

KEYWORDS: waiver of indebtedness

DIGEST: When a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for repayment, even if the government fails to act after notification. Financial hardship is not an appropriate basis for waiver relief under 10 U.S.C. § 2774.

CASENO: 09051102

DATE: 5/15/2009

DATE: May 15, 2009

_____)
In Re:)
 (REDACTED)) Claims Case No. 09051102
)
Claimant _____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for repayment, even if the government fails to act after notification. Financial hardship is not an appropriate basis for waiver relief under 10 U.S.C. § 2774.

DECISION

A reserve member of the United States Air Force requests reconsideration of the April 29, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09030401. In that decision, DOHA denied the member's application for a waiver of indebtedness of \$3,563.16, that he incurred when he received erroneous advance travel payments incident to his military service.

Background

The record shows the member was called to active duty for a period of about 2 years. In connection with the member's orders to active duty, he was authorized and received advance *per diem* payments in the amount of \$86,433.39. When the member submitted his voucher for settlement, the Defense Finance and Accounting Service (DFAS) determined that his authorized expenses were \$82,870.23. This resulted in a debt to the United States of \$3,563.16.

The member states he advised the appropriate personnel each time he was paid incorrectly and offered to repay the money immediately, but was refused. The member continues to point to the lack of training and professionalism of those who processed his incorrect vouchers. He maintains that they continued to err even after he advised them of problems with certain vouchers. The member states his actions only exacerbated the problem, and caused extreme hardship to him and his family. The member indicates that he held the money aside as long as he possibly could, and finally had to use it to feed his family. The member previously requested waiver or remission of the debt, and it appears he is again asking for reconsideration of the denial of waiver of the debt. In the alternative, the member asks how he may apply for remission.

Discussion

A member's right to the equitable relief offered under 10 U.S.C. § 2774 is subject to the regulations set forth in the Department of Defense (DoD) Directive 1340.22 (January 8, 2005) and DoD Instruction 1340.23 (February 14, 2006). The standards for granting a waiver are set forth in Enclosure 4 of the Instruction and state, in pertinent part, the following:

E4.1.1. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. . .

However, we have authority to grant waiver to a service member under 10 U.S.C. § 2774, if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member.

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 a waiver. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify the 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* Instruction at ¶ E4.1.3.

In this case, the adjudicator explained that the *per diem* payments the member received could be considered for waiver, even though they were advance payments, because they were erroneous. She also explained why waiver of the debt remaining after settlement was not appropriate, because the member was aware at the time the payments were made that they were erroneous. *See* Comptroller General decision B-231567, June 7, 1989.¹ *See also* DOHA Claims Case No. 07012401 (January 30, 2007).

Financial hardship is not a basis for waiver relief. *See* Instruction at ¶ E4.1.7. As DOHA's appeal decision advised, DFAS, and not our Office, has the authority to consider any repayment plan. The member should address his request for remission to DFAS as well.

Conclusion

The member's request for relief is denied, and we affirm the April 29, 2009, appeal decision to deny waiver in the amount of \$3,563.16. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

///Original Signed///

Jean E. Smallin
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board

¹In that decision, the member's travel advance debt was waived because he had no way of knowing that his orders were erroneous, and he relied on those orders to his detriment.