

KEYWORDS: waiver of indebtedness; tax withholding

DIGEST: Under 10 U.S.C. § 2774, waiver is not proper when a member is aware or should be aware that he was being overpaid. Partial waiver of the debt is not an appropriate remedy to reimburse a member where the member is no longer able to recover tax withholding from the taxing authority on amounts erroneously overpaid even though he is liable for the gross amount of the overpayment (including withholding taxes paid).

CASENO: 09031701

DATE: 3/26/2009

DATE: March 26, 2009

In Re: [REDACTED] Claimant)))))))))	Claims Case No.09031701
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**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, waiver is not proper when a member is aware or should be aware that he was being overpaid. Partial waiver of the debt is not an appropriate remedy to reimburse a member where the member is no longer able to recover tax withholding from the taxing authority on amounts erroneously overpaid even though he is liable for the gross amount of the overpayment (including withholding taxes paid).

DECISION

A former member of the United States Army Reserve requests reconsideration of the February 20, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08102201. In that decision, DOHA waived \$130 of the government's claim, denied waiver of \$13,602.92, and determined that \$272.75 could not be considered for waiver.

Background

The member was called to active duty in October 2004, but his orders were revoked. He did not perform any active duty service during the period of overpayment. However, the delay in the processing of the revoked orders resulted in the member receiving erroneous payments of pay and allowances. Due to this administrative error, he erroneously received active duty pay from October 8, 2004, through May 15, 2005, in the gross amount of \$13,852.77.

The record reflects that the member was due a credit of \$249.85.¹ However, Servicemembers' Group Life Insurance (SGLI) was erroneously paid on his behalf from October 2004, through December 2006, causing an overpayment of \$402.75. Thus, the total claim against the member was \$14,255.52 (\$13,852.77 + \$402.75). The \$249.85 credit due the member was applied to the debt reducing it to \$14,005.67.

In the appeal decision, our Office waived the amount of SGLI paid on the member's behalf from October 2004 through May 2005, in the amount of \$130. However, our Office denied the overpayment in the amount of \$13,602.92, resulting from the member receiving active duty pay from October 8, 2004, through May 15, 2005. Our Office agreed with the Defense Finance and Accounting Service (DFAS) that the overpayment resulting from SGLI being paid on the member's behalf from June 2005 through December 2006, in the amount of \$272.75 could not be considered for waiver under 10 U.S.C. § 2774 because the member did not receive any pay and allowances during the period.

In his request for reconsideration, the member argues that it is unfair for him to be liable for the gross amount of the debt. He only asks that the amount of his state and Federal Insurance Contributions Act (FICA) taxes that were withheld from him be waived. He states that he can only take a federal tax deduction from the amount he repays. He states that the state does not allow him to take any deduction for repayment of a debt, and there is no way for him to get FICA taxes back. He also states that he disagrees with the amount that was collected from him for a travel pay debt. In addition, he states that the Army owes him \$10,000.00 for repayment of his education loan. He argues that he would be willing to pay back the student loan if his debt is waived.

¹The Defense Finance and Accounting Service (DFAS) advised our Office that the member was indebted \$1,451.07 for the balance of a travel debt for December 2003, a non-performance of duty debt for March 6, 2003, through March 20, 2003, and a non-performance of duty debt for April 20, 2003, through April 28, 2003. Credits for social security and medicare taxes in the amount of \$990.19, and drill pay the member was entitled to receive in the amount of \$710.73 were applied to the \$1,451.07 debt, leaving a credit due the member of \$249.85.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not a sufficient basis in and of itself for granting waiver. *See* Department of Defense Instruction, 1340.23 (Instruction), ¶ E4.1.3. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government, even if the government fails to act after such notification. *See* ¶ E4.1.4 of the Instruction.

In this case, the member had no reasonable basis to expect pay and allowances during the period of overpayment, since his orders to report to active duty were rescinded, and he performed no active duty during the period October 2004 through May 2005. The member stated that he noticed in early 2005 that there was more money in his bank account than he thought there should have been, and he contacted appropriate officials. As explained by the DOHA adjudicator in the appeal decision, the member also had an ongoing duty to be aware of what is being deposited into his bank account. If the member had monitored his account and contacted the appropriate officials when the problem arose in 2004, much of the financial distress incurred by debt repayment could have been avoided. *See* DOHA Claims Case No 07032901 (April 4, 2007). He is partially at fault in the matter, and waiver is precluded.

Amounts withheld from the member's pay for federal and state taxes are forwarded to the appropriate agencies for the benefit of the member. Application of the tax laws to a member's pay is a matter solely within the jurisdiction of the taxing authority, and a member's tax liability on an overpayment does not permit partial waiver of an amount not otherwise appropriate for waiver. Thus, the member is indebted for both the amount paid to him and any amount paid to the tax authorities on his behalf. *See* DOHA Claims Case No. 03121101R (March 31, 2004) and DOHA Claims Case No. 97090808 (September 15, 1997).

The member's repayment of his education loan is a separate issue that has no effect on our consideration under the waiver statute. As directed by the DOHA adjudicator in the appeal decision, he should contact personnel handling the Army's Student Loan Repayment Program. As for the member's concern about how his debt was calculated, the member should contact DFAS in regard to how his travel debt and the credits due him affected the calculation of his debt.

Conclusion

The member's request for additional waiver relief is denied, and we affirm the February 20, 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: Jean E. Smallin

Jean E. Smallin
Acting Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board