

DATE: November 24, 2006

In Re:

[REDACTED]

Claimant

)
 Claims Case No. 06111302

CLAIMS APPEALS BOARD

RECONSIDERATION DECISION

DIGEST

A member of the uniformed services is required to review his leave and earnings statement and generally to be aware of his proper leave balance.

DECISION

A retired member of the United States Marine Corps requests reconsideration of the October 31, 2006, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 06103001, in which our Office waived \$751.01, but denied waiver of \$4,575.04, of a total debt of \$5,326.05 that the member owed the government due to the overpayment of pay and allowances.

Background

The record shows that the member retired from the Marine Corps on January 31, 2003. At that time, he was entitled to receive a final separation payment in the net amount of \$2,779.02. However, due to an administrative error, he erroneously received a payment on February 5, 2003, in the amount of \$3,530.03. This resulted in an overpayment of \$751.01. Our Office waived collection of this overpayment, and it is not at issue in this request for reconsideration.

Additionally, the member used 22 days of leave in excess of his proper entitlement causing an overpayment of \$4,575.04. Our Office denied waiver of collection for this overpayment because the member should have known, if he had read his October 2002 leave and earnings statement (LES), that he had a leave balance of 60 days. The member used 90 days of leave from November 3, 2002, through January 31, 2003, earning only 10 additional days during that time. As a result, he used 22 days (including 2 days of leave not accrued) in excess of his proper entitlement (70 days).

The member argues that he was "unjustly stripped" of 30 days of leave. The member also contends that he did not receive the proper amount of leave in January 2003, receiving 2.0 days instead of 2.5 days. A review of the member's pay records as of October 4, 2002, suggests that the member did have 90 days of accrued leave as of the end of September 2002, but that the leave balance was reset to 60 days at the beginning of October as indicated in his LES. We also agree with the member that the record contains documentary evidence that he was authorized 90 days of leave effective 0800 November 2, 2002, while awaiting release from active duty at the end of January 31, 2003.⁽¹⁾ Although not discussed specifically in prior correspondence, it appears that the member's accrued leave was reduced from 90 days to 60 days at the end September 2002, due to the requirements of the law.⁽²⁾ The member claims that he was punished because he was not permitted to take leave due to the nature of his assignment after September 11, 2001, and he asks us to reconsider the denial of the waiver.

Discussion

Our review of the October 31, 2006, decision focuses on the propriety of waiver relief from the Department's collection of the overpayment of \$4,575.04. We do not address any claim by the member that he was entitled to accrue additional leave in January 2003 or any suggestion by him that he was entitled to accrue more than 60 days of leave.⁽³⁾ These issues are the primary responsibility of the Marine Corps, and he may pursue those issues with the Service. For purposes of this decision, we defer to the leave record provided in the record. 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. Waiver is not appropriate if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.2.

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 that he was being overpaid. The standard employed to determine whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving payments in excess of his entitlements. 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. 97032501 (June 9, 1997), which discusses the long standing rule that military members have a duty to verify the information on their LES. Moreover, the Comptroller General has concluded that "a responsible member of the uniformed services should know approximately what his leave balance is," and that when a member uses a large amount of leave in excess of his proper entitlement, he is at least partially at fault for the overpayment. B-184514, Sept. 10, 1975.

In this case, even though he had orders authorizing 90 days of leave starting on November 2, 2002, the member had an LES indicating that he did not have sufficient leave to cover the period of leave authorized, and would go into an excess leave situation if he used the full 90 days. As a Marine warrant officer with over 26 years of service, he should have questioned the discrepancy between the leave authorized and the accrued leave that he had available as stated in the LES. A member who is authorized by the Secretary concerned or his designee to be absent for a period that is longer than the leave that properly accrued to the member under 10 U.S.C.

§ 701 is not entitled to pay or allowances during the excess period and any excess pay and allowances received are subject collection.⁽⁴⁾ *See* the Comptroller General's decisions B-175160, Apr. 27, 1972 and 66 Comp. Gen. 124 (1986). *See also* our recent decision DOHA Claims Case No. 06091506 (October 4, 2006) and the other decisions cited therein.

Conclusion

For the reasons stated herein, we affirm the decision of October 31, 2006, to deny waiver in the amount of \$4,575.04. In accordance with Instruction ¶ 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: William S. Fields

William S. Fields

Member, Claims Appeals Board

1. Ordered by direction of the Commanding General, Marine Corps Air Ground Task Force Training Center, Marine Corps Air Ground Combat Center, Twentynine Palms, CA, dated September 13, 2002.
2. Title 10 of the United States Code, Section 701(b) (10 U.S.C. § 701(b)) generally provides that a member may not accumulate more than 60 day's leave; however, leave taken during the fiscal year may be charged to leave accumulated during the fiscal year without regard to this limitation. Exceptions to the 60-day carryover are provided in Sections 701(f) and 701(g).
3. For example, a member may carryover up to 90 days of leave if he meets the requirements of 10 U.S.C. § 701 (f) as implemented through Service regulations.
4. The discrepancy between the member's claim that he is owed 2.5 days but that he only received 2.0 days of leave in January may be linked to his failure to earn leave while he was in an excess leave situation.