

KEYWORDS: waiver of indebtedness

DIGEST: When a member knows or reasonably should know that she is being overpaid, she has a duty to set aside the erroneously paid funds for repayment, even if the government fails to act after notification. The government has the right to recover such payments notwithstanding the dilatory recovery efforts of its agents.

CASENO: 2011-WV-022802.2

DATE: 8/17/2011

DATE: August 17, 2011

)	
In Re:)	
[REDACTED])	Claims Case No. 2011-WV-022802.2
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member knows or reasonably should know that she is being overpaid, she has a duty to set aside the erroneously paid funds for repayment, even if the government fails to act after notification. The government has the right to recover such payments notwithstanding the dilatory recovery efforts of its agents.

DECISION

A member of the U.S. Army Reserve requests reconsideration of the July 26, 2011, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2011-WV-022802. In that decision, DOHA denied waiver of the government’s claim in the amount of \$3,058.00.

Background

The record shows that the member was ordered to active for training (ADT) for 41 days with a report-no-later-than date of July 12, 2009. In connection with her ADT, the member received a travel advance payment on July 1, 2009, in the amount of \$3,058.00. The record further shows that when the member submitted her voucher for settlement, the Defense Finance and Accounting Service (DFAS) determined that her authorized expenses were \$3,571.03. Since the member had received a travel advance in the amount of \$3,058.00, she was entitled to a final payment of \$513.03. However, due to an administrative error, DFAS failed to consider the travel advance payment, and erroneously paid the member \$3,571.03 as her final travel settlement. Thus, the member was overpaid \$3,058.00.

In the appeal decision, the member stated that prior to joining the Army, she spent over ten years in the Navy. During her time in the Navy, she stated she never filled out her own travel voucher. She stated that this was the first travel voucher she had ever submitted on her own, and the first time she had ever requested a travel advance. She stated that she trusted that DFAS would pay her the correct amount, and that waiver should be granted as it was the result of an administrative error. The adjudicator determined that a review of her travel voucher summaries dated September 17, 2009, and October 2, 2009, should have alerted her to the fact that the advance in the amount of \$3,058.00 was not deducted from her entitlement. On both vouchers, "0.00" is listed for "Travel Advance Deducted." The adjudicator determined that the member knew, or reasonably should have known, that she was receiving pay in excess of her entitlement. Therefore, she had a duty to retain such amounts for subsequent refund to the government.

In her request for reconsideration, the member makes several arguments. All of the arguments, however, relate to the view that the error is the responsibility of the finance agency and that it is unfair to make her pay for their mistake. She also contends that since the overpayment occurred in the first phase of her training, the finance agency should have rejected her request for advance pay for the second phase of her training. Since they did not, she was led to believe that all previous claims were settled appropriately without error. The member contends she did not know she was overpaid, and could not have reasonably known. The member requests waiver based on her personal integrity, as she believes it is unfair, unequal, and unjust for the soldier to bear the weight of this burden.

Discussion

The member seeks waiver of the debt under title 10, United States Code, § 2774. This statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23 (February 14, 2006) (hereinafter Instruction). Generally, persons who receive a payment erroneously from the government acquire no right to the money. They are bound in equity and 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 must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing.

While an administrative error did occur, our Office has consistently held that the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the government. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right. If it were merely a matter of right, then virtually all erroneous payments made by the government to members would be excused from repayment. *See* Instruction, ¶ E4.1.1.

A travel advance payment is considered as merely a loan to the member, to be used for authorized expenses in accordance with her travel orders. It is not meant to represent a final determination of the amount to which the member is entitled, and members who receive such advance travel funds are on notice that they are entitled to be reimbursed only for legally authorized expenditures.

As to the member's concern that this somehow reflects on the personal integrity of the soldier, the legal definition of "fault" does not imply any ethical lapse on the part of the member. It merely indicates that she is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to her. The standard we employ to determine fault is that of a reasonable person: if such a person knows, or reasonably should know, that she is receiving money to which she is not entitled. In such a situation, waiver is precluded. *See* Instruction, ¶ E4.1.4. Whether the member was experienced with travel vouchers or not, she should have realized that she was not entitled to full reimbursement for all her allowable expenses, a payment of over \$3,500, when she had already received over \$3,000 in advance of her travel. Under these circumstances, we believe that collection of the overpayment would not be against equity or good conscience, nor would it be contrary to the best interests of the United States. *See* DOHA Claims Case No. 07012401 (January 30, 2007), and DOHA Claims Case No. 98102706 (November 26, 1998).¹

Conclusion

The member's request for reconsideration is denied, and we affirm the July 26, 2011, decision to deny waiver of the government's claim in the amount of \$3,058.00. In accordance with the Instruction, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

Jeffrey D. Billett
Member, Claims Appeals Board

¹ The standards for waiver under 5 U.S.C. § 5584 are the same as those for 10 U.S.C. § 2774.

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board