

KEYWORDS: waiver of indebtedness

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

CASENO: 2008-WV-091604.4

DATE: 9/29/2010

DATE: September 29, 2010

)	
In Re:)	
[REDACTED])	Claims Case No. 2008-WV-091604.4
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

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

DECISION

A former member of the Missouri Army National Guard requests reconsideration of the August 4, 2010, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2008-WV-091604.3. In that decision, our Office denied waiver of collection of the overpayment, which totaled \$6,589.74.

Background

The record shows the member was ordered to active duty for special work (ADSW) from October 1, 2004, through June 30, 2005. The orders which were originally issued on September

24, 2004, were amended on April 6, 2005, to change the member's end date to February 26, 2005. The orders were amended again on April 8, 2005, to change the member's end date to February 28, 2005. The fact that the amendments were issued well after the end date of the member's duty caused an overpayment of \$6,589.74. The member stated that she did everything in her power to take care of the issue. The member argues that she went through her chain of command. The member stated, "I was advised on two separate (sic) occasions that the pay was correct." The member also stated, "I had set aside some money for repayment in[] case my Administrative Specialist was incorrect and I was in fact being overpaid." Finally, the member suggests that waiver should be granted because the overpayment was due to an administrative error. Our adjudicator sustained the Defense Finance and Accounting Service (DFAS) recommendation that the waiver be denied. The adjudicator determined that the member was partially at fault, as she knew or should have known that she was not entitled to the payments. The member requests reconsideration, but has submitted no new matters. She submits it was not her mistake, and she does not have the money.

Discussion

Section 716 of title 32, United States Code, 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 National Guard, 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.

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 a waiver. *See* Department of Defense Instruction 1340.23 [hereinafter Instruction], *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, ¶ E4.1.3 (February 14, 2006). The record shows that the member, despite being advised the pay was correct, had sufficient doubt about that advice that she set aside money to repay the government if the administrative section was incorrect. This Office has determined it is more likely that the member was aware she was not entitled to the pay, as she was no longer performing active duty. This Office has consistently held that when a member is aware or reasonably should have been aware that she was receiving pay in excess of her proper entitlement, she has a duty to retain such funds for subsequent refund to the government. *See* Instruction, ¶ E4.1.4. Moreover, waiver is not appropriate where a recipient questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous. *See* Instruction, ¶ E4.1.6. In light of the record and the fact that the member has submitted no new matters, this Office has determined that collection of the overpayment would not be against equity and good conscience, or contrary to the interests of the United States. *See* DOHA Claims Case No. 02101701 (January 8, 2003); DOHA Claims Case No. 03071401 (July 18, 2003); and DOHA Claims Case No. 06052335 (June 6, 2006).

The member has also stated that she does not have the money to pay this debt. Financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction, ¶ E4.1.7.¹

Conclusion

The member's request for reconsideration is denied, and we affirm the August 4, 2010, appeal decision. In accordance with the Instruction, ¶ 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

¹ The member should contact DFAS regarding setting up an appropriate payment plan.