

KEYWORDS: waiver of indebtedness; advance payments

DIGEST: Properly made payments of aviation continuation pay (ACP) are considered advances and are not eligible for waiver consideration under 10 U.S.C. § 2774 because they are not erroneous payments when made. A member retired without completing the period he was obligated to serve under the ACP agreement. The fact that the member may have received incorrect information after payment about whether the government would recoup the unearned portion of an ACP payment does not transform a proper ACP advance into an erroneous payment.

CASENO: 08011601

DATE: 1/23/2008

DATE: January 23, 2008

In Re:	)	)
[REDACTED]	)	) Claims Case No.08011601
Claimant	)	)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Properly made payments of aviation continuation pay (ACP) are considered advances and are not eligible for waiver consideration under 10 U.S.C. § 2774 because they are not erroneous payments when made. A member retired without completing the period he was obligated to serve under the ACP agreement. The fact that the member may have received incorrect information after payment about whether the government would recoup the unearned portion of an ACP payment does not transform a proper ACP advance into an erroneous payment.

## **DECISION**

A retired member of the United States Air Force requests reconsideration of the December 31, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07112701. In that decision, DOHA agreed with the initial determination of the Defense Finance and Accounting Service (DFAS) and concluded that the member's debt to the government, in the net amount of \$6,514.30, was not eligible for waiver consideration under the provisions of 10 U.S.C. § 2774 because no erroneous payment was involved.

### **Background**

The record indicates that the member signed an Aviation Continuation Pay (ACP) agreement to remain on duty with the Air Force until February 5, 2008. As a result, the member was entitled to receive an ACP bonus in the gross amount of \$75,000, which he subsequently received through installments of \$15,000 each on February 6<sup>th</sup> of each year starting on February 6, 2003, through February 6, 2007. However, the member retired from active duty on May 31, 2007, prior to fulfilling the term in his ACP agreement, thus requiring a recoupment of the unearned portion of the ACP bonus in the amount of \$10,208.33. At the time of his retirement, the member was owed pay and allowances in the net amount of \$3,694.03, and this was applied to the unearned portion of the advanced ACP, reducing the member's debt to \$6,514.30, the amount in issue here.

In her decision, the adjudicator discussed paragraph five of his ACP agreement dated February 14, 2003. This paragraph states that if the member voluntarily retires or separates prior to the completion of his ACP agreement, his "entitlement will stop and the unearned portion of the ACP paid . . . is considered a debt to the United States Government and will be recouped on a pro rata basis." The adjudicator provided citations to various decisions by this Board and the Comptroller General, which exemplify decisions in which we have consistently held that a claim arising from a properly paid advance of an entitlement, part or all of which later must be recouped because of early separation or retirement, is not a claim arising from an erroneous payment which may be considered for waiver under 10 U.S.C. § 2774.

We understand the member's position on reconsideration to be that the government had committed various errors, which, in their totality, he believes justifies a waiver in his particular circumstances. He directs our attention to a copy of a letter signed by a fighter wing-level Inspector General, which acknowledges that an enlisted pay representative had incorrectly advised the member on February 22, 2007, that recoupment was unnecessary as indicated in the separation program designator in the member's military pay system records. A screen image of the member's military pay records, which clearly mentions the debt, apparently contains this erroneous separation code. Additionally, the member suggests that the Air Force did erroneously pay him ACP because he got to a point late in his career where he was not working in an aviation position, and that the Air Force breached its "contract" with him by not assigning him to such a position. The member stresses that the ACP agreement does not require recoupment because it

contains the word “may,” and not the word “will,” in stating that “the unearned ACP may be recouped as a result of . . . Voluntary retirement . . .” The member also believes that there is a lack of consistency as to who has to pay back unearned ACP upon voluntary retirement and who does not. The member also believes that the adjudicator erred in referring him to the Air Force for issues regarding the wording of the ACP agreement and repayment enforcement.

### **Discussion**

Under 10 U.S.C. § 2774(a), we have the authority to waive a claim of the United States against a person arising out of an erroneous payment of any pay or allowances, made to or on behalf of a member or a former member of the uniformed services, the collection of which is against equity and good conscience and not in the best interest of the United States. As the language of the statute indicates, an erroneous payment of pay or allowances must be involved. The problem here is that the ACP payment of February 6, 2007, was proper when advanced to the member. Even assuming that the member received incorrect information a couple weeks later when the pay representative made an inquiry of the pay system on his behalf, it did not transform the proper nature of the ACP payment of February 6, 2007, into an erroneous payment. Accordingly, the adjudicator properly concluded that 10 U.S.C. § 2774 did not apply here.<sup>1</sup>

ACP is an entitlement authorized in 37 U.S.C. § 301b, and the ACP agreement is based on it.<sup>2</sup> Upon the acceptance of an aviation officer’s written agreement, the Service Secretary may pay such a “bonus” to an aviation officer if he promises to remain on active duty in aviation service for at least one year. *See* 37 U.S.C. 301b(a). However, if such an officer who entered an agreement and who has received all or part of this “retention bonus” fails to complete the total period of active duty specified in the agreement, “the Secretary concerned may require the officer to repay the United States, on a pro rata basis and to the extent that the Secretary determines conditions and circumstances warrant, all sums paid under this section.” *See* 37 U.S.C. § 301b(g)(1). An obligation to repay the government imposed under this provision is “for all purposes a debt owed to the United States.” *See* 37 U.S.C. § 301b(g)(2). The Secretary concerned prescribes regulations to carry out this provision, subject the approval of the Secretary of Defense. *See* 37 U.S.C. § 301b(h).

As we construe the statute, the word “may” refers to the Secretary’s exercise of

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<sup>1</sup>Even if we could have considered this matter for waiver, it would have been difficult to conclude that waiver was appropriate in these circumstances. The member’s signature on an agreement warning about the repayment, coupled with his inquiry about retirement without repayment of ACP only two weeks after receiving the last ACP payment, would have been troubling.

<sup>2</sup>The version of the statute in effect when the member signed his agreement was current as of the National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, div. A, title VI, § 614(a), 116 Stat. 2458, 2568 (2002). This version is quoted within this decision.

discretion under 37 U.S.C. § 301b, a discretion that is chiefly exercised through the regulations that the Secretary prescribes. It does not create any entitlement for the debtor except as provided in the regulations the Secretary prescribes, and it does not affect the authority of the Secretary of Defense under 10 U.S.C. § 2774, the statute under which the member seeks relief here. The adjudicator correctly referred the member to the Air Force for issues regarding the wording of the ACP agreement and repayment enforcement under 37 U.S.C. § 301b. It is also well-established that we have no authority to investigate whether other similarly situated members with ACP overpayments had to repay their ACP, nor do we have the authority to review whether the member was properly assigned aviation duties.

### **Conclusion**

The member's request for relief is denied, and we affirm the December 31, 2007, appeal decision. 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

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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