

**CONNECTICUT  
VETERANS  
LEGAL  
CENTER**



**Co-FOUNDER  
EXECUTIVE DIRECTOR  
MARGARET MIDDLETON**

**SENIOR COUNSEL  
MARY-CHRISTY FISHER**

**STAFF ATTORNEYS:  
CINTHIA JOHNSON  
MARGARET KUZMA  
DARREN PRUSLOW  
MILLIE VANDENBROEK**

**BOARD OF DIRECTORS**

**JOHN BASHAW**  
Reid and Riege, P.C.

**ADAM M. DWORKIN**  
Griffin Faculty Practice Plan

**JOHN KELLEY**  
Children In Placement  
Connecticut, Inc.

**KEVIN M. LENEHAN**  
Sikorsky Aircraft Corporation

**DR. MICHAEL MORAVECEK**  
DMHAS Whiting Forensic Division

**EDWARD V. O'HANLAN**  
Robinson & Cole LLP

**ALISON O'SHEA**  
Point72, L.P.

**WILLIAM J. PIEPER**  
Pentegra Retirement Services

**BRIAN PIERNE**  
Deloitte

**DAVID N. ROSEN**  
David Rosen & Associates

**THE REVEREND DR. JOHN SELDERS, JR.**  
Moral Monday CT

**JOHN J. SHAY, JR.**  
IBM Credit LLC (Retired)

**KATHLEEN TOURJEE**  
WebMD

**DONALD P. TUTSON, JR.**  
The Law Office of Donald P. Tutson, Jr.

**JEFFREY UDELL**  
Walden Macht & Haran LLP

**ADVISORY BOARD**

**RICHARD BLUMENTHAL**  
U.S. Senator, Connecticut

**KEVIN P. BROWN**  
Chairman, Mohegan Tribal  
Gaming Authority  
Colonel, US Army, Retired

**DR. LAURIE HARKNESS**  
Former Director, Errera Center,  
U.S. Department of Veterans Affairs

**PROFESSOR MICHAEL WISHNIE**  
Yale School of Law

**IN MEMORY OF Co-FOUNDER  
HOWARD R. UDELL / 1941-2013**

July 24, 2017

VIA FAX: (612) 970-5688

Debt Management Center  
Bishop Henry Whipple Federal Building  
P.O. Box 11930  
St. Paul, MN 55111-0930

**Re: [REDACTED] VA File No.: [REDACTED]  
APPEAL and REQUEST FOR WAIVER**

To Whom It May Concern:

I am writing again on behalf of my client, [REDACTED]. I have enclosed a copy of VA Form 21-22a, executed by my client and myself. (Exhibit A) We originally submitted this document, along with our initial appeal and request for waiver, on March 24, 2017. (Exhibit B)

As indicated in my earlier correspondence, Mr. [REDACTED] disputes both the validity and the amount of the debt set forth in the VA's [REDACTED] letter regarding his alleged overpayment of \$4,827.32. Mr. [REDACTED] contests the creation of any debt, given that he timely notified the VA of his change in income. Any overpayment was due to the agency's administrative errors; he is not responsible for any debt that was allegedly created.

When we wrote in March, we also requested that the VA inform Mr. [REDACTED] how the overpayment amount was calculated. It is unclear to him and to counsel how the balance he allegedly owes was computed. Neither he nor I received a response to this inquiry.

Finally, Mr. [REDACTED] requested that, if the VA *should* find he incurred an overpayment, he be granted a waiver and be excused from repaying the debt. He received a letter, dated [REDACTED], indicating that his file was transferred to the Committee on Waivers and Compromises. I want to ensure the Committee reviews this letter, and the VA Form 5655 (Exhibit C) Mr. [REDACTED] completed today, when it makes its decision.

**BACKGROUND**

Mr. [REDACTED] began receiving VA non-service connected (NSC) pension benefits in [REDACTED]. (Prior to this, his income consisted of only \$55.00 per month in financial assistance from the State of Connecticut in addition to his Food Stamps.) At the same time, he was found eligible for a 10% service-connected benefit, based on his tinnitus. Due to his eligibility for pension benefits, he only received the NSC monies each month.

