

KEYWORDS: waiver of indebtedness; Aviation Continuation Pay (ACP)

DIGEST: A member who had an Aviator Continuation Pay (ACP) agreement to serve through July 2012, but who decided in June or July 2006 to retire in April 2007, received an annual installment of ACP in November 2006. The member should have known that he was not entitled to the full amount of the annual installment payment since he was retiring in the next five months. When a member is aware or should be aware that he has received an overpayment, he does not acquire title to the excess payments, and he has a duty to hold the money for eventual repayment. Under these circumstances, waiver is not proper under 10 U.S.C. § 2774.

CASENO: 09020204

DATE: 2/26/2009

DATE: February 26, 2009

)	
In Re:)	
[REDACTED])	
)	Claims Case No.09020204
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member who had an Aviator Continuation Pay (ACP) agreement to serve through July 2012, but who decided in June or July 2006 to retire in April 2007, received an annual installment of ACP in November 2006. The member should have known that he was not entitled to the full amount of the annual installment payment since he was retiring in the next five months. When a member is aware or should be aware that he has received an overpayment, he does not acquire title to the excess payments, and he has a duty to hold the money for eventual repayment. Under these circumstances, waiver is not proper under 10 U.S.C. § 2774.

DECISION

A retired member of the United States Air Force requests reconsideration of the January 15, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08041402. In that decision, DOHA disallowed the member's request that the government waive collection of his debt in the amount of \$13,534.99.

Background

On May 9, 1996, the member signed an Aviator Continuation Pay (ACP) agreement to remain on active duty with the Air Force until April 11, 2001, at which time he would have completed 14 years of active duty commissioned service. As a result, the member was entitled to receive his ACP in annual installments in the gross amount of \$12,000.00 each with 50% of it up-front. He was paid correctly at that rate through September 30, 1999. On December 3, 1999, the member elected to amend his ACP agreement to remain on active duty until July 26, 2012, at which time he would have completed 25 years of aviation service. As a result, the member was entitled to receive his ACP entitlement in annual installments in the gross amount of \$25,000.00 each. The member's annual installment payments were calculated based on the original agreement and the total entitlements of the amended agreement. He subsequently received ACP in annual installments of \$23,978.73 in November of each year starting in November 1999. The member states that in June or July 2006 he submitted his retirement application reflecting his intent to retire in April 2007. He states his application was approved immediately. In November 2006 the member received his annual installment of \$23,978.73. On April 30, 2007, the member retired prior to fulfilling the term of his ACP agreement, thus requiring a recoupment of the unearned portion of the annual ACP payment in the amount of \$18,338.77. During the period April 1, 2007, through April 30, 2007, the member was entitled to receive pay and allowances in the net amount of \$7,613.33. On April 15, 2007, he received a payment in the amount of \$2,809.55. Since he was entitled to receive \$7,613.33, he was due an additional \$4,803.78. However, the \$4,803.78 was applied to the unearned portion of the ACP, reducing the member's debt to \$13,534.99.

The member requested waiver under 10 U.S.C. § 2774. The Defense Finance and Accounting Service (DFAS) determined that the ACP payment was proper when made and therefore was not eligible for waiver consideration under 10 U.S.C. § 2774 because it was not an erroneous payment. On appeal the DOHA adjudicator disagreed with DFAS's determination and concluded that the member's debt to the government in the amount of \$13,534.99, was eligible for waiver consideration under the provisions of 10 U.S.C. § 2774. However, the adjudicator found that recoupment of the unearned portion of the ACP is not against equity and good conscience, and therefore denied waiver under 10 U.S.C. § 2774. In reaching her decision, the adjudicator found that since the member had submitted his retirement application four to five months prior to receiving his ACP, he should have questioned the ACP payment he received in November 2006 in the amount of \$23,978.73. In addition, the adjudicator found that since the member's ACP agreement notified him of the conditions of ACP recoupment and since he was scheduled to retire in April 2007, he should have known the payment he received in November

2006 was miscalculated.

In his request for reconsideration, the member states that he never received his full annual \$25,000.00 bonus payments. He always received less than \$24,000.00. He states that he did ask his finance office in 2006 to explain why he was not receiving the full \$25,000.00. He states that he was led to believe that it was a prorated amount due to his retirement at the 20-year point. In addition, he believes that DFAS miscalculated the amount he owes. He also wants to know why he is being charged interest on a debt that is not his fault.

Discussion

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. 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.

Under 10 U.S.C. § 2774, we have the 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. The fact that the erroneous payment is the result of administrative error is not a sufficient basis, in and of itself, for granting a waiver. Waiver is not appropriate when a recipient knows, or reasonably should know, that payment is erroneous, or when a recipient of any unexplained payment of pay or allowances does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds for eventual repayment in the event that repayment should be necessary. Waiver may be inappropriate in cases where a recipient 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* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.3 through ¶ E4.1.6.

The member takes issue with the adjudicator's statement in the appeal decision saying that he should have questioned the payment he received in November 2006. The member states he did ask his finance office in 2006 for an explanation of why he was not receiving the full \$25,000.00 (as he had asked at other bases over the years, but no one explained it). Although the member says he was led to believe he was not receiving the full \$25,000.00 because the amount had been prorated due to his retirement at the 20-year point, there is no indication in the record that he questioned why he received \$23,978.73 in November 2006 when he was retiring in the next five months. As addressed in the appeal decision, the member signed an agreement warning him of the repayment of the unearned portion of the ACP in the event he was unable to fulfill the term of his ACP agreement. The member states that he submitted his retirement application in

June or July 2006, to retire in April 2007. Therefore, since he was on notice of repayment under the ACP agreement, when he received the payment of \$23,978.73 in November 2006, he should have known he was not entitled to the full annual installment payment, especially since his leave and earnings statements reflect he had been receiving the same amount in November 2003, 2004, 2005 and 2006. Under these circumstances, the member did not acquire title to the questionable overpayment and should have held it for eventual repayment. *See* DOHA Claims Case No. 08040301 (April 15, 2008); DOHA Claims Case No. 07011606 (January 25, 2007);¹ and Comptroller General decision B-236753, Feb. 24, 1992.

The member should address his concerns about the interest on the debt and how his debt was calculated to DFAS.²

Conclusion

The member's request for relief is denied, and we affirm the January 15, 2009, 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

¹This case was decided under 5 U.S.C. § 5584 because the claimant was a civilian employee. However, the standards for waiver are the same for service members and civilian employees.

²The record includes a plausible explanation for the member's receipt of an amount less than \$25,000 per year (i.e., \$23,978.73 per year) in ACP payments under the second agreement. A worksheet provided by DFAS shows that the member had not earned \$12,967.26 that he had received under the prior ACP agreement at the time the second agreement became effective. Under paragraph 2 of the second agreement, the member agreed that any excess paid to him under the first agreement (\$12,967.26 in this case) would be deducted from his new total entitlement (at a rate of \$25,000 per year, allocated over 4,571 days from November 16, 1999, to July 26, 2012, or \$317,430.56 of total entitlement). It also appears that DFAS had to accelerate recovery when the member separated in 2007 instead of 2012, and this may explain why DFAS calculated the unearned ACP debt in the amount of \$18,338.77 rather than simply multiplying the annual payment by 5/12 for the months he did not serve. In any event, this does not affect our decision on whether waiver is appropriate here.

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board