

DATE: January 23, 2007

In Re:

REDACTED

Claimant

)
Claims Case No. 07111908

CLAIMS APPEALS BOARD

RECONSIDERATION DECISION

DIGEST

A service member who knows that he received an erroneous payment of pay and allowances is obliged to return that amount, or set aside an equivalent amount for refund to the government when the error is corrected.

DECISION

A retired member of the United States Air Force requests reconsideration of the January 9, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07010804. In that decision, DOHA denied the member's application for a waiver of an indebtedness of \$2,164.47 that he incurred when he received erroneous payments of pay and allowances incident to his military service.

Background

The record shows that the member retired from the United States Air Force on June 30, 2006. The member received regular active duty pay and allowances on June 15, 2006, in the net amount of \$1,985.78, and he was entitled to receive a final separation payment in the amount of \$2,631.77, which represented 15 days of pay and allowances plus 4.5 days of accrued leave. However, due to an administrative error, six days of leave had not been posted to the member's leave account in calculating the member's final payment. As a result, the member received a final separation payment on July 3, 2006, in the amount of \$4,796.24, which was erroneously computed on 10.5 days of accrued leave rather than 4.5 days of accrued leave. Accordingly, the member was overpaid \$2,164.47. It is not disputed that the member immediately contacted appropriate officials and offered to refund the overpayment, but as we construe the member's request for reconsideration, he interprets the waiver statute, title 10, United States Code, Section 2774 (10 U.S.C. § 2774) as granting him the right to waiver whenever the overpayment results from administrative error without an fault of the member.

Discussion

A member's right to the equitable relief offered under 10 U.S.C. § 2774 is subject to the regulations set forth in the Department of Defense (DoD) Directive 1340.22 (January 8, 2005) and DoD Instruction 1340.23 (February 14, 2006). Copies of these regulations are available at our website: ogc.osd.mil/doha/claims/. The standards for granting a waiver are set forth in Enclosure 4 of the Instruction, and state, in pertinent part, the following:

"E4.1.1. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. However, References (b) [i.e., 10 U.S.C. §

2774, provides] . . . authority to waive, under certain conditions debts individuals owe the Government that are the result of erroneous payments of pay and allowances (including travel and transportation allowances). A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant."

"E4.1.2. Debts may be waived only when collection would be against equity and good conscience and would not be in the best interests of the United States. There must be no indication the erroneous payment was solely or partially the result of the fraud, misrepresentation, fault, or lack of good faith of the applicant."

"E4.1.3. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting a waiver."

"E4.1.4. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. 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."

"E4.1.6. A waiver may be inappropriate in cases where a recipient questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous."

Based on these standards the decisions of the Defense Finance and Accounting Service and DOHA adjudicators not to waive the member's debt are reasonable. The member was aware of the error when he received payment, and diligently initiated action to correct it. He had no basis for believing that he had any right or entitlement to the additional six days of pay, and should have set the overpayment aside for repayment when requested. Under these circumstances, it is not against equity and good conscience or inconsistent with the interests of the United States to collect the overpayment. As indicated in the appeal decision, decisions by our Office and the Comptroller General, issued prior to the Instruction, also explain the long-standing view that equity and good conscience are not impacted by denying waiver in situations like this. See, e.g., DOHA Claims Case No. 98061501 (June 26, 1998); DOHA Claims Case No. 97052732 (July 8, 1997); and Comptroller General decision B-238127, June 28, 1991.

Conclusion

We affirm the appeal decision. 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