

KEYWORDS: waiver of indebtedness

DIGEST: A request for reconsideration of an appeal decision under Department of Defense Instruction 1340.23 must be received at the Defense Office of Hearings and Appeals no later than 30 days after the date of the appeal decision. While this time may be extended up to an additional 30 days for good cause, in no event may the time for receipt be extended beyond the additional 30 days. This Board may not consider any request for reconsideration received after these deadlines.

CASENO: 2008-WV-022503.2

DATE: 12/09/2009

DATE: December 9, 2009

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| In Re: |) |) |
| REDACTED |) | Claims Case No. 2008 WV 022503.2 |
| |) |) |
| Claimant |) |) |
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**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A request for reconsideration of an appeal decision under Department of Defense Instruction 1340.23 must be received at the Defense Office of Hearings and Appeals no later than 30 days after the date of the appeal decision. While this time may be extended up to an additional 30 days for good cause, in no event may the time for receipt be extended beyond the additional 30 days. This Board may not consider any request for reconsideration received after these deadlines.

DECISION

A former Army service member requests reconsideration of the March 11, 2008, appeal

decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08022503. In that decision, DOHA affirmed the initial determination of the Defense Finance and Accounting Service (DFAS) that the member's debt could not be considered for waiver under the provisions of 10 U.S.C. § 2774.

Background

The record indicates that on December 12, 2004, the member reenlisted in the United States Army for four years and subsequently received a selective reenlistment bonus (SRB) in the gross amount of \$10,000. However, the member was discharged on July 27, 2006,¹ prior to completing the four years of her reenlistment commitment. This required the recoupment of a *pro rata* portion of the SRB. After offsetting other amounts owed to the member, the amount to which the member was still indebted is \$4,493.47.

In November 2007, the member applied for a remission of her indebtedness by the Secretary of the Army under the provisions of title 10, United States Code, Section 4837 (10 U.S.C. § 4837), but DFAS considered this matter under the statute that allows the Secretary of Defense to waive a debt for the erroneous payment of pay and allowances under 10 U.S.C. § 2774.² DFAS concluded that the member's indebtedness cannot be waived under 10 U.S.C. § 2774 because the language in the statute requires an erroneous payment of pay and allowances as a precondition to consideration. DFAS found that the bonus was proper when paid to the member. DFAS also noted that financial hardship is not a basis for waiver under this statute.

On appeal, DOHA's adjudicator affirmed DFAS and also noted that DOHA has no jurisdiction over remission issues. The appeal decision specifically addressed the member's right to reconsideration, advising her that DOHA must actually receive a reconsideration request within 30 days of the date of the appeal decision. While the member could have asked for an extension of up to 30 additional days for good cause, no request for reconsideration could have been accepted by DOHA after that time. The adjudicator provided the specific address to which the member had to file her request for reconsideration, as well as a fax number to file her request if timely receipt at DOHA was no longer possible by first class mail. DOHA received the member's request for reconsideration through DFAS on December 7, 2009.

Discussion

¹The record indicates that the member was involuntarily separated because she did not provide a proper family care plan for her children. Statements in the record from the member and others indicate that the member's husband was not considered a proper guardian for her children because he was separated from the Army with severe PTSD and depression.

²The record does not address the reason why DFAS did not process the member's request as a remission request. We note that at the time that the member separated, there was a requirement that the member had to apply within one year of separation, but this limitation was eliminated by amendments in Pub. L. No. 109-364. See Pub. L. No. 109-364, Div. A, Title VI, § 673, 120 Stat. 2083, 2271-2272 (Oct. 17, 2006).

Under 10 U.S.C. § 2774, the Board has authority to waive an indebtedness, in whole or in part, that arises out of an erroneous payment of pay or allowances, to or on behalf of a member or former member of a uniformed service, when collection would be against equity and good conscience and not in the best interest of the United States. The regulations implementing this statutory authority are contained in DoD Instruction 1340.23 (February 14, 2006), hereafter referred to as Instruction. Paragraph E8.12 of the Instruction states that DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision, and that while DOHA may extend this period up to an additional 30 days for good cause shown, no request for reconsideration may be accepted after this time has expired. This paragraph also states that a request for reconsideration must be sent to DOHA at the address in paragraph E8.5, which was the address provided by the adjudicator in her appeal decision. The member did not send her request for reconsideration to the address in paragraph E8.5, and we have no authority to reconsider a waiver more than 60 days after the appeal decision. This is dispositive of any relief under 10 U.S.C. § 2774.³

Our decision concerning waiver, however, does not preclude the member from pursuing other forms of relief. While the member's June 15, 2009, letter to DFAS asking for reconsideration states on the surface that she is seeking a reconsideration of the "decision made by the board" in DOHA Claim No. 08022503, her focus appears to be on the remedy of remission of indebtedness. Her arguments citing several Army Regulations may be relevant in a discussion of remission. We are remanding this matter to DFAS to address, in its discretion, the remedy of remission if still appropriate. This Board has no authority to consider this remedy.

Whether or not remission is appropriate, the member may request the Secretary of the Army to waive recoupment under 37 U.S.C. § 303a(e). This statute is implemented under DoD Financial Management Regulation, DoD 7000.14-R, Volume 7A, Chapter 2 (March 2009) and appropriate Service regulations. It is our understanding that the Army processes such requests through the Army Review Boards Agency, which is under the Assistant Secretary of the Army (Manpower and Reserve Affairs), Room 2E468 Pentagon, Washington, DC 20310. The website is: www.asamra.army.mil/mission_arba.htm#asrb. (link last accessed on December 9, 2009). *See generally* DOHA Claims Case No. 09082801 (September 21, 2009). As in the case of the remission remedy, this Board has no authority to consider this remedy.

Conclusion

The decisions below are affirmed, and this matter is returned to DFAS for any further action it deems appropriate with respect to the member's application for remission of indebtedness under 10 U.S.C. § 4837. This is the final action of the Department of Defense with

³While we do not need to reach these issues, we agree with the conclusions reached by DFAS and DOHA's adjudicator that waiver cannot be considered under 10 U.S.C. § 2774 because the SRB payment was not erroneous, a precondition in the statute, and that waiver is not appropriate for financial hardship.

respect to waiver consideration under 10 U.S.C. § 2774.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board