

KEYWORDS: waiver of indebtedness

DIGEST: When a member is aware or should be aware that she is receiving payments in excess of her entitlement, she does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 09092401

DATE: 10/16/2009

DATE: October 16, 2009

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In Re: )  
          ) [REDACTED] )  
          ) ) Claims Case No. 09092401  
          ) )  
          ) )  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member is aware or should be aware that she is receiving payments in excess of her entitlement, she does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

**DECISION**

A retired member of the United States Air Force requests reconsideration of the August 25, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 09042001.

## **Background**

The record shows that effective January 1, 2008, the member retired from the Air Force. During the period December 1, 2007, through December 31, 2007, the member was entitled to receive pay and allowances in the net amount of \$6,775.48, which represented 31 days of pay and allowances, and a half-day of accrued leave. On December 15, 2007, she received pay and allowances in the amount of \$3,574.32. On January 24, 2008, she was paid \$1,909.76. She then received by mail a check dated February 12, 2008, in the amount of \$3,084.73. Thus, she received payments totaling \$8,568.81, and was therefore overpaid \$1,793.33.

In the appeal decision, the DOHA adjudicator concluded that the member knew or should have known that she was receiving payment in excess of her entitlement when she received the check dated February 12, 2008, and should have retained the overage for subsequent refund to the Government and made prompt inquiry to the appropriate officials concerning her pay.

In her reconsideration request, the member states that she never received any documentation showing what she was paid. She states that the last check she received was dated February 12, 2008, but she did not receive it until March 14, 2008. She states that contrary to what the DOHA adjudicator stated in the appeal decision, she contacted the Defense Finance and Accounting Service (DFAS) to question why she received the payment. She states that she has to pay back the debt she owes in one lump sum or pay interest on it. She suggests that it is not fair to pay interest on the debt she owes when DFAS personnel are responsible for the error. She states that she had to retire because she is the sole care-giver for multiple family members. She states she sought waiver in order to obtain documentation reflecting what she was paid for salary, benefits and leave.

## **Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver. Whether to grant waiver under 10 U.S.C. § 2774, as the statutory language indicates, is not decided as a matter of right whenever a member innocently receives pay to which she is not entitled, but is decided on the principles of equity and fairness presented in each case. The fact that the erroneous payment is the result of administrative error is not a sufficient basis, in and of itself, for granting 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 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. In addition, a waiver generally is not appropriate when a recipient of a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay and 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 in the event that repayment should be necessary. *See* Department of Defense Instruction 1340.23 (Instruction), ¶¶ E4.1.1 through E4.1.5.

In this case, the overpayment was made through administrative error, but that alone may not serve as a basis for relieving the member of her obligation to refund the overpayment. The member retired effective January 1, 2008. The record reflects that during the month of December 2007, she was due pay and allowances in the amount of \$6,775.48, which represented 31 days of pay and allowances, and a half-day of accrued leave. On December 15, 2007, she received a payment in the amount of \$3,574.32. In January 2008, she received \$1,909.76. When she received a check for \$3,084.73, she should have known she was being overpaid. Although the member states that she did contact DFAS in March 2008 to question why she received a check for \$3,084.73, she does not give any further details about the communication such as whom she talked to, what she told them, and what was said to her. It appears that she is claiming that she had no further duty after her initial contact with DFAS. The member never articulates why she reasonably expected to receive so large a final payment. The record reasonably supports the DOHA adjudicator's conclusion that the member knew or had reason to know that she was being overpaid. In such circumstances, the member receiving the money erroneously paid by the Government acquires no right to the money. Accordingly, it is not against equity and good conscience to collect the overpayment, and waiver is not appropriate. *See* ¶¶ E4.1.4 and E4.1.5 of the Instruction. *See also* DOHA Claims Case No. 05091207 (October 5, 2005); DOHA Claims Case No. 04091406 (September 16, 2004); and DOHA Claims Case No. 02052001 (June 5, 2002).

We note that in her initial waiver request, the member submitted relevant leave and earnings statements (LES) for the period of overpayment, a copy of the final check she received, and documents from her separation/retirement package.<sup>1</sup> For further documentation reflecting an accounting of what she was due at separation and what she was actually paid, she should contact DFAS.

### **Conclusion**

The member's request for waiver relief is denied, and we affirm the August 25, 2009,

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<sup>1</sup>The record contains a memorandum titled "Final Pay Understanding Statement," signed by the member on August 23, 2007. In this document, the member acknowledges that if certain documentation is not received by the financial services office prior to her separation date, she will only receive 55% of her final active duty pay on the date of separation. In addition, 45% of her final pay will be withheld to prevent overpayment in the event of a leave discrepancy, and paid by DFAS in approximately 6 to 8 weeks.

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

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Michael D. Hipple  
Chairman, Claims Appeals Board  
Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board