

DATE: May 2, 2013

In Re:)

[REDACTED])

) Claims Case No. 2012-WV-121102.2

Claimant)

**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. Partial waiver of the debt is not an appropriate remedy to reimburse a member where the member is no longer able to recover tax withholding from the taxing authority on amounts erroneously overpaid.

DECISION

A member of the Utah Air National Guard requests reconsideration of the March 28, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-121102.

Background

In February 2011 the member was entitled to receive a reenlistment bonus in the gross amount of \$1,500.00. However, due to an administrative error, on February 20, 2011, the member received a reenlistment bonus in the gross amount of \$10,000.00. As a result, he was overpaid \$8,500.00. The member subsequently requested waiver in the amount of \$2,720.00, which he states is the amount that was never deposited into his bank account.

In the appeal decision, the DOHA adjudicator denied the member's request for waiver. In denying the member's waiver request, the adjudicator noted that the member was entitled to, and expected to receive a \$1,500.00 reenlistment bonus. The member was advised by a finance official prior to receiving the bonus payment into his bank account that an error had been made

and the ANG erroneously issued him a payment in the amount of \$10,000.00. Therefore, the adjudicator held that since the member knew he was receiving erroneous payments, he did not acquire title to the money and had a duty to return it when asked to do so. The adjudicator also explained that although a member does not directly receive all monies which he is indebted to repay, the taxes and other amounts withheld on his behalf do not reduce the amount of indebtedness.

In his request for reconsideration, the member states that he wishes to amend his waiver request from \$2,720.00 to \$1,420.00. He states that the \$2,720.00 represents the amount he never directly received because it was withheld for taxes. He states that he had to take out a loan for \$2,720.00 to pay the debt in full. He states that in January 2013 he received a Certificate of Tax Adjustment from the Defense Finance and Accounting Service (DFAS). This adjustment reflected that in 2012 he paid \$6,503.88 on the debt using the loan he procured and garnishments made to his pay. He states that he subsequently filed this adjustment with his tax return and was able to recover \$1,300.00. He states he then applied the \$1,300.00 to his loan but is still left repaying \$1,420.00. He states that although the government made the error, government personnel are not held accountable for their mistakes. He states that he had no control over the error but is being held accountable for it. He also suggests that waiver should be granted because repayment of the debt has caused him financial hardship.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not a sufficient basis in and of itself for granting waiver. *See* Department of Defense Instruction 1340.23 (Instruction) ¶ E4.1.3. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government, even if the government fails to act after such notification. *See* Instruction ¶ E4.1.4.

In this case, the member was expecting to receive a reenlistment bonus in the amount of \$1,500.00. He was notified by a finance official prior to receiving the bonus that an error had occurred and the ANG was issuing him a payment in the amount of \$10,000.00. Therefore, since the member knew he was being overpaid, he did not acquire title to the excess amounts and had a duty to hold them for eventual repayment to the government. *See* DOHA Claims Case No. 98092212 (October 27, 1998).

In the case before us, the member is requesting waiver of only amounts withheld for taxes. However, amounts withheld from the member's pay for federal and state taxes are forwarded to the appropriate agencies for the benefit of the member. Application of the tax laws to a member's pay is a matter solely within the jurisdiction of the taxing authority, and a member's tax liability does not permit partial waiver of an amount not otherwise appropriate for waiver. Therefore, the member is indebted for any amount paid to the taxing authorities on his

behalf. *See* DOHA Claims Case No. 09031701 (March 26, 2009); DOHA Claims Case No. 97090808 (September 15, 1997), *aff'd by* Deputy General Counsel (Fiscal) (February 16, 2001).

Finally, financial hardship is not a factor for consideration in determining whether waiver is appropriate. *See* DOHA Claims Case No. 2012-WV-040904.2 (September 25, 2012).

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision dated March 28, 2013. In accordance with Instruction ¶ 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