

KEYWORDS: waiver of indebtedness

DIGEST: Under the provisions of Department of Defense Instruction 1340.23, the Defense Office of Hearings and Appeals generally must receive a claimant's request for reconsideration of an appeal decision involving an application for waiver of debt collection under 10 U.S.C. § 2774 within 30 days of the appeal decision.

CASENO: 08122205

DATE: 12/31/2008

DATE: December 31, 2008

_____)
In Re:)
 [REDACTED]) Claims Case No. 08122205
)
Claimant _____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under the provisions of Department of Defense Instruction 1340.23, the Defense Office of Hearings and Appeals generally must receive a claimant's request for reconsideration of an appeal decision involving an application for waiver of debt collection under 10 U.S.C. § 2774 within 30 days of the appeal decision.

DECISION

On December 19, 2008, the mother of a former member of the Army (holding a power of attorney from the member) notified the Defense Office of Hearings and Appeals (DOHA) by handwritten fax that she was faxing her request for reconsideration of the November 19, 2008, appeal decision in DOHA Claim No. 08102402 denying waiver of the collection of an

indebtedness of \$10,031.18. The member incurred the overpayment of pay and allowances when he served in the United States Army.

Background

The record indicates that on May 17, 2005, the member enlisted in the United States Army for 40 months. He was entitled to receive, and did receive, a selective enlistment bonus (SEB) in the gross amount of \$20,000. However on January 17, 2008, the member was discharged. Because he separated before the end of his obligated service, the member was required to repay the unearned portion of the SEB (\$4,253.92). The record also shows that on October 27, 2007, while the member had approximately eight months remaining on his initial enlistment, he reenlisted in the Army for 49 months. As a result, he was entitled to receive, and did receive, a selective reenlistment bonus (SRB) in the gross amount of \$9,194.85. For the same reason, the member was required to repay the full amount of the SRB. This resulted in a total debt of \$13,448.77. At the time of his discharge, an amount of \$3,417.59 was applied toward this indebtedness, which resulted in a net indebtedness of \$10,031.18. DOHA's adjudicator concluded that this remaining indebtedness cannot be considered for waiver because the member is seeking relief under title 10, United States Code, Section 2774 (10 U.S.C. § 2774), which applies only to claims of the United States arising out of erroneous payments, and not to payments that were valid when made. The adjudicator cited prior decisions of this Board which held that the government's claim for recoupment of properly paid SEB/SRB, that must be recouped because the member separated before completing the required service, is not a claim arising from an erroneous payment which may be considered under 10 U.S.C. § 2774.

Discussion

The processing of debt waiver applications under 10 U.S.C. § 2774 is governed by DoD Instruction 1340.23 (February 14, 2006) (Instruction). Paragraph E8.13 of the Instruction provides that the content of a request for reconsideration is the same as the content for an appeal under ¶ E8.3. Following the guidelines of ¶ E8.3, a request for reconsideration, among other things, must identify: specific errors or omissions of material and relevant facts, legal or equitable considerations that were overlooked or misapplied, and conclusions that were arbitrary, capricious, or an abuse of discretion. The request also must present evidence of correct or additional facts, explain the reasons why the findings or conclusions should be reversed or modified, and include supporting documents. The December 19th correspondence contains none of these but, at best, is notice that a further correspondence will include them. The basis for the reconsideration request was contained in correspondence that DOHA received on December 29, 2008. Accordingly, it is not a timely request for reconsideration.

While this is dispositive of the reconsideration request, we believe that DOHA and the Defense Finance and Accounting Service properly concluded that 10 U.S.C. § 2774 did not apply to the circumstances of this case. Since the member's receipt of bonus payments was not

erroneous when they were paid to him, waiver of collection under 10 U.S.C. § 2774 would not have been an appropriate remedy even if the member had established (which he did not) his claim that he was unable to serve as a result of his physical situation. The member should have requested an exception to his obligation for repayment under the regulations prescribed by the Secretary of the Military Department pursuant to 37 U.S.C. § 303a(e)(1)(B).¹ DOHA has no authority to consider the appropriateness of a request under such authority. The member is also free to pursue other remedies such as the correction of his military record.

Conclusion

The member's request for reconsideration is untimely; accordingly, the November 19, 2008, appeal decision is the final decision of the Department of Defense in this matter. *See* ¶ E8.10 of the Instruction.

Signed: Jean E. Smallin

Jean E. Smallin
Acting Chairman, Claims Appeals Board

Signed: James B. Norman

James B. Norman
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

¹Two code provisions generally require repayment: 37 U.S.C. § 309(b) with respect to the SEB and 37 U.S.C. § 308(d) with respect to the SRB. Both of these provisions refer back to section 303a(e) of title 37. 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 Secretary of the Military Department) 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). Recoupment of the SEB and SRB is also covered by Volume 7A of the DoD Financial Management Regulation - *Military Pay Policy and Procedures - Active Duty and Reserve Pay*, DoD 7000.14R (DoDFMR), ¶¶ 090501-090504.