

DATE: June 26, 2013

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In Re:

[REDACTED]

Claimant

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Claims Case No. 2013-WV-011808.2

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

If a member knows or reasonably should know that he is receiving money to which he is not entitled, waiver is not appropriate.

**DECISION**

A member requests reconsideration of the May 20, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2013-WV-011808. In that decision, this Office denied waiver in the amount of \$974.62 the member erroneously received for leave.

**Background**

The member took block leave March 22, through March 28, 2012, with his unit prior to his expected deployment. When he returned from leave, he was informed that due to problems with his status he would not be deploying. The member was then transferred to a Warrior Transition Unit (WTU) at a different installation. When the member was out-processing from the WTU, he informed them of the block leave previously taken. The WTU contacted his previous unit, but they had no record of the leave. Apparently, the leave slips had been sent to another installation for processing. Therefore, when he was out-processed the previous leave taken was not deducted from his leave total. As a representative for the South Carolina Army National Guard (SC ARNG) Mobilization Pay explained to him, the reason he had a debt due was that when he processed out, the block leave he had previously taken had not posted against his master leave record at the Defense Finance and Accounting Service (DFAS).

## Discussion

Title 32, United States Code, § 716, 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 National Guard, if collection of the claim would be against equity and good conscience and not in the best interests of the United States provided that the claim arose from an 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.

The member notes that there have been many administrative errors concerning his records. He is most concerned that the adjudicator in his appeal decision stated that he was discharged from the U.S. Army National Guard. He states that he is still a member of the Army National Guard, and in fact, has just returned from a nine-month deployment to Kosovo.

A review of the member's records indicate that there were several administrative errors associated with this file. None of them change the ultimate outcome, that the member took or was paid for six days more leave than he had earned. The SC ARNG Mobilization Pay representative explained to the member that he accrued thirteen days of leave from December 4, 2011, through May 11, 2012, but he was charged for the block leave for seven days of March 22, 2012, through March 28, 2012. When he was discharged, he was given terminal leave of April 30, 2012, through May 11, 2012 (twelve days which made for nineteen days total). This put the member in excess leave by six days. This caused an overpayment of \$974.62.

The member notes that he did not have any documentation to give the personnel at the WTU, but he was completely honest with them, and was told not to worry about it, that it would be taken care of later. The member states that he has never given the Army reason to question his integrity, and that is true in the leave issue.

While administrative errors did occur in this case, our Office has consistently held that the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the government. Waiver action under 32 U.S.C. § 716 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 were merely a matter of right, then virtually all erroneous payments made by the government to members would be excused from repayment. *See* DOHA Claims Case No. 08020105 (February 12, 2008).

The Board finds no indication of fraud, misrepresentation, or lack of good faith on the part of the member. The Board is unable to say that the member is entirely without fault. 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* Department of Defense Instruction (hereinafter Instruction) 1340.23 ¶ E4.1.4. However, 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.

Regardless of the administrative errors that have occurred in this case, the member was aware the entire time, that he did take the leave. He attempted to inform personnel of the leave at his new station, and when they did not take notice of the leave, he should have made more attempts to resolve the situation. For the above reasons, waiver is not appropriate.

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the May 20, 2013, appeal decision. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

*///Original Signed///*

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Jean E. Smallin  
Chairman, Claims Appeals Board

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Catherine M. Engstrom  
Member, Claims Appeals Board

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Natalie Lewis Bley  
Member, Claims Appeals Board