

KEYWORDS: waiver of indebtedness

DIGEST: Under 10 U.S.C. § 2774, we have the authority to waive collection of overpayments of pay and allowances to a member of the uniformed services, when collection 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.

CASENO: 2009-WV-050508.3

DATE: 2/3/2011

DATE: February 3, 2011

In Re:)	
[REDACTED])	Claims Case No. 2009-WV-050508.3
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, we have the authority to waive collection of overpayments of pay and allowances to a member of the uniformed services, when collection 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.

DECISION

A retired member of the United States Army National Guard requests reconsideration of the November 8, 2010, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2009-WV-050508.2. In that case, DOHA denied waiver of an overpayment in the amount of \$5,208.03.

Background

The record shows that the member was released from active duty after a tour in Iraq effective November 24, 2005. During the period November 1, 2005, through November 24, 2005, he was entitled to receive pay and allowances in the net amount of \$4,437.79. During November 2005, he received payments in the amount of \$2,940.51. The member was due a final separation payment of \$1,497.28. The member did not receive a final separation payment, but erroneously received active duty pay on December 1, 2005, in the amount of \$2,424.80, causing an overpayment of \$927.52. The record further shows that the member's pay account was not properly closed out to show that he was released from active duty on November 24, 2005. As a result, he erroneously continued to receive active duty pay through March 2006, causing an overpayment of \$4,280.51 (December 2, 2005-\$392.63; December 15, 2005-\$2,335.14; December 30, 2005-\$1,439.78; February 8, 2006-\$49.50; February 10, 2006-\$5.92; February 15, 2006-\$51.13; and March 3, 2006-\$6.41). The member was also on reserve duty when he returned from Iraq and was drilling with his unit. He received drill pay from February 2006 through June 2006, when he retired from National Guard service.

The Defense Finance and Accounting Service (DFAS) performed an audit of the member's pay after his retirement, and determined that due to an administrative oversight he had been credited with performing duties in an active duty status which were not performed, thus causing the indebtedness. They referred to the debt as \$4,431.98, as they had applied \$776.05 they had collected from his reserve pay which had reduced the overpayment. The total debt, however, was \$5,208.03. The member submitted a DD Form 2789, *Waiver/Remission of Indebtedness Application*, dated May 17, 2008. The member argued in a statement attached to his application that the pay was for the month after he returned from Iraq, and he believed it to be his final pay for 18 months of deployment. He stated that he had three reserve drills prior to his retirement, and each month he had half his pay taken with no reason given on the Leave and Earnings Statement (LES). The member stated that he considered this to be more of the same erroneous collection activity that he had experienced upon returning home. For example, he received a bill for \$17,000.00 for a SINCGARS radio. Later, he was informed that the radio had been found, with the unit to whom he had signed it over. Next, he received a bill for \$600.00 for a reel of wire. This was later written off as expendable material. The member stated that he considered this another error. He stated that he had no idea what was going on, and decided to remain patient until it was resolved. He stated that he started receiving more letters from DFAS, and he wrote several times to contest the debt, only to receive more notices. In response to his letters, the member stated that he received promises that his case would be reviewed, but he then received no evidence that any review had occurred. He began calling, or attempting to call, DFAS, but he eventually learned that he was calling the wrong location. He called DFAS in Denver, but the section he needed to contact had moved to Indianapolis. Finally, the member noted how much confusion and depression he had experienced due to this debt. He then mentioned that the Department of Veterans Affairs (VA) had screened him for TBI (traumatic brain injury) for the injuries received from IEDs in April and July 2005.

DFAS determined that the member has the responsibility to review his LES, and therefore, he should have seen the erroneous payments. Since he failed to do so, he is not without fault in the matter, which precludes favorable waiver consideration. The member

appealed to this Office, and our adjudicator determined that the member acted in good faith in accepting the overpayment received on December 1, 2005 (\$927.52), and therefore granted partial waiver. The adjudicator denied waiver for the remainder concurring with the rationale of DFAS.

The member requests reconsideration from our office and cites the varying amounts of debt on the notices that he has received from DFAS. He questioned the debt and states that a few months prior to his retirement from National Guard service he was having random (never the same) amounts taken from his drill pay. The pay clerks told him that they were adjustments from his service in Iraq that would be resolved. He notes the debt for lost equipment that he was charged, \$17,000.00 for a SINCGARS radio and \$600.00 for a reel of wire, both of which were found or written off. He states he assumed this was the same kind of error and it would sort itself out.

Discussion

Section 10 of title 2774, United States Code, provides authority for waiving claims for erroneous payments of pay and allowances made to or on behalf of members or former members of the uniformed services, if collection would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are met by a finding that the claim arose from administrative error with 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. *See* Department of Defense Instruction 1340.23 (hereinafter Instruction) *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, ¶ E4.1.2 (February 14, 2006).

Our decisions indicate that in order to determine fault, we must apply the reasonable person standard. In the request for reconsideration, the member provided evidence of his evaluation from the VA. The member received a 50-percent disabling evaluation of an acquired psychiatric condition to include post traumatic stress disorder with associated symptoms of anxiety, depression, and fatigue, adjusted to include residuals of a traumatic brain injury with cognitive difficulties and headaches. In view of this new evidence, and the possible confusion the member indicated regarding the continual billing for lost equipment, this Office now concludes that he should not be considered at fault in the matter. *See* Comptroller General Decision B-217914, June 25, 1986; *Cf.* DOHA Claims Case No. 03102401 (October 28, 2003). Consequently, we find that collection of the overpayment would be against equity and good conscience and not in the best interests of the United States.

Conclusion

The request for reconsideration is granted, and the claim of the United States against the member in the amount of \$5,208.03¹ is hereby waived and the member is advised of his right under 10 U.S.C. § 2774(c) to file a claim within 2 years of the date of the waiver for refund of any amount collected from him or refunded by him on account of this debt. In accordance with

¹ \$5,718.54, with penalties and interest, or higher, if additional penalties and interests have applied.

the Instruction, ¶ E8.15, this is the final administrative decision of the Department of Defense in this matter.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

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Jean E. Smallin
Member, Claims Appeals Board

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