

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. Under the waiver statute, the burden is on the individual seeking waiver to show that there was no reasonable basis for him to know or suspect that erroneous payments were being made. Where the information provided fails to establish an adequate basis upon which such a determination may be made, waiver may not be granted.

DATE: 5/19/2009

CASENO: 09042401

DATE: May 19, 2009

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| In Re: |) | |
| [REDACTED] |) | Claims Case No. 09042401 |
| 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. Under the waiver statute, the burden is on the individual seeking waiver to show that there was no reasonable basis for him to know or suspect that erroneous payments were being made. Where the information provided fails to establish an adequate basis upon which such a determination may be made, waiver may not be granted.

DECISION

A member of the United States Army Reserve requests reconsideration of the April 3, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09012803.

Background

The record shows that the member was called to active duty at Fort Dix, New Jersey. He was paid family separation allowance (FSA) during the period September 27, 2005, through January 15, 2008, in the amount of \$6,908.33. The Army later determined that the member was not entitled to receive FSA during this period because he commuted and resided with his family members daily.¹

The member submitted a waiver application requesting waiver of the debt and he also noted disagreement with the validity of the debt and attached his written protest. He noted on his waiver request that his home of record was in a certain location within 50 miles of Fort Dix. He stated that he first became aware of the erroneous payment in January 2008 via e-mail from his Headquarters and Headquarters Company (HHC) Commander in which his entitlement to FSA was questioned. He stated that he then investigated the situation and since he did not commute home daily, he did not believe he owed the government retroactively for FSA payments. He stated that he then submitted a DA Form 4187, *Personnel Action*, on or about January 7, 2008, to stop future FSA payments. In his written protest, he stated that he was entitled to FSA while stationed at Fort Dix. In his protest, he argued that his home of record was outside the commuting distance of Fort Dix. He cited Chapter 27 of Volume 7A of the Department of Defense Financial Management Regulation (DoDFMR), "In situation where the distance is less than 50 miles, but the time required to commute one way by commonly used route and method of transportation would exceed 1 and a half hours, the dependents shall be considered as not residing near the member's duty station, unless the member actually commutes daily." He stated that this was the basis for his command's denial of future FSA and its collection efforts for FSA paid to him in the past. He further argued that the term "daily" is not defined anywhere in the DoDFMR. His definition of the term "daily" is everyday, and he states that he did not travel home everyday. He stated that he had housing on post and utilized that housing. He asserted that even if knowledge of the DoDFMR could be imputed to him, a reasonable reading of it would not put him on notice or cause him to believe that he was not entitled to FSA.

The record shows that the member's command forwarded his request for waiver to the Defense Finance and Accounting Service (DFAS). In the memorandum forwarding the request, the Acting Commander recommended denial of the request for waiver on the basis of Chapter 27 of Volume 7A of the DoDFMR. DFAS subsequently denied the member's request for waiver under the provisions of 10 U.S.C. § 2774. In reaching its decision, DFAS stated that FSA is authorized to members forced to be separated from their families for more than 30 consecutive days. DFAS stated that the documentation it received reflected that the member commuted to his home of residence on a regular basis. DFAS stated that the member's dependents resided at an address within the commuting range from Fort Dix of 43 miles or 48 miles depending upon the route that is taken. DFAS stated that members should be aware that the FSA entitlement is for

¹See DA Form 4187, *Personnel Action*, issued on January 18, 2008, by the Commander of Fort Dix to stop payment of FSA to the member. The remarks section states that the member is indebted to the government in the amount of \$7,000 for FSA from September 27, 2005, through January 2008, and that the member "commuted / [r]esided with family members daily."

members that are separated from their families because of their duty location. DFAS stated that if the member is going home on a regular basis, he should not expect to receive FSA. DFAS found that in the member's case, he reasonably should have known that he was not entitled to FSA. If the member was unclear of his entitlement, he had a duty to have the FSA entitlement validated with regard to the fact that he was residing with his family on a regular basis.

The member appealed the DFAS's denial of his request for waiver to our Office. In his appeal, the member noted that he had concurrently submitted a protest of the establishment of the debt as unlawful and procedurally defective. He disputed his liability for the underlying debt. He stated that DFAS applied the incorrect standard for determining he was not entitled to FSA. He stated that the standard is not that members should not expect to receive FSA if they are going

