

KEYWORDS: waiver of indebtedness; PEBD

DIGEST: 1. Due to administrative error, a member's pay entry base date (PEBD) was erroneously established when he entered active duty. This resulted in the member being overpaid based on an erroneous base pay. He was unaware that his PEBD was incorrect until he was notified on November 18, 2004. Under 10 U.S.C. § 2774, the amounts the member received before notification may be waived. However, the amounts he was paid after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government. 2. Waiver of the amount of the overpayment the member received in the form of a large, unexplained payment is denied because he failed to articulate a reason why he thought he was entitled to the payment and should not have relied on the assurances that the payment was correct. He did not acquire title to the money and should have held it until his entitlement to it was determined or until he was asked to return it.

CASENO: 05091207

DATE: 10/5/2005

DATE: October 5, 2005

In Re:

[Redacted]

Claimant

Claims Case No. 05091207

CLAIMS APPEALS BOARD DECISION

DIGEST

1. Due to administrative error, a member's pay entry base date (PEBD) was erroneously established when he entered active duty. This resulted in the member being overpaid based on an erroneous base pay. He was unaware that his PEBD was incorrect until he was notified on November 18, 2004. Under 10 U.S.C. § 2774, the amounts the member received before notification may be waived. However, the amounts he was paid after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

2. Waiver of the amount of the overpayment the member received in the form of a large, unexplained payment is denied because he failed to articulate a reason why he thought he was entitled to the payment and should not have relied on the assurances that the payment was correct. He did not acquire title to the money and should have held it until his entitlement to it was determined or until he was asked to return it.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claims Case No. 05052402, dated July 18, 2005, which denied in part a member's waiver request. The member's debt arose when his pay entry base date (PEBD) was erroneously established.

Background

On March 8, 2004, the member entered active duty. At entry he was erroneously given credit for his inactive duty in the Army National Guard and the Air Force Reserves. His PEBD was erroneously established as June 28, 1991, instead of March 18, 2002. During the period March 8, 2004, through July 31, 2004, the member was overpaid in the amount of \$760.92, because he was paid as a captain (03) with 12 years of service, instead of an 03 with less than two years of service.

From the period August 1, 2004, through December 15, 2004, the member continued to be paid based on the erroneous PEBD of June 28, 1991, resulting in an overpayment of \$6,173.55. In addition, in August 2004 the member received an erroneous retroactive payment in the amount of \$5,912.97. Therefore, the member was overpaid in total amount of \$12,847.44.

In our settlement certificate, our Office agreed with the Defense Finance and Accounting Service (DFAS) and waived the portion of the overpayment occurring during the period March 8, 2004, through July 31, 2004. However, our Office

denied waiver of the overpayment occurring during the period August 1, 2004, through December 15, 2004, which included the erroneous retroactive payment. Our Office denied these overpayments in the total amount of \$12,086.52 (\$6,173.55 + \$5,912.97), on the basis that the member should have questioned the fact that he received pay in excess of \$11,000.00 for the month of August; that he should have requested a written audit of his pay; and that if he had specifically questioned this amount, presumably the overpayment would have been discovered and would have prevented the perpetuation of the error.

In his appeal, the member argues that he did not request a written audit of his pay because he was already in contact with his local finance office and they were in the process of auditing his pay, sending him explanations and updates in the form of e-mails. He attaches those e-mails and points out that in three of the e-mails, he was advised that he would be receiving a large payment in August as a result of missing basic allowance for housing (BAH) and basic allowance for subsistence (BAS).

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 interest of the United States, provided there is no indication of fraud, misrepresentation or fault on the part of the member. The standard we employ to determine fault is whether a reasonable person would or should have known that he was receiving payments in excess of his entitlements. However, waiver is not appropriate when a member is aware that he is being overpaid or has no reasonable expectation of payment in the amount received. *See* DOHA Claims Case No. 00031401 (May 10, 2000), and DOHA Claims Case No. 99033117 (April 15, 1999).

In the case before us, when the member entered active duty, he was erroneously paid based on an incorrect PEBD. His leave and earnings statements (LES) during the period March 2004 through June 2004 listed his PEBD as June 28, 1991, and his years of service as 12. However, when he started work at his new duty station, his July 2004 LES showed his PEBD as January 15, 2004, and his years of service as "00," although his base pay remained the same. In his waiver application, the member stated that he immediately went to the local finance office to inquire about the changes. He was told that his years of service (00) were correct and that they had no effect on his pay; they had an effect on the time required for retirement. The finance officials also pointed out that his base pay remained the same even though his PEBD and years of service were different. The member kept in contact with his local finance office concerning these issues but was constantly assured his base pay was correct. The member states that it was not until November 18, 2004, when he was contacted by the Air Force Personnel Center (AFPC), that he was aware that his PEBD may have been established incorrectly. Therefore, we conclude that during the period March 8, 2004, through November 15, 2004, the member acted in good faith in accepting the overpayment due to receiving credit for his inactive duty service in the Army National Guard and Air Force Reserves. Because he was not aware his PEBD was incorrect, we waive the additional amount of \$4,801.65 (which represents the portion of the overpayment occurring during the period August 1, 2004, through November 15, 2004). However, since he was told his PEBD date was incorrect on November 18, 2004, waiver of the payments made to the employee during the period November 16, 2004 through December 15, 2004, in the amount of \$1,371.90, is not proper.

As for the remaining \$5,912.97, which represents the amount the member received in August 2004 as a result of a large retroactive payment, the member has attached e-mail correspondence from his local finance office alerting him that he would be receiving a large August mid-month payment as a result of missing BAH and BAS. However, an examination of the member's LES for the preceding months shows that he had been receiving BAH and BAS. Therefore, there was no reason for the member to believe that he was entitled to any missing payments for these allowances. Further, in order for the member to be able to rely on his local finance office's statements, he would have to have been able to articulate a credible reason why he thought he was entitled to the payment. If he could not do so, he should have continued to press for a more thorough explanation. In the meantime, he did not acquire title to the payment. He should have held it until he received a final determination that the money was his or until he was asked to return it. *See* DOHA Claims Case No. 03071401 (July 18, 2003); DOHA Claims Case No. 00031401, *supra*; and DOHA Claim Case No. 99033117, *supra*.

Conclusion

We waive the additional amount of \$4,801.65, and deny \$7,284.87 (\$1,371.90 + \$5,912.97).

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board