Sometime in [REDACTED], Mr. [REDACTED] submitted an application for Social Security Disability Insurance (SSDI). This application, which was initially denied in [REDACTED], was denied again in late [REDACTED]. Mr. [REDACTED] contacted

**CONNECTICUT VETERANS LEGAL CENTER, INC.**

114 Orange Avenue, 2<sup>nd</sup> Floor ★ West Haven, CT 06516

PHONE: 203 794-4291 ★ FAX: 203 889-0111

ctveteranslegal.org

the local Social Security Administration (SSA) office in early [REDACTED] and applied for retirement benefits. He was granted such benefits in [REDACTED] when he turned 62 years of age. He began receiving his monthly benefits of \$967.00 in late [REDACTED].

Mr. [REDACTED] took steps to alert the VA once he began receiving his retirement monies. He prepared a statement advising the VA Pension Office of his income change; this statement was faxed to and received by the VA's Pension Office on [REDACTED]. (Exhibit D) The VA responded by letter, dated [REDACTED], which advised Mr. [REDACTED] that it was processing the claim he submitted. (Exhibit E)

The VA next contacted Mr. [REDACTED] in late [REDACTED], in response to his [REDACTED] report of his new income source. (Exhibit F) According to the agency's letter, his VA benefit payments changed, effective [REDACTED]. He was found to be ineligible for NSC monies as of that date. Instead, he began receiving \$133.00 each month in service-connected benefits.<sup>1</sup> He was told the VA would subsequently inform him regarding the amount he was overpaid. It was not until [REDACTED] that the VA finally sent out its overpayment letter. (Exhibit G) In addition to informing Mr. [REDACTED] that he was overpaid \$4,827.32, the letter stated the VA would begin collecting this overpayment as of [REDACTED].

The VA did begin collecting his entire monthly service connection check to repay the overpayment. We ask that, based on his request for a review and a waiver, his VA income remain intact and the service connection monies that were deducted from his account be returned to him.

#### PERTINENT LAW AND REGULATIONS

VA statutes and regulations establish the agency's process for dealing with reductions and discontinuances of pension benefits. 38 U.S.C. § 5112; 38 C.F.R. §§ 3.500 et. seq. Under 38 U.S.C. § 5112(b)(10), "[t]he effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension . . . by reason of an erroneous award based solely on administrative error or error in judgment shall be the date of last payment."

The provisions of 38 C.F.R. § 3.660(a) (1), relating to the reductions or discontinuances of benefits, provides in pertinent part: "A veteran . . . who is receiving [a] pension, . . . must notify the Department of Veterans Affairs of any material change or expected change in his or her income or other circumstances which would affect his or her entitlement to receive, or the rate of, the benefit being paid. Such notice must be furnished when the recipient acquires knowledge that he or she will begin to receive additional income."

There are several statutory sections, 38 U.S.C. §§ 501, 5302, 5314, pursuant to which the VA has promulgated rules relating to the collection of debts incurred by veterans. One regulation, 38 C.F.R. § 1.911, outlines how veterans with debts "resulting from an individual's participation in a VA benefit or home loan program" will have such monies collected. As the regulation provides, the "VA shall promptly demand, in writing, payment of the debt. VA shall notify the debtor of his or her rights and remedies and the consequences of failure to cooperate with collection efforts." 38 C.F.R. § 1.911(b).

