

KEYWORDS: waiver of indebtedness-knowledge; waiver of indebtedness-other applicants

DIGEST: 1. 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.

2. Each waiver application is considered on the basis of its own merits, and this Office has no authority to investigate a waiver applicant's assertions that another person received similar overpayments and is not repaying them.

CASENO: 07090603

DATE: 9/11/2007

DATE: September 11, 2007

	)	
In Re:	)	
[REDACTED]	)	Claims Case No.07090603
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

1. 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.

2. Each waiver application is considered on the basis of its own merits, and this Office has no authority to investigate a waiver applicant's assertions that another person received similar overpayments and is not repaying them.

## **DECISION**

An Army officer requests reconsideration of the August 8, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07050807. In that decision, DOHA's adjudicator reviewed the member's indebtedness to the government in the amount of \$10,124.36, and she waived \$2,358.57 of that debt, but denied waiver of \$7,765.79.

### **Background**

The record shows that the member entered active duty on January 4, 2004. Due to an administrative error, she was erroneously given credit for pay purposes for the three years during which she pursued her professional degree. As a result, the member's pay entry base date (PEBD) was erroneously established as December 29, 2000, instead of January 4, 2004, and she was erroneously paid as a first lieutenant (1LT) with three years of service instead of a 1LT with zero years of service. In April 2004, the member's leave and earnings statement (LES) was corrected to reflect "00" years of service and her PEBD (or "Pay Date") on the LES was corrected to January 4, 2004. The remarks block of the LES also included the following notations: "CORRECT TOTAL ACTIVE FED MIL SVC 040420(111)" and "CORRECT PAY DATE 040420(111)." However, the Defense Finance and Accounting Service (DFAS) failed to reduce the member's base pay from \$3,421.50 to \$2,608.20 for April 2004. The member continued to accrue an indebtedness due to the incorrect base pay for a 1LT with less than two years of service, and this problem continued after the member was advanced to the rank of captain in June 2004.

DOHA's adjudicator waived the overpayment that had accrued from January 4, 2004, through March 31, 2004 (\$2,358.57), and that action is not in dispute in this reconsideration request. However, the adjudicator found that the changes and notations in the member's April 2004 LES, coupled with the member's acknowledged pay inquiry at that time detailing her concerns that she was being overpaid, should have caused her to question the correctness of her base pay. The adjudicator concluded that the member had sufficient information to also question the effect of the changes and notations on base pay, and to cause her to question whether her pay was correct when the base pay had not changed even prior to her promotion to captain in June 2004. Thus, the adjudicator denied waiver of the debt that accrued between April 1, 2004, and April 30, 2005.

In her request for reconsideration, the member provides us with a detailed chronology of the events that had taken place in this matter. Some of those include: the April 30, 2004, pay inquiries by the member and another officer basic course class mate detailing their concerns that they might be overpaid; the correction of her years of service to "00" on April 30, 2004, and the member's assumption that the problem, therefore, was resolved; the August 16, 2004, assurance by a named non-commissioned officer that the member's time in service and pay were correct; and the sudden assessment of debts on the member's pay account starting in February 2005 and the efforts thereafter to resolve the debts. The member describes how the debt assessments

described in her LES and debt notices widely fluctuated from 2005 through 2007, with the latest at \$17,397.68. The member argues that a person in her position could not have looked at a pay chart and known what she should have been paid due to the fluctuations in the indebtedness. Significantly, she also suggests that DFAS approved a total waiver for the class mate who launched the pay inquiry with her in April 2004, even though she had taken the same steps as the member did.

### **Discussion**

Under 10 U.S.C. § 2774, we have authority to waive a claim for an erroneous overpayment of pay or allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or the lack of good faith on the part of the member. It is not against equity and good conscience to deny waiver when a reasonable person should have suspected that she was receiving payments in excess of her entitlement. *See* DOHA Claims Case No. 02030501 (April 18, 2002), which states this long-standing rule now codified in DoD Instruction 1340.23 ¶ E4.1.4 (February 14, 2006).

In this case there was sufficient record evidence to support the DOHA adjudicator's conclusion that by April 2004, the member suspected that she may have been overpaid. The adjudicator also reasonably concluded that once the member knew that her years of service had been changed to "00" on her April 2004 LES, she should have reasonably expected the "Base Pay" amount to reduce. It did not. This fact, coupled with her continuing concern over her pay, should have prompted the member to refer to the publicly available pay chart to determine her proper entitlement.<sup>1</sup> There was no reasonable basis for the member's assumption that the change in years of service, without a change in base pay, actually rectified the problem. Simple reference to the pay table would have clearly indicated the amount of base pay the member should be receiving for "00" years of service as a first lieutenant, and later as a captain.

The member's contention that her class mate received a full waiver does not help the member. Preliminarily, the class mate's pay records are not available to our Office because any waiver the class mate received was accomplished by DFAS. In the absence of appeal of the DFAS's action by that member, we have no authority to review that member's records. More importantly, a waiver determination is based on the written record of the person requesting the waiver without regard to waiver relief that may or may not have been granted to a person that a

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<sup>1</sup>The 2004 military pay table, a publicly available document available through the DFAS web site, contains the following relevant information: in 2004 for an O-2 with two years or less of cumulative years of service, the base pay was \$2,608.20 per month, not \$3,421.50 per month, which was the amount payable to an O-2 with over 3 years of service. The member received \$3,421.50 as base pay for April 2004, notwithstanding the change to "00" years of service. After her promotion to captain, the member should have expected to receive \$3,018.90 in base pay per month with 2 years or less of service, but the base pay on her LES for June 2004 was \$3,821.02, an amount that exceeded the base pay for an entire month of a captain with over 3 years of service (\$3,693.90). For the period July 2004 through December 2004, the member's base pay was \$3,693.90 per month.

party regards as similarly situated. This Board and the Comptroller General have consistently held that each case is considered on the basis of its own merits, and that we have no authority to investigate a waiver applicant's assertions that another person received similar overpayments and is not repaying them. *See* DOHA Claims Case No. 02032601 (May 13, 2002) and the Comptroller General's decision in B-239895, Feb. 14, 1991. Based on the written record here, DOHA's adjudicator had a reasonable basis to deny waiver of the indebtedness that accrued for the period from April 2004 through April 2005.

While the relevant period of consideration here does not extend beyond April 30, 2005, we are concerned about the member's report that DFAS now has asserted overpayment claims against her as high as \$17,397.68. We urge DFAS to perform a prompt and complete audit of the member's pay account, and reach a definitive conclusion concerning any overpayments or underpayments in her pay account. The member is free to request waiver of any debt incurred after April 30, 2005, and any increase to the debt already assessed against her for the period up to April 30, 2005. If the member disagrees with the initial determination of DFAS in this regard, she is free to pursue her appeal in accordance with DoD Instruction 1340.23.

### **Conclusion**

The member's request for additional waiver is denied, and we affirm the decision to deny waiver of \$7,765.79 of the administratively reported debt of \$10,124.36. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in the matter related to the administratively reported debt of \$10,124.36 that accrued through April 30, 2005.

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: William S. Fields

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William S. Fields  
Member, Claims Appeals Board