denied, and denial of waiver of the overpayment in the amount of \$15,193.39 is sustained. In accordance with the Instruction,

¶ E8.15, this is the final administrative decision of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Acting Chairman, Claims Appeals Board

///Original Signed///

Catherine M. Engstrom
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board

