

Background

On January 24, 2000, the member signed an Aviator Continuation Pay Agreement (Agreement) to remain on duty with the Air Force until March 5, 2011. During the period March 2000 through March 2006, the member received ACP payments in the gross amount of \$204,924.68. On February 28, 2007, the member retired from the United States Air Force, prior to fulfilling the term of his ACP agreement, thus requiring a recoupment of the unearned portion of the ACP bonus in the amount of \$30,688.56. At the time of his discharge, the member was owed pay and allowances in the net amount of \$6,645.37, and this was applied to the unearned portion of the advanced ACP, reducing the member's debt to \$24,043.19, the amount in issue here.

In her decision, the adjudicator cited paragraph five of the member's Agreement dated January 24, 2000. This paragraph states that if the member is mandatorily separated "as directed by Title 10 U.S.C. statutory retirement requirements" prior to the completion of his Agreement, his ACP entitlement will stop and the unearned portion of ACP paid "is considered a debt to the United States Government and will be recouped on a pro rata basis." The adjudicator also cited case law in which this Board and the Comptroller General 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.

In his request for reconsideration, the member challenges the validity of the Agreement. He states that the Agreement was flawed due to the misinterpretation of eligible years of aviation service. The member states that at the time he signed the Agreement, the approving officer's and his understanding was that he would be able to complete, at a minimum, twenty years of aviation service. The member states that he was only able to complete sixteen years because his prior four years of enlisted service were counted in his total active federal service. If he had known that the twenty years would include his prior service, he would have chosen an option with a shorter term. He contends that the Agreement was prepared, agreed upon and signed under false pretenses, and therefore all subsequent payments were erroneous. The member states he intends to provide additional information for his reconsideration request, but has not provided any additional information to date.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive claims of the United States against members of the Uniformed Services arising out of erroneous payments of pay or allowances, made to or on behalf of members, the collection of which is against equity and good conscience and not in the best interest of the United States. In order to be considered for waiver under 10 U.S.C. § 2774, a payment to a member must be erroneous when made. *See* 10 U.S.C. § 2774(a). Payments that were valid when made are not "erroneous" under 10 U.S.C. § 2774.

See DOHA Claims Case No. 08081206 (August 14, 2008).

Under 37 U.S.C. § 301b, the Service Secretary may pay a bonus to an aviation officer if he promises to remain on active duty in aviation service for at least one year. Bonuses can be extended to cover multiple years, but cannot extend beyond the date on which the member would complete 25 years of aviation service. *See* 37 U.S.C. § 301b(d). However, if the officer fails to complete the period of active duty specified in his agreement, the officer shall repay the United States an amount equal to the unearned portion of the bonus unless the Secretary concerned determines that repayment would be contrary to a personnel policy or management objective, would be against equity and good conscience, or would be contrary to the best interests of the United States. *See* 37 U.S.C. § 307b(g) and the repayment provisions under 37 U.S.C. § 303a(e).

In the appeal decision, the adjudicator properly concluded that 10 U.S.C. § 2774 did not apply because the ACP payments made to the member were proper when advanced. *See* DOHA Claims Case No. 08011601 (January 23, 2008), and DOHA Claims Case No. 97041401 (June 26, 1997). In his reconsideration request, the member challenges the validity of his Agreement. However, agreements such as this one are not governed by ordinary contract principles. Rather, they are interpreted in accordance with their controlling statutes and regulations. *See United States v. Larionoff*, 431 U.S. 864, 869 (1977); DOHA Claims Case No. 97012101 (February 6, 1997); 60 Comp. Gen. 257 (1981); and B-259696, Jan. 25, 1995. If the member wishes to raise an issue about whether he had a proper understanding of his rights, the place to do so would be with the Secretary concerned under 307b(g). As referenced under 37 U.S.C. § 301b, the member should contact the Air Force concerning the enforcement of the Agreement's repayment provisions. In addition, any further information submitted by the member in support of his reconsideration request to our Office is untimely under paragraph E8.13 of DoD Instruction 1340.23, and we will not consider it at this point.

Conclusion

The member's request for relief is denied, and we affirm the October 27, 2008, 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

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