

KEYWORDS: Waiver of indebtedness

DIGEST: When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 2012-WV-040904.2

DATE: 9/25/2012

DATE: September 25, 2012

In Re:)	
[REDACTED])	Claims Case No. 2012-WV-040904.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

A retired member of the U.S. Air Force requests reconsideration of the August 17, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-040904.

Background

On July 17, 2008, the member reenlisted in the Air Force for a period of four years and three months. As a result, he was entitled to receive a Selective Reenlistment Bonus (SRB) in

the gross amount of \$60,000.00. The member subsequently received \$50,000.00¹ and was entitled to receive a final SRB payment in the amount of \$10,000.00 in July 2011. However, on December 23, 2010, the member was medically retired.

At separation, the member was entitled to receive pay and allowances in the amount of \$5,994.53. However, the member received a final separation payment in the amount of \$13,687.54, causing an overpayment of \$7,693.01 (\$13,687.54 - \$5,994.53).

In the appeal decision, our Office denied the member's request for waiver. In denying the member's waiver request, the adjudicator considered the member's statement that he believed the payment he received was his final SRB payment in accordance with Chapter 2 of Volume 7A of the DoD Financial Management Regulation – *Military Pay Policy and Procedures – Active Duty and Reserve Pay*, DoD 7000.14R (DoDFMR), because he had been medically retired from the Air Force. The adjudicator concluded that the member should have requested written documentation of a breakdown of his entitlements, especially since there was no record of the Secretary concerned taking action under the DoDFMR section to allow payment of the unearned portion of the SRB.

In his reconsideration request, the member states that there was no way for him to be aware that an overpayment was made when he was under the impression that he was receiving his final SRB along with his separation pay. He states that there was no cause for him to question the payment. He states that had he known he needed a breakdown of his entitlements, he would have asked for one. He further states that these types of overpayments could be reduced or eliminated if the Defense Finance and Accounting Service (DFAS) included a breakdown of entitlements when payment is made. He states that if DFAS had included this information with his final separation pay, he would have been made aware that an error occurred and would have had the opportunity to question the overpayment. He states that the first time he was given a statement of his entitlements was in July 2011 when he requested it after receiving notice of the overpayment. He states that even if he had suspected there was a possible error in December 2010 and retained the funds, after six months any normal person would have assumed the payment was correct. He acknowledges that while he does not have any evidence that action was taken by the Secretary concerned under the DoDFMR, he was merely stating that this is the rule which led him to believe he did indeed receive his final SRB payment along with his final separation pay. He states that the amount matched exactly what he would have received had the SRB payment been made. In addition, he states that he spoke with a Reenlistment Specialist who indicated that he should receive the final SRB payment. He further states that charging interest on the debt is unfair. He also asks that the debt be forgiven due to financial hardship.

Discussion

¹The member received \$25,000.00 (net \$17,500.00) in July 2009, and \$25,000.00 (net \$17,500.00) in July 2010.

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 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. *See* Department of Defense Instruction 1340.23 (Instruction) (February 12, 2006) ¶ E4.1.2.

A member is considered to be at least partially at fault, and waiver is precluded when, in light of all the circumstances, it is determined that he should have known that he was being overpaid. The standard employed to determine whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving payment in excess of his entitlements and made inquiries or brought the matter to the attention of the appropriate officials. A member is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in question. *See* DOHA Claims Case No. 09020204 (February 26, 2009).

The issue in this case centers on the reasonableness of the member's belief that he should receive a final SRB payment. In this regard, we find that the member's expectation of a final SRB payment was not reasonable. The member medically retired on December 23, 2010, approximately one year and seven months prior to the end of his reenlistment obligation. At the time of his reenlistment, he signed a document entitled *Reenlistment Eligibility Annex to DD Form 4*. On that document, he acknowledged that he had been advised of, understood and agreed to the conditions which might terminate his continued entitlement to unpaid bonus installments and cause a portion of advance bonus payments to be recouped or terminated. Although the member questioned a Reenlistment Specialist, he should have followed up by requesting a definitive explanation from a pay official. In addition, as explained in the appeal decision, there is no evidence in the record reflecting that the Secretary concerned made a determination to pay the final SRB payment when the member had not completed his term of reenlistment.² Therefore, we uphold the appeal decision. *See* DOHA Claims Case No. 00102418 (December 18, 2000).

The member should address his concerns about the interest on the debt to DFAS. In addition, 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. 08040301 (April 15, 2008).

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

²Under paragraph 020203(B) of Volume 7A of the DoDFMR, "In all other instances involving a member's separation for medical reasons not falling under 10 U.S.C. chapter 61 which were not the result of the member's misconduct, the Secretary of the Military Department concerned has the discretion to determine whether to require repayment of the unearned portion of the pay or benefit, or to pay an unpaid balance of a pay or benefit."

Air Force), has the discretion to determine whether or not to pay the unpaid balance of the SRB. The 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 August 17, 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