

DATE: March 15, 2007

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In Re:

[REDACTED]

Claimant

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Claims Case No. 07030507

**CLAIMS APPEALS BOARD**  
**RECONSIDERATION DECISION**

**DIGEST**

A discharged member's debt arising from advance pay may not be considered for waiver under 10 U.S.C. § 2774 because the advance pay was not erroneous when paid. However, because the final separation payment should have been applied to his debt, the amount he received at separation may be considered for waiver. Waiver of that amount is denied because he should have questioned his entitlement to a final separation payment in light of his debt for advance pay.

**DECISION**

A retired member of the United States Marine Corps requests reconsideration of the Defense Office of Hearings and Appeals (DOHA) decision in DOHA Claim No. 07010811, dated February 23, 2007. In that decision, DOHA determined that the government's claim against the member in the amount of \$900.00 could not be considered for waiver.

**Background**

The member was recalled to involuntary active duty to serve in Iraq from February 5, 2005, through October 18, 2005. The member received advance payments totaling \$900.00 in three payments of \$300.00 paid to him on July 9, 2005, August 4, 2005, and August 29, 2005. During the period February 2005 through October 2005 the advance payments were never posted to the member's pay account. On October 18, 2005, the member was discharged from active duty prior to repayment of the advance payments. At discharge he received a final separation payment of \$831.56. That entire amount should have been applied to his debt for the advance payments. As a result, the member was indebted \$900.00.

This Office determined that the payments totaling \$900.00 were proper when made. Therefore, under 10 U.S.C. § 2774, they did not constitute erroneous payments subject to waiver. In his request for reconsideration, the member states that the DOHA decisions cited by our Office were issued before leave and earnings statements (LES) were automated on-line and involved peacetime advance payments that could be tracked by a bank statement. The member states he did not receive copies of his 2005 LES. He states that it was impossible to detect an error in his pay because the advance payments were combat cash. He also requests copies of his 2005 LES which show the debt was never deducted from his pay.

**Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive collection of 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 is not appropriate if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member.

To be considered for waiver, payments must be erroneous when made. Advance payments generally cannot be considered for waiver because they are not usually erroneous at the time of payment. *See* DOHA Claims Case No. 03050907 (May 15, 2003), DOHA Claims Case No. 01103017 (December 12, 2001), and DOHA Claims Case No. 98101314 (November 16, 1998). An exception occurs when a member receives a final payment from which a correct advance of pay should have been deducted. In that case, the final pay itself is an erroneous payment and may be considered for waiver. *See* DOHA Claims Case No. 98101314, *supra*; and B-244977, Mar. 23, 1992. However, waiver cannot be granted unless the statutory requirements listed above are met.

In the present case, the member was indebted to the government for three payments of advance pay which he received in July and August 2005. As payments of advance pay, they were proper when made and cannot be considered for waiver because they were not erroneous. However, the \$831.56 paid to the member at separation should have been applied to his debt. Therefore, the \$831.56 may be considered for waiver. The remaining \$68.44 (\$900.00 minus \$831.56) cannot be considered for waiver.

Waiver of \$831.56 is not appropriate because the member should have at least questioned his entitlement to his final separation payment because he knew that he was indebted for the balance of advance pay he had received. *See* DOHA Claims Case No. 98101314, *supra*; and

B-244977, *supra*. Although the member states that he did not receive any LES during 2005, he knew that the advance payments issued to him should have been automatically taken out of his pay. When he returned from Iraq in September 2005, he could have requested copies of his LES in order to verify that the payments had been deducted from his pay or questioned his separation pay to be sure the payments had been deducted.

The member should contact DFAS to obtain copies of his 2005 LES.

### **Conclusion**

We modify the February 23, 2007, decision as follows: waiver of \$831.56 is denied and the remaining \$68.44 cannot be considered for waiver. 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

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom

Member, Claims Appeals Board