

KEYWORDS: waiver of indebtedness; SRB

DIGEST: The unearned portion of a Selective Reenlistment Bonus may not be considered for waiver under 10 U.S.C. § 2774 because payment was proper when made.

CASENO: 08092602

DATE: 10/23/2008

DATE: October 23, 2008

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| In Re: |) | |
| [REDACTED] |) | |
| |) | Claims Case No.08092602 |
| |) | |
| Claimant |) | |

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The unearned portion of a Selective Reenlistment Bonus may not be considered for waiver under 10 U.S.C. § 2774 because payment was proper when made.

DECISION

A former member of the Army requests reconsideration of the July 31, 2008, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08052001. In that decision, DOHA did not disturb the Defense Finance and Accounting Service’s (DFAS) recommendation to waive \$16,390.87 of the \$20,919.19 claim against the member. This amount is not at issue in this reconsideration request. DOHA determined that the balance (\$4,528.32)

could not be considered for waiver. The member requests reconsideration of DOHA's determination that the \$4,528.32, which represents the unearned portion of his Selective Reenlistment Bonus (SRB), cannot be considered for waiver.

Background

On March 3, 2000, the member reenlisted in the United States Army for a period of six years. As a result, he was entitled to receive SRB payments in the gross amount of \$10,666.50. The record indicates that the member received two SRB payments, the first in the amount of \$5,333.25 in March 2000, and the second in the amount of \$1,066.65 in March 2001, for a total of \$6,399.90. The member was convicted by a general court-martial on March 20, 2001, and entered confinement that same day. The sentence was finally approved as follows: to be reduced to the rank of private (E-1); to forfeit all pay and allowances; to be confined for 10 years; and to be discharged from the service with a bad-conduct discharge. The member was placed in a federal confinement facility and was released on November 30, 2007. While in confinement, effective October 24, 2006, the member received a bad-conduct discharge from the Army. DFAS determined that the member was liable for recoupment for a pro rata portion of the SRB already paid because he did not complete his term of enlistment. This amount was determined to be \$4,528.32.

Our Office determined that the \$4,528.32 could not be considered for waiver because it did not represent an erroneous payment. In his request for reconsideration, the member states that he was prevented from continuing his service against his will. He was placed by the Army in federal custody. He also contends that he completed his term of enlistment and should not be held liable for the \$4,528.32. He states that he was kept on active duty until October 2006, beyond his projected reenlistment of six years. Finally, he alleges that he never received the second SRB payment in the amount of \$1,066.65.

Discussion

Under 10 U.S.C. § 2774, we have 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, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.2 (February 14, 2006). A debt cannot be considered for waiver unless the payment was erroneous when made, and we have held that a debt arising from the unearned portion of an SRB does not arise from an erroneous payment since the payment was proper when made. *See* DOHA Claims Case No. 07103007 (November 15, 2007) and DOHA Claims Case No. 06053038 (June 2, 2006).

The record reflects that the member was paid two payments of SRB in the total amount of

\$10,666.50. Although the member alleges he did not receive the second SRB payment, his March 2001 leave and earnings statement (LES) reflects he was paid a \$1,066.65 SRB payment. In addition, DFAS has advised our Office that the member's master military pay account reflects that this payment was paid under voucher #KA650161, dated March 5, 2001. In this case, we accept the agency's statement of facts, absent clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 03082101 (August 29, 2003). Under 10 U.S.C. § 2774, a debt cannot be considered for waiver unless the payment was erroneous when made. *See* DOHA Claims Case No. 03082101, *supra*, and Comptroller General decision B-261958, Nov. 8, 1995. The record indicates that the payments of SRB were proper when made, and the member has not presented any evidence to the contrary.

The member contends that he completed his term of enlistment because he remained on active duty until October 2006. He also argues that he was prevented from continuing his service against his will. As stated above, there is no legal basis for us to waive the member's SRB debt under 10 U.S.C. § 2774 because the SRB was not paid in error. Even if we could consider the debt for waiver, waiver would not be appropriate under the circumstances of this case. We note that according to the SRB recoupment worksheet, DFAS gave the member credit for service on his reenlistment contract from March 3, 2000, through March 19, 2001. DFAS determined that recoupment was required effective March 20, 2001, when the member was sentenced and entered confinement, because he was no longer performing duty for the specified period of time for which the bonus was paid.¹ Although his bad-conduct discharge was not effective until after his reenlistment period terminated, at the time of his confinement, his rank had been reduced to E-1. He also forfeited all pay and allowances, and he was to receive a bad-conduct discharge.² A member cannot reasonably assume he is free of a recoupment obligation in such a situation without some evidence of a reasonable basis to support such an assumption. *Cf.* DOHA Claims Case No. 00102418 (December 18, 2000) (involving recoupment of a member's unearned portion of SRB when he was involuntarily discharged because he did not make weight requirements).

¹Two code provisions apply to recoupment of the unearned portion of SRB. Under 37 U.S.C. § 308(d), a member who does not complete the term of enlistment for which a bonus was paid to the member under this section . . . is subject to the repayment provisions of section 303a(e) of this title. Under 37 U.S.C. § 303a(e)(1)(A), a member who receives a bonus and whose receipt of the bonus is subject to the condition that the member continues to satisfy certain eligibility requirements shall repay an amount equal to the unearned portion of the bonus if the member fails to satisfy the requirements. The Secretary concerned (generally the Service Secretary) may establish by regulations, procedures for determining the amount of the repayment required, and the circumstances under which an exception to the required repayment may be granted. *See* 37 U.S.C. § 303a(e)(1)(B).

²Recoupment of the SRB is covered by Volume 7A of the DoD Financial Management Regulation - *Military Pay Policy and Procedures - Active Duty and Reserve Pay*, DoD 7000.14R (DoDFMR). Paragraph 090401 requires recoupment of the unearned portion of the SRB when a member does not complete his term of reenlistment because of misconduct. To be eligible to receive an SRB, an enlisted member must be serving in pay grade E-3 or higher. *See* ¶ 090201 of the DoDFMR. The language referenced here is taken from the version of the DoDFMR as it was written in 2001. Moreover, time in the Army from March 20, 2001, is lost time under 10 U.S.C. § 972 and is not creditable toward the member's term of enlistment. *Compare Hare v. United States*, 35 Fed. Cl. 353, 354 (1996), *aff'd* 108 F. 3d 1391 (Fed. Cir. 1997).

Conclusion

The member's request for relief is denied, and we affirm the July 31, 2008, decision. In accordance with Instruction ¶ 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