

DATE: April 4, 2007

In Re:

[REDACTED]

Claimant

)
Claims Case No. 07032901

CLAIMS APPEALS BOARD DECISION

RECONSIDERATION DECISION

DIGEST

Financial hardship is not an appropriate basis for waiver relief under 10 U.S.C. § 2774.

DECISION

A former Navy service member seeks reconsideration of the March 6, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07012903. In the appeal decision, DOHA waived \$1,312.32 of the government's \$12,210.46 claim against her for the overpayment of pay and allowances. DOHA denied waiver of the balance of the debt, \$10,898.14. The member seeks waiver of the entire indebtedness.

Background

The record indicates that the member separated from the Navy on July 25, 2001. For the month of July 2001, she was entitled to receive pay and allowances in the net amount of \$3,707.52, which represented 25 days of pay and allowances and nine days of accrued leave. However, due to administrative error, the member erroneously received payments totaling \$5,019.84 (\$1,072.99 on July 13, 2001, and \$3,946.85 on August 15, 2001). The waiver of \$1,312.32 is not in issue on this request for reconsideration.

The record also shows that the separated member continued to receive mid-month and end-of-month payments from August 30, 2001, through November 30, 2001, totaling \$10,898.14. On reconsideration, the member states that she is not sure if the total amount of indebtedness of \$10,898.14 is accurate.⁽¹⁾ Her primary reason for requesting waiver is her financial inability to repay the debt, and she believes that she is being "singled out" for the mistakes of the finance clerks.

Discussion

The standards for waiver determinations are set forth in Enclosure 4 to Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). 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. *See* Instruction at ¶ E4.1.1. However, we have authority to grant waiver to a service member under 10 U.S.C. § 2774 if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation or lack of good faith on the part of the employee. *See* Instruction 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* Instruction 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 a sufficient basis in and of itself for granting a waiver. 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. *See* Instruction at ¶¶ E4.1.3 and E4.1.4.

A waiver generally is not appropriate when a recipient of a significant unexplained increase in pay or allowances, or (as here) of any other unexplained payment of pay or allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary. Financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction at ¶¶ E4.1.5 through E4.1.7; DOHA Claims Case No. 04022401 (February 25, 2004).

We agree with the member that the government was partially at fault; however, the record shows that the member was also partially at fault. The member had no reasonable basis to expect to continue to receive her pay and allowances once she separated, and as our adjudicator explained in the appeal decision, the member also had a duty to be aware of what is being deposited into her bank account. *See* DOHA Claims Case No. 00112010 (March 12, 2001); and DOHA Claims Case No. 00032701 (May 30, 2000). If the member had monitored her account and contacted the Defense Finance and Accounting Service (DFAS) or Navy when the problem arose, much of the financial distress incurred by debt repayment could have been avoided.

As indicated above, financial hardship is not a proper basis for waiver relief. As DOHA's appeal decision advised, DFAS, and not our Office, has the authority to consider any repayment plan. DFAS can also address any concern the member may have in how it calculated the \$10,898.14 portion of the debt.

Conclusion

The member's request for relief is denied, and we affirm the March 6, 2007, appeal decision to deny waiver in the amount of \$10,898.14. In accordance with paragraph E8.15 of the Instruction, 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

1. As indicated above, \$10,898.14 refers to the part of the debt incurred from the payment of August 30, 2001, through November 30, 2001, and is not the total debt.