

KEYWORDS: waiver of indebtedness

DIGEST: Under 10 U.S.C. § 2774, waiver is not proper when a member is aware or should be aware that he is being overpaid. The burden is on the member seeking waiver to show that there was no reasonable basis for him to know or suspect that the erroneous payments were being made.

CASENO: 09091801

DATE: 9/30/2009

DATE: September 30, 2009

_____)
In Re:)
 [REDACTED]) Claims Case No. 09091801
)
Claimant _____)

**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 is being overpaid. The burden is on the member seeking waiver to show that there was no reasonable basis for him to know or suspect that the erroneous payments were being made.

DECISION

A member of the United States Navy Reserve requests reconsideration of the August 20, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09022301.

Background

The record reflects that the member performed drills during the period October 3, 2007, through November 28, 2007, and received \$11,730.40 (\$1,232.00 fly pay + \$10,498.40 basic pay) for those drills. However, the Defense Finance and Accounting Service (DFAS) later determined that the member had reached the annual maximum for paid drills, and was only entitled to receive points, instead of drill pay, for the drills he performed during the period October 3, 2007, through November 5, 2007. DFAS determined that the member was entitled to receive \$2,132.80 (\$224.00 fly pay + \$1,908.80 basic pay) for the drills he performed during the period November 6, 2007, through November 28, 2007. He thus became indebted to the United States for drill pay he received in the amount of \$9,597.60 (\$11,730.40 - \$2,132.80) for the period October 3, 2007, through November 5, 2007. Tax adjustments in the amount of \$656.86 further reduced the overpayment to \$8,940.74.

On appeal, the DOHA adjudicator denied the member's request for waiver of the overpayment. The adjudicator based her decision on the fact that once the member had reached his annual maximum for paid drills, he reasonably should have been aware that he was receiving erroneous payments. In reaching her decision, the adjudicator noted that the member had over 22 years of service and could sign his own advance inactive duty training approvals. Because of those circumstances and because the member received retirement points for the drills, the adjudicator held that collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States.

In his reconsideration request, the member states that he did not spend the whole 22 years of his service as a reservist. He had 16 years on active duty. He states that as he made a transition from active duty to the reserves, he began to learn that his commands would routinely use all of their drills, along with numerous additional drill periods and annual training active duty orders, to provide support to their active-duty component. He states that drills were an accounting tool and once they completed the drills under standard funding, they moved on to other funding. He states that his liberal use of drills to accomplish the duty was how he was socialized into the reserves. He states that he had no reason to believe that the drill pay he received in October and November 2007 was erroneous. He states that he made a good faith effort to resolve the matter once he suspected a problem in February 2008. He also states that he should be allowed to retain the pay he received because he earned it.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member or former member of the uniformed service if repayment 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 former member. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.2

(February 14, 2006). Generally, persons who receive an erroneous payment 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. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* ¶ E4.1.1 of the Instruction. Furthermore, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting waiver. *See* ¶ E4.1.3 of the Instruction. A waiver is usually 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. *See* ¶ E4.1.4 of the Instruction.

While there is no issue here of fraud, misrepresentation, or lack of good faith on the part of the member, the DOHA adjudicator reasonably concluded after review of the record evidence that the member knew or should have known that he was not entitled to the drill payments he received because he had reached his annual maximum for paid drills. Although the member states that he was not aware that he had reached his annual quota for paid drills, the DOHA adjudicator reasonably concluded that a member of his rank and years of service, and a member who could sign his own advance inactive duty training approvals, should have been familiar with the regulations regarding drill pay. Therefore, when he was paid for the drills he performed during the period October 3, 2007, through November 5, 2007, he should have questioned the payments and set aside the funds for eventual repayment. Under 10 U.S.C. § 2774, the burden is on the member to show that there was no reasonable basis for him to know or suspect that the erroneous payments were being made. In this case, the member has not met that burden. *See* DOHA Claims Case No. 07111506 (November 21, 2007).

In addition, waiver under 10 U.S.C. § 2774, is not a matter of right but is available to provide relief as a matter of equity, if the circumstances warrant. In this case, the member received retirement points for the drills. Therefore, the DOHA adjudicator reasonably concluded that collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. *See generally* DOHA Claims Case No. 08111302 (November 26, 2008) and DOHA Claims Case No. 07031906 (March 27, 2007) (holding that collection of insurance premiums that were not withheld from a member's pay is not against equity and good conscience because the member received the benefit of the coverage).

Conclusion

The member's request for relief is denied, and we affirm the August 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: 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