

KEYWORDS: waiver of indebtedness

DIGEST: The unearned portion of a Selective Reenlistment Bonus may not be considered for waiver under 10 U.S.C. § 2774 because payment was proper when made.

CASENO: 2012-WV-030203.2

DATE: 5/17/2012

DATE: May 17, 2012

In Re:)		
[REDACTED])		Claims Case No. 2012-WV-030203.2
Claimant)		

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The unearned portion of a Selective Reenlistment Bonus may not be considered for waiver under 10 U.S.C. § 2774 because payment was proper when made.

DECISION

A former member of the U.S. Air Force requests reconsideration of the April 13, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-030203. In that decision, DOHA concluded that the claim against the member in the amount of \$7,538.03 could not be considered for waiver under 10 U.S.C. § 2774 because it did not arise from an erroneous payment.

Background

On September 30, 2003, the member reenlisted in the Air Force for a period of four years. As a result, he was entitled to receive a Selective Reenlistment Bonus (SRB) in the gross

amount of \$51,645.60, which he subsequently received. The member was court-martialed and sentenced to confinement on February 14, 2007. While in confinement, effective August 25, 2009, the member received a dishonorable discharge from the Air Force. DFAS determined that the member was liable for the recoupment of a *pro rata* portion of the SRB already paid because he

did not complete his term of enlistment. This amount was determined to be \$8,105.49. Credits due the member reduced his SRB debt to \$7,538.03.¹

In the appeal decision, our Office concluded that the \$7,538.03 could not be considered for waiver because it did not represent an erroneous payment. The DOHA adjudicator explained that a claim arising from a properly paid SRB, which later must be recouped because of a member's failure to complete the terms of his enlistment contract, is not a claim arising from an erroneous payment which may be considered for waiver under 10 U.S.C. § 2774.

In his reconsideration request, through his attorney, the member asks that the debt be forgiven due to mitigating circumstances, prior honorable service and financial hardship. He states that at the time of his court-martial, he elected to entrust his former spouse with a full Power of Attorney (POA). He states that she used the POA to withdraw all of the member's Thrift savings plan accumulated funds. He further states that at the time of his initial confinement, he was admitted to a psychiatric ward for adjustment disorder. His former spouse communicated with him for seven months, but then she chose to dissolve their communication. During this period, the member states that he did not know that he was being overpaid pay and allowances because he was not in contact with his spouse. He further states that his spouse used the funds to support his three children. He also alleges that he did not know that his spouse was entitled to receive his pay and allowances as a result of the deferment of the automatic forfeiture of his pay and allowances for six months from July 5, 2007, through September 29, 2007. He states that he is not a career criminal, was not convicted of a crime of moral turpitude and was not sentenced to any restitution. He states that he has served more than 44 months in confinement; he has not seen his children in over five years; his ability to earn a wage as a disenfranchised felon is unlikely; and his medical conditions also prevent him from earning income to repay the bonus.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay and allowances to a member or former member if collection would be against

¹The DOHA adjudicator specifically outlined all the underpayments and overpayments the member received during the period February 2007 through April 2008, which ultimately resulted in an underpayment due the member in the amount of \$567.46.

equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. A debt cannot be considered for waiver unless the payment was erroneous when made, and we have held that a debt arising from the unearned portion of an SRB does not arise from an erroneous payment, since the payment was proper when made. *See* DOHA Claims Case No. 09082801 (September 21, 2009);² DOHA Claims Case No. 08092602 (October 23, 2008); and DOHA Claims Case No. 07103007 (November 15, 2007).

The member seeks waiver relief under 10 U.S.C. § 2774. Title 10 U.S.C. § 2774(a) specifically requires “an erroneous payment of any pay or allowances . . . to or on behalf of a member or former member of the uniformed services” as a condition for applying the statute. In this case, the SRB payment was proper when made, and the member does not dispute this fact. Therefore, the unearned portion of the member’s SRB cannot be considered for waiver under 10 U.S.C. § 2774, because the debt did not arise from an erroneous payment. *See* DOHA Claims Case No. 08092602, *supra*.

Even though the member may not have been ordered to pay restitution as a result of his court-martial conviction, this has no effect on our decision in this matter. Restitution is a remedy wherein the criminal offender is required to repay, as a condition of his sentence, the victim or society in money or services. *See* Black’s Law Dictionary 1313 (6th ed. 1990). In contrast, the member was statutorily liable for the recoupment of a *pro rata* portion of the SRB already paid because he did not complete his term of enlistment.

As explained by the DOHA adjudicator in the appeal decision, even if we could consider the SRB payment for waiver, financial hardship is not a factor for consideration in determining whether waiver is appropriate. However, DFAS has the authority to arrange a repayment plan which takes any hardship into account. *See* DOHA Claims Case No. 07103007, *supra*.

Although we have no authority to consider the unearned portion of an SRB for waiver because it does not constitute an erroneous payment, our decision does not preclude the member from seeking other available remedies. We note that under 37 U.S.C. § 303a(e), the Secretary concerned (in this case, the Secretary of the Air Force), has the discretion to determine if the member’s repayment of the unearned portion of the SRB is appropriate based on whether repayment would be contrary to a personnel policy or management objective, would be against equity and good conscience, or would be contrary to the best interests of the United States.³ The

²This decision involved waiver under 32 U.S.C. § 716 (the waiver statute applicable to members of the National Guard). The standards for waiver are the same under 10 U.S.C. § 2774 (the waiver statute applicable to active duty and reserve members of the Uniformed Services).

³Repayment of the SRB is currently covered by Volume 7A of the DoD Financial Management Regulation – *Military Pay Policy and Procedures – Active Duty and Reserve Pay*, DoD 7000.14R (DoDFMR). Chapter 2 sets forth conditions under which repayment of the SRB will or will not be sought. The Secretary’s authority cited above to make a case-by-case

member may wish to pursue this remedy with the Secretary of the Air Force.

Conclusion

The member's request for relief is denied, and we affirm the April 13, 2012, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense concerning the member's waiver request under 10 U.S.C. § 2774.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board

determination is also stated in Chapter 2 at paragraph 20203.E.