

KEYWORDS: waiver of indebtedness

DIGEST: Under 10 U.S.C. § 2774(b)(2), we may not waive collection of erroneous payments to or on behalf of a service member if application for waiver is received after the expiration of five years immediately following the date on which the erroneous payment was discovered.

CASENO: 2010-WV-110802.3

DATE: 8/11/2011

DATE: August 11, 2011

In Re:	)	)
[REDACTED]	)	) Claims Case No. 2010-WV-110802.3
Claimant	)	)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 10 U.S.C. § 2774(b)(2), we may not waive collection of erroneous payments to or on behalf of a service member if application for waiver is received after the expiration of five years immediately following the date on which the erroneous payment was discovered.

**DECISION**

The former spouse of a retired service member appeals the July 7, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-110802.2, a matter involving her application for waiver of a debt which resulted from the overpayment made to her of her former husband's retired pay. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS) determination that the former spouse's waiver request in the amount of \$12,813.13 could not be considered because she did not submit

her application within the time limits set forth under 10 U.S.C. § 2774.

### **Background**

The record indicates that pursuant to a divorce decree issued September 7, 1984, the member's former spouse was entitled to receive a portion of his retired pay as community property. The member subsequently requested that the Department of Veterans Affairs (VA) increase his disability rating. The VA granted his request retroactive to May 1, 1993. Because the member waived receipt of his military retired pay for any VA compensation he received, DFAS determined that the member's former spouse was indebted \$12,813.13 for the payments she received from his retired pay for the period May 1, 1993, through October 2003. DFAS discovered the overpayment in December 2003, and notified the member's former spouse that she had been overpaid by letter dated December 23, 2003. The record indicates that the member's former spouse did not submit a written request for waiver until July 21, 2009.

In her request for reconsideration, the member's former spouse asserts that she was never notified by letter dated December 23, 2003, that she was overpaid. She states that the first time she was notified by DFAS of the indebtedness was by letter dated April 3, 2009. She attaches a letter from her attorney to her former husband concerning the reduction of the amount she was receiving from his retired pay. She contends that if she had known that she was indebted, she would not have hired an attorney. She would have submitted a waiver request instead. She therefore states that the correct date of discovery should be April 3, 2009.

### **Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive collection of overpayments of pay and allowances to or on behalf of service members if collection would be against equity and good conscience and not in the best interest of the United States and if there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the waiver applicant. However, section 2774(b)(2) states that the Secretary concerned may not exercise his authority to waive any claim if application for waiver is received in his office after the expiration of five years immediately following the date on which the erroneous payment was discovered.<sup>1</sup> As explained by the DOHA adjudicator in the appeal decision, the date of discovery is the date it was definitely determined by an appropriate official that an erroneous payment had been made. *See* 54 Comp. Gen. 133 (1974), and DOHA Claims Case No. 06070704 (July 17, 2006).

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<sup>1</sup>We note that at the time the erroneous payment was discovered in this case, December 2003, the time limit for applying for waiver was three years. Effective March 1, 2007, the time limit was changed to five years. *See* Pub. L. No. 109-364, Div. A, Title VI, § 671(a)(2), 120 Stat. 2083, 2270 (2006).

In this case, the record reflects that DFAS (Retired and Annuity Pay) sent the member's former spouse a letter dated December 23, 2003, notifying her that she was overpaid from May 1993 through October 2003, due to the VA's decision to retroactively pay her former husband disability compensation. This letter advised her that a debt had been established on her account in the amount of \$13,115.13,<sup>2</sup> that beginning on February 1, 2004, it would be deducted at a monthly rate of \$50.00 until the total was deducted, and that she could request an application for waiver of the debt from DFAS. As noted in the appeal decision, this letter was mailed to the same address as the address listed on the member's former spouse's waiver application. Although the former spouse states that she was unaware of the overpayment until April 3, 2009, the letter she submits from her attorney (dated January 22, 2004) supports the fact that she was aware that the amount she had received and was receiving of her husband's retired pay was reduced when he was awarded VA compensation.

Although the member's former spouse contends that the date of discovery should be April 3, 2009, we have consistently held that the controlling date in determining timeliness of application for waiver is the date when the erroneous payment was discovered by the administrative office, and not when the waiver applicant was notified of the overpayment. Thus, for the issue of the time limitations under section 2774(b)(2), the waiver applicant's actual or imputed knowledge is irrelevant. *See* DOHA Claims Case No. 06070704, *supra*, and B-208811, Aug. 2, 1983. Therefore, we find that the DOHA adjudicator reasonably concluded that the date of discovery was December 2003. Since the member's former spouse did not submit a written request for waiver until July 21, 2009, we have no authority to consider it.

### **Conclusion**

We affirm the July 7, 2011, 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: Jean E. Smallin

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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<sup>2</sup>The record reflects that based on further review of the circumstances, DFAS determined that the debt was \$12,813.13, instead of \$13,115.13.

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board