

KEYWORDS: waiver of indebtedness

DIGEST: Under the provisions of the Department of Defense Instruction 1340.23, the Defense Office of Hearings and Appeals generally must receive a claimant's request for reconsideration of an appeal decision within 30 days of the date of the appeal decision. Upon request, this period may be extended for an additional 30 days for good cause shown. In the absence of such a request, the decision becomes final 30 days after the date of the appeal decision.

CASENO: 2008-WV-081106.3

DATE: 4/05/2011

DATE: April 5, 2011

In Re:)	
[REDACTED])	Claims Case No. 2008-WV-081106.3
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under the provisions of the Department of Defense Instruction 1340.23, the Defense Office of Hearings and Appeals generally must receive a claimant's request for reconsideration of an appeal decision within 30 days of the date of the appeal decision. Upon request, this period may be extended for an additional 30 days for good cause shown. In the absence of such a request, the decision becomes final 30 days after the date of the appeal decision.

DECISION

A former member of the United States Army Reserve (USAR) requests reconsideration of the December 15, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2008-WV-081106.2. In that decision, this Office waived \$3,333.33 of the government's claim, and determined that \$10,833.34 of the claim is not an erroneous payment and, therefore, cannot be considered for waiver.

Background

The record shows that the member reenlisted in the USAR for a period of six years on March 7, 2006. As a result, he was entitled to a reenlistment bonus (RB), which he subsequently received in the amount of \$14,166.67. The Defense Finance and Accounting Service (DFAS) recommended that the entire amount not be considered for waiver. The adjudicator in the appeal decision disagreed. The adjudicator noted that the member was discharged on August 12, 2007. On August 22, 2007, he received Inactive Duty Training (IDT) pay in the amount of \$324.45, which should have been applied to the RB recoupment. Since he mistakenly received it, it was an erroneous payment. The adjudicator waived that amount. The adjudicator also noted that DFAS indicated the member had no documentation of a proper reenlistment as of March 7, 2006, and therefore he should be held liable for the recoupment of the entire RB except for the erroneous August 7, 2007, IDT payment, *i.e.*, \$13,842.22 (\$14,166.67-\$324.45). However, the adjudicator determined that the file indicated that the member performed Reserve drills subsequent to March 7, 2006. [DFAS has not shown that these drills were part of a prior enlistment or that the member did not perform them.] Absent documentary evidence to the contrary, it appears the member was authorized to perform these drills, pursuant to an apparent reenlistment. The adjudicator found that given these facts, collection of \$3,008.88 (the amount that represents service for the period March 7, 2006, through August 21, 2007) would be against equity and good conscience, and contrary to the interests of the United States. The adjudicator sustained the determination of DFAS, that the remaining portion (\$10,833.34) of the RB recoupment may not be considered for waiver. The adjudicator correctly restated the long-held principle that the waiver authority provided by the statute, 10 U.S.C. § 2774, applies only to claims arising out of erroneous payments, and not to payments which are valid when made.

The member requests reconsideration of this decision. The member again argues that he had no intention of separating from the Army. He states that in fact he volunteered for Iraq, but was diagnosed with PTSD (Post Traumatic Stress Disorder). He contends that he was told by the reenlistment officer he would not have to repay this bonus if it was determined that he was no longer fit to serve. We first received the member's request for reconsideration by fax on February 17, 2011, making it untimely. The member stated that he did not receive a copy of DOHA's decision until January 28, 2011, and this Office requested evidence of the delay. The member submitted an envelope postmarked January 25, 2011, which DFAS sent to the member, but he submitted no evidence that the decision DOHA sent to him was delayed.

Discussion

A request for reconsideration should have been received by this Office by January 14, 2011, unless a request to extend the period for up to 30 days for good cause had been received, by that time. As noted above the request for reconsideration which arrived on February 17, 2011, is untimely. However, even if the request had been timely, the member's arguments would not have changed our decision.

Title 10, United States Code, § 2774, provides authority for waiving 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. Our Office has consistently held that the waiver authority provided by 10 U.S.C. § 2774, applies only to claims arising out of erroneous payments, and not to payments which are valid when made. We have further held that a claim arising from a properly paid RB, which later must be recouped because of a member's early separation, is not a claim arising from an erroneous payment which may be considered for waiver under 10 U.S.C. § 2774. See DOHA Claims Case No. 09082801 (September 21, 2009), and DOHA Claims Case No. 07103007 (November 15, 2007).

Although we have no authority to consider the unearned portion of a RB for waiver because it does not constitute an erroneous payment, our decision does not preclude the member from seeking other available remedies. We note that under 37 U.S.C. § 303a(e), the Secretary concerned, (in this case the Secretary of the Army), has the discretion to determine if the member's repayment of the unearned portion of the RB is appropriate based on whether repayment would be contrary to a personnel policy or management objective, would be against equity and good conscience, or would be contrary to the best interests of the United States. The member may wish to pursue this remedy with the Secretary of the Army through his Army Reserve chain of command.¹

Conclusion

The reconsideration request is untimely and the appeal decision of December 15, 2010, is the final decision of the Department of Defense with respect to a waiver under 10 U.S.C. § 2774. See Department of Defense Instruction 1340.23, ¶ E8.10. Thus, \$3,333.33 of the government's claim is waived: \$3,008.88 for the portion of the RB representing the period between March 7, 2006, and August 12, 2007, in which the member was authorized to continue drilling with his Reserve unit; plus \$324.45 representing the erroneous IDT payment. As noted, the remaining \$10,833.34 may not be considered for waiver under 10 U.S.C. § 2774, but the member may wish to pursue waiver of this amount with the Secretary of the Army.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

///Original Signed///

Jean E. Smallin

¹ The member should submit any documentation he has in this regard, including a copy of Order # 07-220-00005, which shows that he was released from the reserves on August 15, 2007, as medically disqualified, not the result of his own misconduct.

Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board