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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

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DOCKET NUMBER: BC-2023-02016

COUNSEL:

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HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His military record be corrected to waive \$21,500 of the USAF debt resulting from the government's overpayment of his Officer Retention Bonus (ORB) in April 2020.
2. The Defense Finance and Accounting Service (DFAS) be directed to refund him \$21,500 of the debt he already repaid to reimburse the attorneys' fees required to contest the debt thereby making him whole.

APPLICANT'S CONTENTIONS

He requests relief from the error and injustice that occurred when DFAS disbursed an erroneous \$250,000 payment to him in April 2020 for what should have been a \$25,000 ORB. DFAS deducted \$55,000 in Federal Income Tax Withheld (FITW) and deposited \$195,000 in his checking account. After accounting for his rightful bonus and the federal tax on the bonus, he returned \$175,500 to the government in April 2021. However, he remained indebted to DFAS for \$49,500 in Federal income taxes that were withheld in Tax Year 2020 and paid to the Internal Revenue Service (IRS). In March 2023, he discharged this debt and is no longer indebted to the government, but the process caused exorbitant financial penalties to him for an error in no way was attributable to him.

A partial waiver of his overpayment debt would rectify the consequences of the government's error. Department of Defense Instruction (DoDI) 1340.23, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, provides standards for waiver determinations at Enclosure 4.1.2. "Debts may be waived only when collection would be against equity and good conscience and would not be in the best interests of the United States." E4.1.7, states, A waiver or partial waiver is not appropriate just because an erroneous payment occurred. Financial hardship is not a factor. Additionally, E4.1.8, states, waivers depend on the facts in each case, and waiver criteria are generally met "by a finding that the erroneous payment occurred through administrative error and that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member..." Finally, E3.6. *Refund Of Repaid Debts That Are Subsequently Waived*, states, "When a final action waives all or part of a debt that has been repaid, the waiver application shall be interpreted as an application for a refund and the Component concerned shall, to the extent of the waiver, refund the amount repaid." Therefore, his expenditures for legal and tax assistance amounted to \$21,500. A waiver and refund of \$21,500 would promote equity, be in good conscience, and serve the best interest of himself, the Air Force, and the United States government.

AFBCMR Docket Number BC-2023-02016

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Controlled by: SAF/MRB

CUI Categories: Work-Product

Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

Granting a partial waiver would also mitigate the injustice he suffered from the government's error. Most people count two certainties in life, but many service members know three: death, taxes, and military pay problems. When he reported the overpayment to his finance office in May 2020, he should have been able to return the money, but because pay is no longer issued by written check, he could not simply send it back via return mail advising of the error and requesting a corrected check be issued. Instead, he reported the problem to the local comptroller's office and trusted they would do what they said, only to find out later that he did not have a Case Management System (CMS) ticket pending and remained woefully ignorant on how to repay a debt unknown to the entity that created it. He had to start over with a new finance office. The injustice, here, is one of cause and effect. He received one-quarter of a million dollars to figure out how to return on his own. The manifold obstacles to repaying government debts forced his issue to cross tax years, which improperly and inaccurately put him in a higher tax bracket and deprived him of deductions and credits. Once he notified the Air Base comptroller's office of the issue, the office should have given him prompt instructions for returning the money. In this regard, he took immediate and affirmative steps to repay his overpayment, but the government failed to correct its error, and only compounded the problem when its fuzzy math produced an inaccurate W-2 for Tax Year 2021, that required correction in 2022 and a long delay in filing his 2020 return.

At every step in this case, he did what was required of him. However, he encountered a hurdle that seemed low and easy to overcome but was insurmountable until involving lawyers and the top personnel at AFPC/DPP and DFAS. The evidence of an error and injustice is clear, and the relief is obvious. He has made the government whole, at significant financial cost to him and his family. The Board should grant a partial waiver of his debt and direct DFAS to refund him \$21,500.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force major (O-4).

On 30 April 2020, according to DFAS Form 702, *Defense Finance and Accounting Service Military Leave and Earnings Statement*, for the period covered, 1 – 30 Apr 20, he was paid a "Nuc Off ACC Bonus" of \$250,000.

On 10 Mar 21, according to email *RE: CMS Case #<redacted>*, provided by the applicant, his local finance office informed him of the following: "... Unfortunately, even though you did not technically receive all of that money, you are required to pay taxes back as well. In order to get your W-2C, you will need to have paid the majority of your debt back."

On 22 April 2021, according to DD Form 1131, *Cash Collection Voucher*, provided by applicant, he made a payment of \$175,500. Block 8, *Detailed Description of purpose for which collections were received*, states "Paying of portion of DQ debt."

On 24 Aug 21, according to email *Debt Update*, provided by applicant, he was informed "The DFAS Office of General Counsel had ruled on the above that no refunds can occur from prior year withholdings." Further, "...DFAS stance is that since the \$49,500 was paid to the IRS under your name and SSN, there is no way for them to get it back so you are the only one who can get it back."

On 18 Mar 22, according to a letter from his Congressional Representative, provided by the applicant, the Representative submitted a Congressional Inquiry on 9 Mar 22 to DFAS in regard

to the DFAS overpayment error and being held responsible for \$49,500 in tax overage DFAS dispersed to the IRS.

