

DATE: June 12, 2014

In Re:)

[REDACTED])

) Claims Case No. 2013-WV-100216.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member who erroneously received aviation continuation pay for four years remained unaware of the erroneous payments until he was notified by his command. Under 32 U.S.C. § 716, the amounts he received prior to notification were waived. However, the amount he received after notification may not be waived because he did not acquire title to the excess amount and has a duty to return it to the government.

DECISION

A retired U.S. Air Force officer requests reconsideration of the May 7, 2014, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-100216. In that decision, DOHA allowed, in part, waiver of the collection of the overpayment of aviation continuation pay (ACP) in the amount of \$75,000.00, but denied waiver of \$25,000.00.

Background

On December 22, 2003, the member entered into an ACP agreement with the Air Force whereby he agreed to remain on active duty for five years, in consideration for which he became entitled to receive ACP payable in annual installments of \$25,000.00 each fiscal year for five years. In Fiscal Year 2004 the National Guard Bureau Manpower, Personnel and Services Directorate (NGB/A1) authorized the approving authority to amend ACP agreements for members in a fiscal year 2002 or earlier agreement to extend payment of ACP to their 25 years of aviation service (YAS). On October 28, 2004, the member signed an amendment to the ACP agreement that was effective retroactive to October 3, 2003, which indicated that he would complete a statutory tour service commitment through his 25th year of aviation service (YAS),

September 29, 2013. In accordance with the December 22, 2003, ACP agreement he signed, the member properly received five years of ACP payments through December 21, 2008. Under that ACP agreement, his entitlement to ACP should have also terminated on December 21, 2008. However, due to the amended ACP agreement, he was granted ACP through 25 YAS. As a result, he received ACP payments in the total amount of \$100,000.00, during the period March 2009 through December 2011. The NGB/A1 later determined that the October 28, 2004, amendment was invalid because his ACP agreement was not initiated in fiscal year 2002 or earlier. In addition, the fiscal year 2005 NGB/A1 policy that was in effect during the time when the member signed the amendment rescinded the authorization to amend agreements. As a result, the member became indebted for the ACP payments he received during the period March 2009 through December 2011 in the amount of \$100,000.00.

The member was verbally notified by his command in December 2011 that he had been erroneously overpaid ACP. The DOHA adjudicator waived the amounts of ACP the member received prior to notification but denied the amount he received after he was notified by his command. In his reconsideration request, the member notes that none of the decisions cited by the adjudicator in support of her determination involved the overpayment of ACP. Therefore, he contends that they should not apply to his case. He further asserts that under the terms of his amended ACP agreement, he was entitled to receive the payments. He states that an abundance of evidence has been presented to prove that a follow-on agreement was signed, reviewed and accepted by ACP program managers. He also attaches the NGB-Judge Advocate's (NGB-JA) legal opinion dated April 4, 2012, in which the NGB-JA determined that the member's amended agreement was contrary to the regulatory guidance prescribed by 37 U.S.C. § 301b(h), that there was no follow-on agreement signed by the member and that NGB/A1 should recoup all ACP payments received after December 21, 2008. The NGB-JA also found that the member could petition the Air Force Board for Correction of Military Records (AFBCMR) to correct his record to reflect that he executed a follow-on ACP agreement in 2008, which would mitigate the recoupment, or in the alternative, the member could request that the Secretary of the Air Force Manpower and Reserve Affairs (SAF/MR) grant an exception to policy and ratify the member's amended agreement, which would make recoupment unnecessary. The member states that DOHA should grant a full waiver in his case to fix this situation and preclude the next step of filing a petition with the AFBCMR. He further argues that although he has acknowledged that he was verbally informed that he was receiving erroneous payments in December 2011, he was told that his ACP contract was in question and that a legal review was being requested by the NGB-JA. He states that the first written notification he received was from an Air Force Audit Agency (AFAA) memorandum dated January 9, 2012, requesting a legal review by the NGB-JA. He states that in this memorandum, the AFAA miscalculated his overpayment which further complicated matters.

Discussion

Under 37 U.S.C. § 301b, the Secretary concerned may pay ACP to an aviation officer if he promises to remain on active duty in aviation service for at least one year. To carry out these statutory provisions, the Secretaries concerned are to prescribe regulations, subject to the approval of the Secretary of Defense. *See* 37 U.S.C. § 301b(h). Therefore, an officer's

entitlement to such payments is subject to these statutory provisions, the service's implementing regulations and the provisions of the applicable agreement.

Under 10 U.S.C. § 2774 and 32 U.S.C. § 716, we have the authority to waive a claim for an erroneous overpayment of pay or allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or the lack of good faith on the part of the member. It is not against equity and good conscience to deny waiver when a reasonable person should have suspected that he was receiving payments in excess of his entitlement. *See* DOHA Claims Case No. 09020204 (February 26, 2009); DOHA Claims Case No. 07082707 (September 4, 2007); DOHA Claims Case No. 97041401 (June 26, 1997); and Comptroller General decision B-271951, Dec. 17, 1996.¹ In applying for waiver, an applicant is not disputing his legal obligation to pay an indebtedness, but is arguing that as a matter of equity it would be inappropriate for the government to pursue collection in the circumstances of the case. As the language of the waiver statute indicates, whether to grant waiver is not to be decided simply as a matter of right whenever an individual innocently receives compensation to which he is not entitled, but is to be decided on principles of equity and fairness under the circumstances present in each case. A waiver is usually not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such circumstances, 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* Department of Defense Instruction 1340.23 (February 14, 2006) ¶ E4.1.4.

As discussed above, our authority in this matter is limited to a decision as to whether waiver is appropriate or not. The record contains the member's written statement to the Secretary of the Air Force Remissions Board (SAFRB). The member states in his remission request that while deployed he was advised that the Wing Commander had requested an audit of the ACP program. He states that in November 2011 he was verbally informed by his Wing Commander that the audit had deemed his October 28, 2004, amended ACP contract as invalid. In his original waiver request, the member acknowledges that he became aware of the overpayment when he was verbally informed by his Wing Commander in December 2011. Although the member may not have received a written determination until January 9, 2012, he was clearly on notice as of November 2011 that the ACP payments he was receiving were at least questionable. Under the circumstances, he should have held the ACP payment he received on December 22, 2011, in the amount of \$25,000.00 until he obtained further verification. In the meantime, he did not acquire title to the erroneous payment of ACP. *See* DOHA Claims Case No. 2012-WV-101904.2 (December 27, 2012); DOHA Claims Case No. 2011-WV-072902.2 (March 8, 2012); and B-214740, Oct. 2, 1984.²

¹All four of these decisions involve erroneous payments of ACP.

²These decisions were decided under 5 U.S.C. § 5584 because the applicants for waiver were civilian employees. However, the standards for waiver under all three waiver statutes (10 U.S.C. § 2774, 32 U.S.C. § 716 and 5 U.S.C. § 5584) are the same.

Our decision in this matter does not preclude the member from pursuing other possible remedies with either the AFBCMR or SAF/MR.

Conclusion

The member's request for relief is denied, and we affirm the May 7, 2014, decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense.

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