

KEYWORDS: waiver of indebtedness; five-year statute of limitations

DIGEST: To be considered under the provisions of 10 U.S.C. § 2774, a service member's application for waiver must be received within five years of the discovery of the debt.

CASENO: 2012-WV-030704.2

DATE: 5/30/2012

DATE: May 30, 2012

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| In Re: [REDACTED] Claimant |))))))) | Claims Case No. 2012-WV-030704.2 |
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**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

To be considered under the provisions of 10 U.S.C. § 2774, a service member's application for waiver must be received within five years of the discovery of the debt.

DECISION

A former member of the U.S. Army requests reconsideration of the May 10, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-030704. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS) determination that the member's request in the amount of \$851.28 could not be considered because he did not submit his application within the five-year statute of limitations as set forth under 10 U.S.C. § 2774.

Background

On July 24, 2003, the member separated from the Army. At that time, the member was due pay and allowances in the gross amount of \$1,277.67, for the period July 16, 2003, through July 24, 2003. However, due to an administrative error, the member's pay account was not updated to reflect his separation on July 24, 2003. As a result, he erroneously received active duty pay and allowances through July 31, 2003, in the amount of \$2,129.45. Since the member was due \$1,277.67, but was paid \$2,129.45, he was overpaid \$851.78.¹ DFAS discovered the overpayment on August 1, 2003. The member's leave and earnings statement (LES) for August 2003 reflected the overpayment. DFAS notified the member that he had been overpaid by letter dated February 22, 2011. The member did not submit a written request for waiver until July 25, 2011.

In his request for reconsideration, the member contends that he has new evidence that reflects DFAS did not discover the debt until February 2011. He attaches a copy of his credit report reflecting that the debt has an opening date of February 2011. He requests that we clarify with DFAS the date of discovery. In addition, he states that he is not liable for the debt, and has never accepted responsibility for it. However, because of the passage of time, he has been unable to verify the debt.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of overpayments of pay and allowances to 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.² 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* DOHA Claims Case No. 06070704 (July 17, 2006).

In this case, the record reflects that the overpayment was reflected on the member's leave and earnings statement (LES) in August 2003. Specifically, the member's Master Military Pay Account (MMPA) records for September 30, 2003, which reflect information contained on his LES for the period July 1, 2003, through September 30, 2003, show that the \$851.78 indebtedness was reflected on his August 2003 LES. Although DFAS did not notify the member by letter that he had been overpaid until February 22, 2011, and the member contends that he

¹In the appeal decision, there was a typographical error reporting the debt as \$851.28, instead of \$851.78.

²We note that at the time the erroneous payment was discovered in this case, August 1, 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).

was unaware of the overpayment until June 2011, 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. 2010-WV-110802.3 (August 11, 2011); and DOHA Claims Case No. 06070704, *supra*. Therefore, we find that the DOHA adjudicator reasonably concluded that the date of discovery was August 1, 2003. Since the member did not submit a written request for waiver until July 25, 2011, we have no authority to consider it.

Although the member attaches a copy of his credit report reflecting that the debt owed to DFAS was opened in February 2011, as explained above, the controlling date is the date the erroneous payment was discovered by the administrative office. In this case, that date was August 1, 2003, not the date DFAS may have reported the indebtedness to the credit reporting agency. In addition, the fact that there have been delays by the government does not alter the underlying debt. This Office has consistently held that the United States is not liable for the erroneous acts of its officers, agents, or employees, even though committed as part of their official duties. *See* DOHA Claims Case No. 2011-WV-041101.2 (December 20, 2011).

Conclusion

We affirm the May 10, 2012, 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

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