home on a regular basis. He stated that the standard for losing the entitlement to FSA is daily commuting. He also stated that DFAS erred in determining the location of his residence. He stated that his dependents have lived at a certain location within 50 miles of Fort Dix, from approximately April 1, 2007, until the present. He stated that DFAS was incorrect in assuming that his dependents lived at this location the entire time he received FSA. He stated that his dependents lived at another location more than 50 miles from Fort Dix until approximately March 31, 2007. He attached copies of his leave and earnings statements with each address. He also argued that DFAS applied the incorrect standard for determining a reasonable commuting distance. He stated that Fort Dix determined a commuting area using guidance given in Volume 7A, Chapter 27 of the DoDFMR. He argued that both locations where his family resided during the overpayment period are outside the commuting area. He attached copies of Fort Dix's commuting distance determinations. He also argued that he had a reasonable belief that he was entitled to FSA and relied on the finance office at Fort Dix to be the subject matter experts regarding his pay. He stated that his entitlement to FSA was never questioned prior to January 2, 2008, and the government certified that he was entitled to FSA on multiple occasions. He argued that DFAS was incorrect in stating the purpose of FSA as an entitlement for members "that are separated from their family members because of their duty location." He alleged that the purpose of FSA is set forth in the DoDFMR, Volume 7A, Chapter 27, paragraph 270103, which states that FSA "provides compensation for added expenses incurred because of enforced family separation." He stated that he meets the criteria to receive FSA and the fact that he travels home does not negate his entitlement.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the waiver request. In reaching her decision, the DOHA adjudicator found that the member never questioned the effect his regular trips to his residence had on his FSA entitlement. Since the member presented no documentary evidence that he questioned the effect his trips had on his entitlement to FSA, the adjudicator concluded that it would not be against equity and good conscience, nor contrary to the best interests of the United States to deny waiver of the indebtedness resulting from the erroneous FSA payments he received.

In the member's request for reconsideration, he again raises the issue that his protest of the establishment of the debt was never addressed. He contests the decisions of DFAS and

DOHA regarding his waiver. He states that both decisions were untimely because neither addressed the validity of the debt, or addressed his protest of the procedures utilized in establishing the debt as violating the DoDFMR. He states that he has not been provided with any documentation DFAS or DOHA considered in reaching their decisions.

Discussion

A member's entitlement to FSA is set forth in 37 U.S.C. § 427. The legislative history of FSA shows that the purpose for the allowance is to compensate a member for the added household expenses that arise by reason of his separation from his dependents as a result of his military assignment. The extra expenses include such matters as home and automobile maintenance, increased child care costs, etc. *See* S. Rep. No. 88-387 (1963); 60 Comp. Gen. 154 (1981); B-176685, Oct. 17, 1972; and B-162528, Nov. 3, 1967.

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience and not in the best interest of the United States. Generally, persons who receive a payment erroneously from the government acquire no right to the money. They are bound by equity and good conscience to 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* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.1. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. *See* Instruction ¶ E4.1.6. A member cannot reasonably expect to receive FSA when he is not separated from his family. *See* DOHA Claims Case No. 02030502 (March 22, 2002). 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 erroneous payments were being made. Where the information provided fails to establish an adequate basis upon which such a determination may be made, waiver may not be granted. *See* B-194027, May 17, 1979.

According to the record, the member's command determined that he was not separated from his dependents because he commuted and resided with his family members on a daily basis. Therefore, the member's command stopped payment of FSA to the member. The command also noted that the member was indebted to the government in the amount of \$7,000 for FSA paid to him during the period September 27, 2005, through January 2008. The member requested waiver of the debt under 10 U.S.C. § 2774. DFAS then relied on documentation from the member's command concerning his entitlement to FSA. The DOHA adjudicator upheld DFAS's denial of the waiver request. In reaching her decision, the DOHA adjudicator found that since the member received FSA but made regular trips to his residence, he should have at least questioned the effect the trips to his residence would have on his FSA entitlement. Since the member presented no documentary evidence that he questioned the effect his trips had on his entitlement to FSA, the adjudicator concluded that it would not be against equity and good conscience, nor contrary to the best interests of the United States to deny waiver of the FSA payments he received. We

find no error in the appeal decision. The DOHA adjudicator reasonably relied on the documentation presented to her by DFAS and the Army in reaching her decision to deny waiver.

If the member wishes to contest the validity of the underlying debt, he should contact DFAS. If he is not satisfied with that determination, he may pursue the matter as a claim under DoD Instruction 1340.21 (May 12, 2004). Under DoD Instruction 1340.21, the claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed. As noted above, in this case, the member must prove that he was separated from his family to be entitled to FSA. He must present his claim under the applicable statutes and regulations, and if DFAS decides against him, he may appeal that determination to our Office. In addition, the member should request any documentation related to his case from DFAS.

Conclusion

The member's request for waiver relief is denied, and we affirm the April 3, 2009, appeal decision. This decision does not affect the member's right to file a claim in accordance with DoD Instruction 1340.21.

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