

KEYWORDS: waiver of indebtedness; Component concerned not right to request reconsideration

DIGEST: Under Department of Defense Instruction 1340.23, ¶ E8.11, the Component concerned does not have a right to request reconsideration of an appeal decision. In exceptional circumstances, the Defense Office of Hearings and Appeals (DOHA) may exercise its inherent authority and modify or reverse a debt waiver that it has granted, or remand it to the Component concerned for further development, to assure compliance with the waiver statute (*e.g.*, 10 U.S.C. § 2774).

CASENO: 09030908

DATE: 3/20/2009

DATE: March 20, 2009

In Re:)	
[REDACTED])	Claims Case No. 09030908
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under Department of Defense Instruction 1340.23, ¶ E8.11, the Component concerned does not have a right to request reconsideration of an appeal decision. In exceptional circumstances, the Defense Office of Hearings and Appeals (DOHA) may exercise its inherent authority and modify or reverse a debt waiver that it has granted, or remand it to the Component concerned for further development, to assure compliance with the waiver statute (*e.g.*, 10 U.S.C. § 2774).

DECISION

The United States Coast Guard requests reconsideration of the January 15, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08091001. That decision involved a request from a service member that the government waive recovery of \$1,042.60 that he was erroneously paid on a travel claim.

Background

Initially the Coast Guard had denied waiver believing that the member had submitted his claim for *per diem* on temporary duty (TDY). The member appealed the initial determination arguing, among other things, that he was not aware that the travel claim had been filed on his behalf. In its administrative report, the Coast Guard admitted that certain ‘shortcuts’ had been taken incident to the evacuation of members during Hurricane Katrina, and that in the member’s case, a yeoman had completed and submitted a travel claim for the member for travel which he did not take. The Coast Guard stated, however, that the member had electronic access to his bank account, and if he had reviewed all of the deposits to his account, he would have realized that the deposit of \$1,042.60 was “unexpected.”¹ DOHA’s adjudicator reviewed the administrative report, including the member’s statement, and concluded that under the circumstances there was no substantial evidence that the member was aware, or should have been aware, that he was receiving more than his entitlement. In making her decision, the adjudicator considered the fact that the member did not submit the claim, as well as the fact that he was under TDY orders and was entitled to receive *per diem* when he received the overpayment.

In its request for reconsideration, the Coast Guard asks that we consider new information, which it described as a “critical element,” that it did not include or discuss in its administrative report, namely, that the overpayment was related to a TDY period of only three days, while the *per diem* paid was for a period of 32 days. The Coast Guard argues that, considering his grade and time in the service, the member should have realized that \$1,228.50 was excessive for a three day TDY period without lodging costs.

Discussion

For the reasons that follow, we do not believe it is appropriate to address the merits of the reconsideration request in this case. A reconsideration request involving a debt waiver under 10 U.S.C. § 2774² is governed by Department of Defense Instruction (DoDI) 1340.23, and this Instruction does not provide for a reconsideration request by the Component concerned. The

¹DOHA’s adjudicator found that this payment on November 29, 2005 was one of three payments issued to the member for TDY during a relatively brief span of time. The other two were: \$2,427.37 paid on November 14, 2005, and \$2,867.97 paid on December 13, 2005.

²This statute applies to uniformed service members and others overpaid under their accounts. Waiver is available to civilian employees under 5 U.S.C. § 5584, and to National Guard members under 32 U.S.C. § 716. Waiver relief under all three statutes is administered through Department of Defense Instruction (DoDI) 1340.23.

Instruction merely states that “[a]n applicant may request reconsideration of a DOHA appeal decision.” *See* DoDI 1340.23, ¶ E8.11. A contrast exists between this instruction involving waiver applications and the other major instruction governing matters considered by the DOHA Claims Division, DoDI 1340.21. DoDI 1340.21 involves claims by service members and others under 31 U.S.C. § 3702 and was drafted around the same time as DoDI 1340.23. However, DoDI 1340.21 specifically provides that a “claimant or the Component concerned, or both, may request reconsideration of a DOHA appeal decision.” *See* DoDI 1340.21, ¶ E7.12. The inference is that this contrast in the Board’s reconsideration authority between DoDI 1340.21 and DoDI 1340.23 is intentional, and therefore we conclude that we do not have broad discretion to reverse or modify adversely a waiver once it is granted to an applicant under 10 U.S.C. § 2774, or the other two waiver statutes.

