

KEYWORDS: waiver of indebtedness; excess leave

DIGEST: Member's request for waiver of a claim against him for excess leave he took while in the Air Force is denied since he knew or should have known he was taking leave that he had not earned.

CASENO: 08020105

DATE: 2/12/2008

DATE: February 12, 2008

)	
In Re:)	
[REDACTED])	
)	Claims Case No.08020105
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Member's request for waiver of a claim against him for excess leave he took while in the Air Force is denied since he knew or should have known he was taking leave that he had not earned.

DECISION

A member requests reconsideration of the January 15, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07121106. In that decision, DOHA denied waiver of the member's indebtedness to the government in the amount of \$851.69.

Background

On May 16, 2006, the member was discharged from the Air Force. Prior to his separation, the member used 105 days of leave. However, he only had 98 days of leave available. As a result, he used seven days of leave in excess of his entitlement (and was assessed a 1-day penalty) causing an overpayment of \$851.69.

In the appeal decision, our Office denied waiver of the \$851.69. The member used seven days of leave in May 2004. However, this leave never posted to his leave account, and the member's leave and earnings statements (LES) reflect that the seven days were never deducted. Our Office determined that since the member should have been aware of his proper leave balance and reviewed his LES, it would not be against equity and good conscience to deny waiver of the overpayment.

In his reconsideration request, the member argues that he should not be held accountable for an administrative error, and he should not have to pay the government \$851.69 because he inadvertently took leave several years after somebody else made a mistake. He characterizes the Defense Finance and Accounting Service's (DFAS) attempts to collect the overpayment as harassment.

Discussion

Under 10 U.S.C. § 2774, we have authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment 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 former member. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.2 (February 14, 2006). 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* ¶ E4.1.1 of the Instruction. 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 waiver. *See* ¶ E4.1.3 of the Instruction. 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. *See* ¶ E4.1.1. of the Instruction.

As pointed out in the appeal decision, the member should have been aware that the seven days of leave he used in May 2004 were never deducted from his leave account. His April 2004 LES reflected a leave "used" balance of 22 days. After he took the seven days leave, his "used"

leave balance on his LES remained at 22 days through September 2004.¹ We agree with the DOHA adjudicator that the discrepancy in the member's leave record was enough to put him on notice that an error had been made. Therefore, the member should have questioned the discrepancy and contacted the appropriate officials to resolve the matter. Although the error was not caught until after he separated from the Air Force, we have consistently held that a member is expected to know his approximate leave balance. If a member does not remain within his leave balance, he is required to repay any amounts he receives in excess of his entitlements. *See* DOHA Claims Case No. 06091506 (October 4, 2006); 66 Comp. Gen. 124 (1986); and B-249371, Nov. 19, 1992. Thus, waiver is not appropriate under the circumstances of this case.

Conclusion

The member's request for relief is denied, and we affirm January 15, 2008, 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

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

¹The member's "used" leave balance reflected a zero on his October 2004 leave and earnings statement because it was the beginning of a new fiscal year.