

DATE: January 25, 2007

In Re:

[REDACTED]

Claimant

)

Claims Case No. 07011711

CLAIMS APPEALS BOARD DECISION

RECONSIDERATION DECISION

DIGEST

When a member is aware or should be aware that she is receiving payments in excess of her entitlements, she does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

An Army National Guard member requests reconsideration of the December 29, 2006, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 06121909. In that decision, DOHA denied waiver of \$3,302.90.

Background

On July 29, 2004, the member was called to active duty. On October 8, 2004, the member was reduced in grade from an E-4 to an E-3. On April 27, 2005, the member was further reduced in grade from an E-3 to an E-2. Due to an administrative error, the member's pay was not adjusted to reflect the reductions in grade. As a result, she was overpaid \$3,302.90 from October 8, 2004, through October 15, 2005.

In her request for the reconsideration, the member states that she is a member of the Army National Guard, not a member of the reserves as stated in the appeal decision. She also states that her demotion from an E-4 to an E-3 was backdated. Although it was effective October 8, 2004, she states that she was not notified by her commander of the demotion until October 11, 2004. She states that this was less than one day before her flight overseas for her deployment. Once in Iraq, she was not able to view her leave and earnings statements (LES). She called her mother to make sure she was receiving hard copies of her LES, but asked her mother not to open them because she was embarrassed by her demotion. Thus, she states that she was unaware of the overpayment until she returned from her deployment. She also states that she should not be held responsible for an error she did not commit.

Discussion

Although previous actions in this case were taken under 10 U.S.C. § 2774 (the waiver statute applicable to active duty and reserve members of the Uniformed Services), the proper statute for consideration is 32 U.S.C. § 716 (the waiver statute applicable to National Guard members). The standards for waiver are the same under both 10 U.S.C. § 2774 and 32 U.S.C. § 716. Under 32 U.S.C. § 716, we may waive a claim of the United States against a member of the National Guard for erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. Waiver cannot be granted if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. The standard we employ in determining whether a member is at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable

person would or should have been aware that she was receiving more than her entitlement. *See* DOHA Claims Case No. 03021006 (February 14, 2003). A member is considered to be aware of an erroneous payment when she 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.

In the present case, the record indicates that the member signed the Record of Proceedings under Article 15, UCMJ (DA Form 2627) on October 8, 2004. Even if, as the member alleges, the DA Form 2627 was backdated, and she really signed it on October 11, 2004, she was still aware that she had been demoted to an E-3 prior to her deployment. Under these circumstances, a reasonable person should expect a decrease in pay. Further, on April 27, 2005, the member again signed a DA Form 2627, reducing her rank from an E-3 to an E-2. Once again, a reasonable person should have expected a decrease in pay. *See* DOHA Claims Case No. 06111301 (November 15, 2006) and DOHA Claims Case No. 98051810 (June 19, 1998).

We agree with the member that her debt was the result of an administrative error. However, a member is not entitled to waiver as a matter of right merely because she was erroneously overpaid due to administrative error, and she is not relieved of the responsibility to verify the correctness of payments she receives. *See* DOHA Claims Case No. 02030502 (March 22, 2002). We have consistently held that a member has a duty to verify information on her LES. Waiver is not appropriate when a member has records which would indicate an overpayment (e.g., LES and bank statements) and fails to review such documents for accuracy or otherwise fails to take corrective action. *See* DOHA Claims Case No. 02030502, *supra*, and DOHA Claims Case No. 97032501, *supra*. Although the member states that she could not access her LES while she was deployed, hard copies of her LES were being sent to her mother's address during her deployment. The information was available to the member, but for personal reasons she chose not to review and verify the accuracy of the information. In these circumstances, it is not against equity and good conscience to deny waiver of the resulting debt.

Conclusion

The member's request for relief is denied, and we affirm the December 29, 2006, decision to deny waiver of \$3,302.90. In accordance with Department of Defense Instruction 1340.23, 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

