

KEYWORDS: Waiver of Indebtedness

DIGEST: When a member is 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 to the government.

CASENO: 2012-WV-100906.2

DATE: 03/26/2013

DATE: March 26, 2013

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In Re: )  
[REDACTED] ) Claims Case No. 2012-WV-100906.2  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member is 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 to the government.

**DECISION**

A member of the Montana Air National Guard requests reconsideration of the February 21, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-100906. In that decision, this Office denied waiver of the total amount of the debt of \$1,875.00.

**Background**

The member began receiving Special Duty Assignment Pay (SDAP) on March 27, 2007, at the rate of \$150.00 per month. Under National Guard Regulation 500-3/Air National Guard Instruction 10-2503, in order to continue receiving SDAP, the member was required to maintain

HAZMAT Technician certification as set forth under 29 C.F.R. 1910.120. In order to maintain this certification, the member had to complete a minimum of eight hours of annual refresher training. The member last received the training on November 16, 2009, and his certification remained valid for a twelve-month period following this date. Therefore, payment to the member of SDAP should have stopped on November 16, 2010. However, due to an administrative error, the member continued to receive SDAP from November 16, 2010, through November 16, 2011, causing an overpayment of \$1,875.00.

In the appeal decision the member contended that he was wrongly forbidden by members of his command to suit up from June 3, 2010, through February 16, 2012, and therefore could not qualify for HAZMAT technician training. He also contends that his non-commissioned officer (NCO) informed all members of his unit of the training, but deliberately excluded him. The member contends that much of the command's ill treatment of him was due to the fact that he filed a complaint with the National Guard Bureau Inspector General (NGB-IG), and many of his complaints were substantiated.

### **Discussion**

Title 10, U.S.C., § 2774, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, those criteria are met by a finding that the claim arose from administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

Our Office has consistently held that when a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for eventual repayment to the Government, even if the Government fails to act after notification. *See* Department of Defense Instruction (hereinafter Instruction) 1340.23, ¶ E4.1.1. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the government. If it was merely a matter of right, then virtually all erroneous payments made by the Government would be excused from repayment.

In the member's request for reconsideration, he repeats the facts that are already in the record regarding his IG complaint, and adds as new evidence the report from the Air Force Board of Correction of Military Records (AFBCMR) regarding his case. The AFBCMR did find in the member's favor and ordered several of his records corrected. The board relied, in part, on the DoD/IG report that concluded the member had been a victim of reprisal.

The member states that he has set aside the money for repayment, and that the issue is not the repayment, but rather the principle of the matter. The member contends that he has acted honorably and has not attempted to defraud the government. The Claims Appeals Board finds no indication of fraud, misrepresentation, or lack of good faith on the part of the member. The Board, however, is unable to say that the member is entirely without fault. The legal definition of "fault" does not imply any ethical lapse on the part of the member. It merely indicates that he

is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person: if such a person knows or reasonably should know that he is receiving money to which he is not entitled, waiver is precluded. *See* Instruction ¶ E4.1.4.

The member was able to obtain relief from the AFBCMR for the correction of his records, as that is their purview. The correction of his record in their forum does not translate to waiver of his SDAP overpayment in this forum. Under our authority, waiver is not available to the member.

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the appeal decision dated February 21, 2013. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

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Jean E. Smallin  
Chairman, Claims Appeals Board

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Gregg A. Cervi  
Member, Claims Appeals Board

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Natalie Lewis Bley  
Member, Claims Appeals Board