On 1 Jun 22, the Air Force Personnel Center, Director, DAF Personnel Pay, responded to the Congressional Inquiry, stating they have taken appropriate action to resolve the remaining debt balance and will contact the applicant to explain all associated computations and actions no later than 3 Jun 22.

On 5 Jul 22, according to the letter from counsel to the Department of Treasury, the applicant requested the IRS accept the attached Form 4852, *W-2 Substitute Form* as the correct wage information and that a letter be issued to DFAS asking a correct W2 be issued.

On 26 Jul 22, according to email memorandum for record, *Notification of Indebtedness*, provided by applicant, he was informed by the Chief, Air Force Military Pay Policy and Procedures, Operating Location, Indianapolis, IN, (AFPC/DPP), that he was indebted to the Air Force in the amount of \$49,500. It further states that "Additional updates have been made reducing this amount to \$25,155.21. This transaction has been audited by our debt technicians to ensure accuracy of the indebtedness."

On 10 Aug 22, according to DD Form 2789, *Waiver/Remission of Indebtedness Application*, provided by applicant, reflects he requested a waiver for Erroneous Officer Retention Bonus Payment, for the gross debt amount of \$25,155.21

On 26 Aug 22, according to memorandum *Demand for Audit of Military Pay Account, <applicant> Request for Issuance of 2020 W-2C and 2021 W-2C, <applicant> Request for Waiver of any Outstanding Debt Resulting from DFAS's Payment Error, <applicant>*, addressed to AFPC/DPP, the applicant requested a waiver of the debt.

On 14 Oct 22, according to the memorandum, *Demand Letter - <applicant>*, provided by applicant, AFPC/DPP replied to the Demand Letter and attached the audit. The audit found for 2021, there was an error requiring a W2C as the 2021 tax withhold was improperly applied which erroneously reduced his taxable wages to zero. The 2021 tax withhold was reapplied correctly and as a result the original debt balance of \$49,500 will be reestablished minus all payments made to address the debt. Their records indicated they have collected \$5,544.26 from the applicant's pay, leaving a current debt balance of \$43,955.74.

On 8 Nov 22, according to a memorandum provided by applicant, DFAS determined that, in accordance with 10 USC § 2774, his debt in the amount of \$49,500 is ineligible for a waiver.

On 7 Jan 23, according to *Applicant's Appeal Brief*, provided by applicant, he submitted to the Defense Office of Hearings and Appeals (DOHA), through counsel, his appeal for the denial of request for waiver of indebtedness and contended DFAS's denial decision was arbitrary, capricious, and contrary to law.

On 22 Feb 23, according to memorandum *Recommendation and Administrative Report*, provided by applicant, DFAS recommended to DOHA: "We do not believe the member has provided ample evidence for our initial determination to be overturned. The fact remains that a FITW debt is not a pay, nor an allowance; therefore, the debt is not an erroneous payment subject to waiver. Therefore, we recommend that our initial determination be sustained."

Effective 8 Jun 23, according to Special Order Number [REDACTED] dated 9 Feb 23, the applicant was relieved from active duty, effective 9 Jun 23 he was permanently Disability Retired in the grade of major, with a compensable percentage for physical disability of 100 percent.

On 8 Jun 23, according to the applicant's DD Form 214, *Certificate of Release or Discharge from Active Duty*, he was honorably retired and credited with 16 years and 9 days of active service.

On 27 Jun 23, a letter from AFPC/DPP, provided by the applicant and signed by the Director of DAF Personnel Pay, was submitted to support the applicant's request for BCMR dispensation in of expenses incurred as a result of multiple government errors impacting his pay. The letter provides detailed background to map out the facts of the case and indicates there were multiple processing errors committed on the part of the government to resolve a government-initiated error. It further states, while it is recognized the BCMR is legally barred from paying attorney fees, the applicant is not requesting the BCMR pay his attorney fees but instead requesting the Board waive, remit, refund, or forgive a portion of the net overpayment which he returned to the government in an amount commensurate with these fees. These fees, which are reported to be approximately \$21,000, effectively consume the entire net portion of the first installment of his nuclear bonus (\$19,500), which means the applicant paid out of pocket to accept an Air Force retention incentive. Based on the multiple government mistakes committed over multiple years, the Director of DAF Personnel Pay supports the applicant's request to refund the debt paid by the applicant to cover the out-of-pocket expenses the applicant would have otherwise not paid if not for the error by the government.

On 20 Feb 24, according to memorandum *Appeal Decision*, provided by applicant, DOHA determined a waiver over the overpayment is not appropriate and accordingly, under the authority of 10 USC § 2774, hereby sustained DFAS's denial of the applicant's request for a waiver.