When the Comptroller General exercised the authority that DOHA now exercises, he would reverse or modify a decision to grant a waiver when the prior decision was “based on an erroneous or incomplete statement or understanding of the facts involved.” *See* the Comptroller General’s decision in B-272467, Aug. 28, 1998, *citing* B-259602, Nov. 27, 1995; and 65 Comp. Gen. 696 (1986).³ Also, the Comptroller General or his successors could reconsider, modify, or reverse, as appropriate, a prior waiver “where there is a showing that the [official granting waiver] acted on the basis of some material mistake of fact, error of law, fraud, or misrepresentation.” The Comptroller General also noted the authority of government officers to reopen a settlement or reverse a decision made by a predecessor ‘upon production of new and material evidence, or to correct manifest mistakes of fact such as errors in calculation, or for fraud or collusion.’ *See* B-272467, *supra*. Of course, the Comptroller General was not limited by the regulatory authority of DoDI 1340.23.

Construing the limitation on our reconsideration authority as contained in DoDI 1340.23 as consistently as possible with our inherent authority to reconsider our own decisions to assure compliance with the requirements of the debt waiver statutes, we believe that the Component concerned does not have a right to reconsideration under DoDI 1340.23. However, in exceptional circumstances the Director of DOHA (generally acting through this Board) has inherent discretionary authority to reconsider a DOHA waiver decision (including a Board decision), and may remand, modify or reverse it, when necessary, to prevent fraud, misrepresentation, collusion, or bad faith, and to correct manifest mistakes of fact such as calculation errors. In instances such as the one here, where the Component concerned urges us to reverse or modify a waiver decision based on a claim of additional evidence of fault on the part of the member, we will examine the evidence to determine whether the evidence was something that was not known or reasonably knowable at the time the Component concerned submitted its administrative report to DOHA. *Compare* 65 Comp. Gen. 696, *supra*, where the Comptroller General modified his decision to waive the entire amount of pay that a widow mistakenly received from her late husband’s retired pay account after the Coast Guard learned that the

³This decision also discusses the legislative history of the transfer of waiver authority formerly exercised by the Comptroller General to the Executive branch, along with the subsequent delegations within the Executive branch.

widow was entitled to survivor benefits, a fact not known to the Coast Guard or Comptroller General when they originally considered the waiver.

It is not consistent with the purposes of the waiver statute to disturb a DOHA adjudicator's decision to waive a debt in favor of new evidence in circumstances such as the ones in this case. Here, the adjudicator made a plausible finding, based on the record provided by the Component concerned, that the member in these difficult circumstances was not aware that he was being overpaid.⁴ Moreover, the conclusions drawn by the adjudicator were not arbitrary, capricious or contrary to law. Also, in contrast to 65 Comp. Gen. 696, *supra*, the Coast Guard here knew, or should have known, about the claimed additional evidence of the member's fault and did not explain it in its administrative report. A decision to consider the new evidence now offered by the Coast Guard would encourage a dilatory or piecemeal presentation of the Component's case, and is not consistent with the equitable considerations of 10 U.S.C. § 2774.⁵

Conclusion

The appeal decision of January 15, 2009, is the final decision 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

⁴Even assuming that the member would have known that a three-day TDY without lodging would not have entitled him to the amount of erroneous payment identified by the Coast Guard, the adjudicator could still plausibly find that, under all of the circumstances in this case, the member may not have realized at the time that the identified overpayment was for a three-day TDY period.

⁵Even in general claims where equitable considerations are not involved, we are reluctant to consider new evidence or a new theory of recovery on reconsideration. *Cf.* DOHA Claims Case No. 08061102 (June 17, 2008).