

KEYWORDS: waiver of indebtedness; PEBD; erroneous advice

DIGEST: When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 08040301

DATE: 4/15/2008

DATE: April 15, 2008

)	
In Re:)	
[REDACTED])	
)	Claims Case No.08040301
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

The member requests reconsideration of the March 5, 2008, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 08010803. In that decision, our Office denied the member's application for waiver of collection of the debt he owes the government in the amount of \$6,420.80.

Background

On May 19, 2001, the member was discharged from the United States Marine Corps as a corporal with over four years of service. On October 31, 2001, he reenlisted as a corporal. On November 1, 2001, he reported for duty. Due to an administrative error, his pay entry base date (PEBD) was erroneously established as May 20, 1995, instead of May 20, 1997, causing his basic pay to be miscalculated based on six years of service instead of four years of service. As a result, he was overpaid \$6,862.40 from November 1, 2001, through June 30, 2007.

The Defense Finance and Accounting Service (DFAS) adjudicated the claim under 10 U.S.C. § 2774, waived \$441.60 of the overpayment and denied \$6,420.80. Our Office upheld DFAS's determination to deny waiver of the \$6,420.80.

In his reconsideration request, the member states the assertion made in the appeal decision that he should have gone to the finance and disbursing office himself, instead of relying on the administrative personnel in his respective units, demonstrates a lack of understanding for an enlisted Marine's chain of command regarding administrative matters. He attaches a letter from a Marine colonel supporting his position. He states that non-staff enlisted personnel would never seek out the finance and disbursing office unless ordered to do so. He also states that he not only relied on his administrative office personnel concerning the accuracy of his PEBD, but also relied on the Board for Correction of Naval Records (BCNR). He states he petitioned the BCNR about a date of rank issue. He states that the BCNR referenced the inaccurate PEBD when they reviewed his case. Finally, he states he understands that waivers cannot be granted due to financial hardship but he originally requested remission of the debt and understands financial hardship to be a factor to consider for remission. He requests cessation of repayment of the debt be instated until after the matter has been resolved.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay and allowances to a member 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. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.2. A waiver usually is not appropriate when a member knows, or reasonably should know, that a payment is erroneous. The member has 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* ¶ E4.1.4 of the Instruction. A waiver may be inappropriate in cases where a member questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous. *See* ¶ E4.1.6 of the Instruction.

Our decisions and those of the Comptroller General have consistently held that there is no basis for waiver based on reliance on incorrect advice unless the official(s) providing the advice is(are) identified and the member's version of the events is corroborated in the written record by

pay and disbursing officials with evidence of his statement(s) to them and their statement(s) to him. See DOHA Claims Case No. 02120917 (December 20, 2002); DOHA Claims Case No. 01010906 (March 8, 2001); DOHA Claims Case No. 97042817 (July 1, 1997); and Comptroller General decision B-256417, July 22, 1994.

The member left the Marine Corps on May 19, 2001 with over four years of service. He reenlisted five months later on October 31, 2001. In May 2002 the member noticed that his PEBD was incorrectly listed on his leave and earnings statement (LES). He noticed that the new PEBD was listed as May 20, 1995, when his original date during his first enlistment was May 20, 1997. He immediately brought the error to the attention of his Marines Regimental Personnel Center (RPAC) and was told that the change was due to his break in service. He states that he was informed that it was not a matter of concern. When he reported to his new command in August 2003, he brought the matter up with the Group Personnel Administration Center (GPAC) and again was told it was due to his break in service and not a big deal. He states he continued to bring the matter up at each of his subsequent commands and was told each time it was not a matter of concern.

Although the member was told that the change to his PEBD was due to his break in service, there is no indication in the record that he told his administrative personnel he was being paid for six years rather than four years and that his break in service was only a little over five months. The member continued to inform every command after he discovered the PEBD error on his May 2002 LES, which indicates his own continuing doubts concerning the accuracy of his PEBD. Unfortunately, there is nothing in the record from personnel officials collaborating what the member told them and what they told him. Even though the member states that the BCNR referenced the wrong PEBD in its review of his case, the member petitioned the BCNR concerning a date of rank issue, not his PEBD. There is no indication in the record that the member raised any issue about the validity of his PEBD with the BCNR. Under these circumstances, the member should have obtained clear and unambiguous advice in writing. In the meantime, he did not acquire title to the questionable overpayments and should have held them until a final determination was made that they were his or until the government asked for repayment. Cf. DOHA Claims Case No. 07032702 (April 6, 2007); DOHA Claims Case No. 07011606 (January 25, 2007);¹ DOHA Claims Case No. 02120917, *supra*; and DOHA Claims Case No. 01010906, *supra*.

As pointed out in the appeal decision, financial hardship is not a basis upon which we can grant waiver. As for the member's petition for remission, he must contact DFAS for information on its status. He should also contact DFAS regarding the timing of repayment. This Office has no authority with regard to remissions.

¹This decision involved a waiver request from a civilian employee under 5 U.S.C. § 5584. The same waiver standards also apply to military members seeking waiver under 10 U.S.C. § 2774.

Conclusion

The member's request for relief is denied, and we affirm the March 5, 2008, decision to deny waiver in the amount of \$6,420.80. 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

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