Once notified of the existence of a debt, a veteran can "informally dispute the existence or amount of the debt, to request waiver of collection of the debt, to a hearing on the waiver request, and to appeal the Department of Veterans Affairs decision underlying the debt." 38 C.F.R. § 1.911(c). An "informal dispute" provides that "the debtor writes to the Department of Veterans Affairs and questions whether he or she owes the debt or whether the amount is accurate. The Department of Veterans Affairs will, as

---

<sup>1</sup> The letter stated that the VA had switched Mr. [REDACTED] benefits from NSC to service connection compensation and, in doing so, had "reduced the amount of [his] overpayment." It is unclear how his overpayment was reduced.

expeditiously as possible, review the accuracy of the debt determination.” 38 C.F.R. § 1.911(c)(1). Veterans who are informed they do owe a debt are advised that they have “the right to request waiver of collection, in accordance with § 1.963 or § 1.964, and the right to a hearing on the request. Requests for waivers must be filed in writing.” 38 C.F.R. § 1.911(c)(2). If a waiver is granted, in whole or in part, the debtor has a right to refund of amounts already collected up to the amount waived. *Id.*

Under the regulations, an “overpayment,” for the purposes of waiver and collection, consists of “only ... those benefit payments made to a designated living payee or beneficiary in excess of the amount due or to which such payee or beneficiary is entitled” 38 C.F.R. § 1.962.

Finally, VA regulations provide for protections when collection appears appropriate. The regulations state: “there shall be no recovery of payments or overpayments (or any interest thereon) of any benefits under any of the laws administered by the Secretary whenever the Secretary determines that recovery would be against equity and good conscience.” 38 C.F.R. § 1.962. The agency applies this standard in cases that require a need for “reasonableness and moderation.” A waiver will not be granted in cases where there is an “indication of fraud, misrepresentation, or bad faith on the part of the person or persons having an interest in obtaining the waiver....” 38 C.F.R. § 1.963.

The VA has identified six factors that should be considered in weighing whether a collection would be against equity and good conscience, although they are not intended to be inclusive:

1. Fault of debtor. Where actions of the debtor contribute to creation of the debt;
2. Balancing of faults. Weighing fault of debtor against that contributed by the Department of Veterans Affairs;
3. Undue hardship. Whether collection would deprive debtor or family of basic necessities;
4. Defeat the purpose. Whether withholding of benefits or recovery would nullify the objective for which benefits were intended;
5. Unjust enrichment. Failure to make restitution would result in unfair gain to the debtor;
6. Changing position to one's detriment. Reliance on Department of Veterans Affairs benefits results in relinquishment of a valuable right or incurrence of a legal obligation.

See 38 C.F.R. §1.965.

## ARGUMENT

### A. No Overpayment Was Created

In Mr. ██████ case, no overpayment was created. Mr. ██████ acknowledges that his eligibility for NSC benefits ceased upon his receipt of Social Security Retirement benefits. However, he timely notified the VA of the change in his income shortly after he began receiving his Social Security payments. Mr. ██████ was not required to take any other action. The agency’s failure to change his benefit payments in a timely fashion was the result of the VA’s administrative error and/or delayed processing subsequent to its receipt of Mr. ██████ notification.

Statutory section 5112(b)(10) applies to Mr. ██████ case. As the Court of Appeals of Veterans Claims held in *Dent v. McDonald* (No. 13-2406, July 15, 2015), “when erroneous payments of a pension award are made solely as a result of VA administrative error or error in judgment under section 5112(b)(10), no

debt or overpayment is created because the reduction or discontinuance is required to be made effective on the date of the last payment.”

The VA’s failure to act for more than three full months before officially responding to the veteran’s notice regarding his change in circumstances constitutes administrative error. Accordingly, the discontinuance of Mr. ██████ NSC benefits was effective when he received his last payment. As a result, no overpayment was created

#### B. The VA Should Verify How the Alleged Overpayment was Created

Mr. ██████ should be notified how the VA calculated the amount of his alleged overpayment. It is unclear from the VA’s correspondence how the overpayment amount was determined and if it was calculated correctly. Pursuant to 38 C.F.R. § 1.911(c)(1), Mr. ██████ requests that the agency conduct a review of the accuracy of the debt. Once this review is completed, Mr. ██████ asks that he be sent a full explanation of how the agency VA calculated the amount he allegedly owes. The courts have held that when a claimant asks for an explanation of the way the debt has been computed, he is entitled to a straightforward computation from the VA.

