

DATE: May 23, 2016

In Re:)

[REDACTED])

) Claims Case No. 2015-WV-122906.2

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 former member of the U.S. Air Force requests reconsideration of the March 11, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-122906.

Background

The member was selected by the Air Force under the date of separation (DOS) rollback program to accelerate his separation. As a member separating under this program with more than six years but less than 20 years total active service, the member was eligible for one-half separation pay but had to sign an Individual Ready Reserve (IRR) agreement to serve for a minimum three years following his military service obligation. On May 6, 2013, the member signed the *Individual Ready Reserve Agreement Conditional for Enlisted Separation Pay*. On May 7, 2013, the member received his separation orders, *Request and Authorization for Separation*, AF IMT 100. Although his orders reflected an incorrect separation program designator (SPD) code, the back of this form stated that the member was only authorized half of the separation pay based on the SPD code. On May 31, 2013, the member was discharged from the Air Force. During the period May 1, 2013, through May 31, 2013, the member was entitled to receive payment in the net amount of \$18,638.70, which included 30 days of pay and

allowances, a clothing allowance, 20 days of lump sum leave and a final separation payment in the gross amount of \$19,339.56. Although the member was only entitled to receive payment in the amount of \$18,638.70, he received a payment for active duty and separation totaling \$31,252.42. Specifically, on May 15, 2013, the member received \$606.61, and on June 3, 2013, he received \$30,645.81. Since the member was only entitled to receive \$18,638.70, he was overpaid \$12,613.72.

In the appeal decision, the DOHA adjudicator upheld the Defense Finance and Accounting Service's denial of the member's waiver request. The adjudicator noted that the member should have been alerted to a discrepancy in his final separation pay by the documentation provided to him. Specifically, the adjudicator found that although the member's original orders, AF IMT 100, reflected an incorrect SPD code, the back of this form stated that the member was only authorized half of the separation pay based on the SPD code. The adjudicator further noted that although the member received a separation worksheet that indicated a separation payment of \$38,679.11, he should have questioned why he received \$30,645.81 on June 3, 2013, since his orders specifically stated that he was only entitled to receive half of the separation pay. In addition, the adjudicator noted that when the member received the payment of \$30,645.81, his leave and earnings statement (LES) reflected an advance debt of \$12,614.22. The adjudicator concluded that the member was furnished with information that would have lead a reasonable person to conclude that there was an error in his pay, and he had a duty to report the discrepancy, and obtain clear and thorough advice from an appropriate official. Further, the adjudicator noted that when an agency's prompt notification of an overpayment to a recipient precludes the recipient from relying on the accuracy of the payment to his detriment, waiver is not appropriate.

In his request for reconsideration, the member contends that it was unreasonable to expect him to have understood the payroll errors that lead to the overpayment. He states that the complexity of these pay issues is apparent from the adjudicator's description of them in the appeal decision. The member notes that the adjudicator stated that he was entitled to receive \$19,339.56 in separation pay, plus 30 days of pay and allowances, a clothing allowance and 20 days of lump sum leave but describes a final entitlement of \$18,638.70 which is less than the initial entitlement for the separation pay. The member further states that the documents cited by the adjudicator indicate three different figures: a debt of \$12,614.22, a separation payment of \$31,252.42 and a separation payment of \$38,679.11. However, the member states that this does not explain how a reasonable person would conclude from these numbers that there is an overpayment of \$12,613.72. He states that given the presumption of regularity in government affairs and the complexity of the calculations involved, he had a reasonable belief that he had been paid the correct amount. He also states that he spent approximately \$4,000.00 of the separation payment shortly after receiving it. Therefore, the member maintains that the government's prompt notification of the debt did not prevent his reliance on the accuracy of the payment.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In this case, the overpayment at separation in the amount of \$12,613.72 was made as a result of an administrative error, and there is no indication of fraud, misrepresentation, or lack of good faith on the member's part. However, 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 he was being overpaid. The standard we employ to determine fault is whether a reasonable person knew or should have known that he was receiving payments in excess of his entitlements. Waiver is not appropriate when a member is aware that he is being overpaid or had no reasonable expectation of payment in the amount received. 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. Once a member receives information that brings the validity of the payment into question, he has a duty to hold the amount received for eventual repayment. *See* DOHA Claims Case No. 2015-WV-010201.2 (September 8, 2015); and DOHA Claims Case No. 06071717 (July 31, 2006).

In this case, the member was identified by the Air Force under the DOS rollback program to accelerate his separation. Under this program, he was eligible for one-half his separation pay but had to agree to serve in the IRR for a minimum of three years. On May 6, 2013, he agreed to do so. On May 7, 2013, he received his separation orders, an AF IMT 100 form, reflecting that he was only entitled to receive half of his separation pay. The separation pay worksheet dated May 28, 2013, indicated separation pay in the amount of \$38,679.11. Therefore, the member should have at least questioned the amount of separation pay he received on June 3, 2013, since he was only eligible for half of his separation pay.

The member states that he was confused by all the different numbers. First, the adjudicator noted that at his discharge the member was entitled to a net amount of \$18,638.70. The adjudicator explained that this net amount included active duty pay, various allowances and a gross separation payment of \$19,339.56. We acknowledge that the gross separation payment is greater than the net amount the member was entitled to receive. However, this is because the adjudicator noted the gross amount the member was entitled to receive prior to applying the required deductions such as Federal Income Tax Withholding (FITW), Social Security Tax (FICA), Medicare and State Income Tax (SITW). We also note that if the member was confused by the different amounts, this should have given him more reason to question the amount he received at separation. *See* DOHA Claims Case No. 04112605 (January 5, 2005); and DOHA Claims Case No. 01061503 (July 23, 2001).

We further agree with the adjudicator that the member was promptly notified of the debt. In this regard, the member's LES for June 2013 reflected a debt in the amount of \$12,614.22. Although the member states that he did not receive LES, he had access to his MyPay account, and should have verified the accuracy of the amount of separation pay he received. In addition, the member acknowledges receiving a phone call from his finance office on July 6, 2013,

alerting him to the error, and on July 20, 2013, DFAS sent him a debt notification letter. It is not against equity and good conscience to recover an erroneous payment when the government makes prompt notification, as it did here. *See* DOHA Claims Case No. 07030507 (March 15, 2007); DOHA Claims Case No. 98062401 (October 13, 1998);¹ and Comptroller General decision B-271951, Dec. 17, 1996.

Conclusion

The member's request for relief is denied, and we affirm the March 11, 2016, 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 request for waiver 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

¹This case involved a request for waiver by a civilian employee under 5 U.S.C. § 5584. However, the same standards apply to waiver requests under 10 U.S.C. § 2774.