For more information, see the applicant's submission at Exhibit A, the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

APPLICABLE AUTHORITY/GUIDANCE

10 U.S. Code § 2774 - Claims for overpayment of pay and allowances and of travel and transportation allowances. (a) A claim of the United States against a person arising out of an erroneous payment of any pay or allowances made before, on, or after October 2, 1972, or arising out of an erroneous payment of travel and transportation allowances, to or on behalf of a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part by—(2) the Secretary concerned, as defined in section 101(5) of title 37, when—(A) the claim is in an amount aggregating not more than \$10,000; and (B) the waiver is made in accordance with standards which the Director of the Office of Management and Budget shall prescribe.

Department of the Air Force Instruction (DAFI) 36-3034, Remission of Indebtedness, 10 Jan 23. 3.2. The following types of indebtedness will not be remitted or canceled. 3.2.5. When the debt is based upon taxes owed.

AIR FORCE EVALUATION

SAF/MRBL recommends against granting relief. The applicant seeks reimbursement for legal expenses incurred while correcting an erroneous payment and claims counsel fees were

unavoidable due to the inability of the Air Force pay administrators to correct the error. The requested fees include legal expenses for preparing the BCMR application and for the preceding expenses, such as submissions to DFAS and DOHO.

The AFBCMR lacks the legal authority to cover the applicant's legal fees. While the AFBCMR can correct errors and injustices within military records, its jurisdiction does not extend to paying attorney's fees. Although the applicant frames the relief as a remission of the debt, his primary goal is to fund legal expenses incurred associated with the AFBCMR application. Essentially, he is seeking a form of monetary damages resulting from the error. Granting this relief would violate DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBMC)*. According to paragraph 7.2.4, the AFBCMR cannot "pay expenses of any kind incurred by or on behalf of an applicant in connection with a correction of military records under 10 U.S.C. § 1034 or § 1552. This includes attorney's fees or other costs related to an AFBCMR application." The applicant provides no precedent for bypassing this regulation. Additionally, the broad language of the DAFI includes fees of any kind, such as those in the current application.

The applicant fails to provide any applicable precedent for the requested remedy. While he references 10 U.S.C. § 2774 to waive the \$21,000; however, this statute does not authorize the AFBCMR to reimburse legal fees. The statute focuses on waiving erroneous payments of pay or allowances, not covering legal expenses incurred in correcting such error. Even if applicable, the statute is limited to \$10,000 with respect to Service Secretaries.

Therefore, while the applicant's situation is unfortunate, the Board is bound by law and regulations and cannot disburse funds (directly or indirectly) to cover legal expenses.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 27 Jun 24 for comment (Exhibit D), and the applicant replied on 26 Jul 24. In his response, the applicant contended through counsel to disregard the Advisory Opinion as it fails to address the primary issue at hand; he was unjustly penalized by the Air Force's negligence in overpaying him his bonus and their inexcusable delay in failing to promptly accept return of those funds during the applicable tax year. An injustice that can be remedied by forgiving a portion of the debt imposed in an attempt to make him whole.

Repayment of his attorneys' fees was not his request. What he requested was forgiveness of so much of the overpayment in an attempt to offset the financial loss he incurred as result of the Air Force's gross negligence and reckless disregard of his financial well-being. While it is accurate that a request for payment of attorneys' fees is not within the Board's authority to grant, the statute does not prohibit remitting a debt in the same or similar amount to attorneys' fees to rectify an injustice caused by the Air Force. In fact, 10 USC § 1552(c)(1) expressly authorizes the Board to grant monetary relief: "The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee." He was entitled to full pay and allowances for his service but due to the various errors committed by the Air Force, an unjust debt was imposed against him forcing him to repay money he never received. Furthermore, the Chief, DAF

Personnel Pay, specifically wrote a memo in support of his request highlighting his repeated efforts to correct these errors without the assistance of an attorney and the multiple errors made by the Air Force compounded the situation.

Therefore, he respectfully requests the Board disregard the Advisory Opinion and grant the requested relief, specifically, forgiveness of a portion of the overpayment requirement commensurate with his attorney-related expenses made necessary by the gross incompetence of the Air Force.

The applicant's complete response is at Exhibit E.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of SAF/MRBL and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes the applicant is not requesting to waive the debt of \$21,500.00 associated with the overpayment of his Officer Retention Bonus, but reimbursement for lawyer fees associated with fixing his pay records, because of the DFAS error. While the Board notes, the applicant's unfortunate situation; however, the Board is bound by law and regulations and cannot disburse funds (directly or indirectly) to cover legal expenses. The Board finds granting the applicant's request for relief would violate DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. Specifically, paragraph 7.2.4, states the AFBCMR cannot "pay expenses of any kind incurred by or on behalf of an applicant in connection with a correction of military records under 10 U.S.C. § 1034 or § 1552. This includes attorney's fees or other costs related to an AFBCMR application." In addition, the broad language of the DAFI 36-2603 includes fees of any kind, such as those requested in the current application. Therefore, the Board recommends against correcting the applicant's records.
4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-02016 in Executive Session on 14 Jan 25:

Work-Product Panel Chair
Work-Product Panel Member

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Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 6 Jun 23.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, SAF/MRBL, dated 6 Jun 24.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 27 Jun 24.

Exhibit E: Applicant's Response, w/atchs, dated 26 Jul 24.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

4/23/2025

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Board Operations Manager, AFBCMR

Signed by:

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