

DATE: March 6, 2007

---

In Re:

[REDACTED]

Claimant

---

)  
Claims Case No. 07030202

## **CLAIMS APPEALS BOARD**

### **RECONSIDERATION DECISION**

#### **DIGEST**

A member continued to receive active duty pay and allowances after her separation. Waiver of the resulting debt under 10 U.S.C. § 2774 is not appropriate because the member was aware that she was receiving amounts to which she was not entitled.

#### **DECISION**

A former Navy member requests reconsideration of the January 31, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07012908, in which DOHA waived \$922.53 of the government's claim against her totaling \$4,732.44, but denied waiver of the balance of the debt (\$3,809.91). The member seeks waiver of additional amounts.

#### **Background**

The record shows that the member separated from the Navy on July 17, 2006. At that time she was entitled to a separation payment in the net amount of \$1,617.24, which represented 17 days of pay and allowances including a clothing allowance. However, due to administrative error, the member received \$2,539.77 through July 30, 2006 (\$1,270.14 on July 15, 2006, and \$1,269.63 on July 30, 2006). These amounts are consistent with the regular mid-month and end-of-month net active duty pay and allowances that the member had been receiving while on active duty. The July 2006 payments were \$922.53 in excess of the member's entitlements. Our Office waived collection of the overpayment of \$922.53, and that amount is no longer in issue.

The balance of the debt, \$3,809.91, is composed of the following erroneous net payments of mid-month and end-of-month pay and allowances: \$1,270.14 received on August 15, 2006; \$1,269.63 received on August 30, 2006; and \$1,270.14 received on September 15, 2006. These amounts of active duty pay and allowances were paid to the member due to administrative error.

In her request for reconsideration, the member contends that DOHA misconstrued her initial waiver request. She clarifies her position by stating that the Navy advised her on August 22, 2006, that she was still receiving active duty pay. Consequently, she argues that anything she received after that date was the result of administrative error made by the government and without any fault on her part; therefore, she should be entitled to keep it. If payments made after August 22, 2006, are waived, she states that she will immediately remit the full remaining amount of debt, which should include the August 15<sup>th</sup> payment.

#### **Discussion**

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. *See* DoD Instruction 1340.23 at ¶ E4.1.1. Nevertheless, 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. *See* DoD Instruction 1340.23 at ¶ E4.1.2. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* DoD Instruction 1340.23 at ¶ E4.1.1.

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. 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. *See* DoD Instruction 1340.23 at ¶¶ E4.1.3 and E4.1.4.

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. 06111302 (November 24, 2006).

By her own admission, the member had actual knowledge on August 22, 2006 that the government failed to discontinue her active duty pay and allowances. Accordingly, from at least that day forward, she was duty bound to set aside any erroneous payments received for return to the government when requested. Equity clearly does not require waiver of erroneous payments made to the member when she knows she was not entitled to them. Moreover, the member is deemed to know the approximate balance of her bank account, and had a responsibility to monitor the account. *See* DOHA Claims Case No. 04022401 (February 25, 2004). If the member had paid attention to the August 15, 2006, deposit, considering the amount, she should have realized, as our adjudicator concluded, that she erroneously received active duty pay and allowances. The adjudicator reasonably concluded that there was no basis for waiving any portion of the debt in excess of \$922.53.

### **Conclusion**

The member's request for relief is denied, and we affirm the January 31, 2007, decision to deny waiver in any amount in excess of \$922.53 already granted. In accordance with DoD 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