

DATE: December 20, 2006

In Re:

[REDACTED]

Claimant

)
Claims Case No. 06121110

CLAIMS APPEALS BOARD DECISION

RECONSIDERATION DECISION

DIGEST

When a member is aware or should be aware that he has received an overpayment, he does not acquire title to the excess amounts, and he has a duty to hold the money for eventual repayment. In such circumstances waiver is not proper under 10 U.S.C. § 2774.

DECISION

A member requests reconsideration of the Defense Office of Hearings and Appeals (DOHA) decision in DOHA Claim No. 06110807, dated November 14, 2006, which denied his request for waiver of a debt which arose when he received erroneous payments of multi-year special pay.

Background

On September 17, 2002, the member applied for multi-year special pay (MSP) in the yearly amount of \$12,000 for two years. His request was approved and he received \$12,000 on October 2, 2002, and \$12,000 on October 8, 2003. After these two payments, he was not entitled to receive any additional MSP. However, due to an administrative error, he erroneously received a payment in the amount of \$12,000 on October 1, 2004. Thus, he was overpaid \$12,000.

In his request for reconsideration, the member states that the Defense Finance and Accounting Service's (DFAS) error in 2004 led him to believe that he had one more year on his contract. He argues that If he never received the erroneous payment in October 2004 he would have initiated a new 4-year MSP contract. He states that he has been under a MSP contract since 1997. Thus, he states that the error resulted in his loss of \$28,000 for 2004. He states that even though he fully understands his part in not recognizing and reporting the overpayment in 2004, he thinks it is unfair that he must bear the entire financial burden.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of a claim for erroneous overpayments of pay or allowances against a member of the Uniformed Services if collection would be against equity and good conscience and not in the best interest of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. A member is considered to be at least partially at fault, and waiver is precluded when, in light of all of the circumstances, it is determined that he should have known that he was being overpaid. If a reasonable person should have been aware that he received an erroneous payment, waiver is not appropriate. 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. *See* DOHA Claims Case No. 06111302 (November 24, 2006).

The record shows that on September 17, 2002, the member requested MSP for two years. In his request he stated: "This obligation entitles me to special pay of \$12,000.00 per year for two years for the specialty of [Pathology]." On September 24, 2002, the member was advised that his request for MSP was approved "for two years, at \$12,000 per year, effective 1 October 2002." He subsequently received the two \$12,000 payments he was entitled to under the contract, one on October 2, 2002, and the other on October 8, 2003. Therefore, when he received a third payment in the amount of \$12,000 on October 1, 2004, he should have known that this payment was erroneous as he had received all he was entitled to under the contract. Even though an administrative error caused the additional payment, the member at a minimum should have questioned his entitlement to the payment, especially considering his experience with MSP contracts. Under the waiver statute, the member is considered partially at fault for accepting the payment. The member did not acquire title to the money and should have held it for eventual repayment when asked to do so. *See* DOHA Claims Case No. 05032801 (March 30, 2005), DOHA Claims Case No. 04031102 (March 22, 2004), DOHA Claims Case No. 03041511 (May 7, 2003), DOHA Claims Case No. 03021006 (February 14, 2003)⁽¹⁾ and DOHA Claims Case No. 02120405 (January 8, 2003).

Conclusion

The member's request for relief is denied, and we affirm the November 14, 2006, decision to deny waiver in the amount of \$12,000. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom

Member, Claims Appeals Board

1. This decision involved a request for waiver from a National Guard member under 32 U.S.C. § 716. The waiver standards under 32 U.S.C. § 716 are the same as under 10 U.S.C.

§ 2774.