#### C. If The VA Should Find that there was an Overpayment, A Waiver should be Granted

In the absence of a validly created debt, consideration of Mr. ██████ request for a waiver, and a determination as to whether the requirements of a waiver of such debt have been met, is not necessary. However, if an overpayment is found, Mr. ██████ should not be penalized for the agency’s inaction. Instead, he should be granted a waiver. The VA standards governing whether to waive all or part of a debt are different from the factors the VA must consider in a dispute of a debt. In such instances, the VA shall give the Veteran the benefit of the doubt. 38 U.S.C. § 5107(b). *See also Dela Cruz v. Principi*, 15 Vet. App. 143, 148-49 (2001). As set forth below, five out of the six factors identified by the VA in 38 C.F.R. §1.965 weigh in favor of a waiver of Mr. ██████ debt:

##### 1. Fault of the Debtor

Mr. ██████ was not at fault in incurring this debt. He never intended to receive VA benefits to which he was not entitled. Rather, he promptly notified the VA of his change in income after becoming aware of the impact his Social Security Retirement benefits had on his NSC. Mr. ██████ had no control over the VA’s continued payment of his NSC monies.

##### 2. Balancing of Faults

Mr. ██████ took all the appropriate steps needed to inform the VA that his income situation changed and his NSC benefits should be discontinued. He had every reason to believe that the VA would timely take steps to adjust his payments.

The VA did quickly respond to his initial August notice – it took the agency less than three weeks to send out its reply, indicating it had received his correspondence. However, it then took the VA another three months to actually discontinue his monies and another month and a half to notify him of the amount of his overpayment.

The overpayment arose because the VA continued to pay Mr. ██████ his NSC benefits after he informed the agency of his receipt of Social Security Retirement monies. It failed to promptly respond to the veteran’s timely notice of his change in income. Accordingly, responsibility for the creation of the overpayment of benefits rests entirely with the agency.

### 3. Undue Hardship

In [REDACTED], Mr. [REDACTED] received \$970.00 in Social Security retirement benefits and \$133.87 in VA service connection compensation, for total monthly income of \$1,103.87. Due to the collection of his VA monies, he is currently living solely on his Social Security benefits and food stamps. Given Mr. [REDACTED] age and disability, it is unlikely he will ever have any sources of disposable income other than his Social Security Retirement and his VA benefits.

It is evident that Mr. [REDACTED] is currently living a minimal existence. Until [REDACTED], he resided in his family's home, which was lost in a foreclosure. He now resides in subsidized housing, with basic electricity costs that he has difficulty paying. After losing his family home, Mr. [REDACTED] needed to use what available funds he did have to acquire furnishings and other items to make his new place livable.

As outlined above and in his enclosed VA Form 5655, Mr. [REDACTED] monthly expenses far exceed his monthly income. When his monthly payment (and deduction) of his VA 10% service-connected monies is taken into account, his expenses total over \$300.00 more than his basic expenses. Even with the waiver of this alleged overpayment, Mr. [REDACTED] net monthly income would still be less than the income that is available to him.

Mr. [REDACTED] needs all of his income to meet his basic expenses. Requiring him to forgo his monthly service connection benefits to repay this debt constitutes a tremendous hardship. He is unable to replace the tires on his truck, and make other needed repairs. Collecting this debt at the monthly amount permitted by law would deprive him of his ability to meet his basic needs for years.

### 4. Defeat the Purpose

Although Mr. [REDACTED] is now eligible for Social Security Retirement benefits and VA service connection monies, his actual income has barely changed since he was receiving NSC pension benefits, which are designed to help veterans who are living near the poverty line meet their basic needs. His current combined cash benefits total \$1,103.00 each month, contrasted with the \$1,072.00 he was receiving in NSC benefits. This change resulted in an increase of only \$31.00 in his gross monthly income.

Mr. [REDACTED] cash benefits now result in an annual income of \$13,236.00; this amount is just \$1,176.00 more than the 2017 Federal Poverty Guideline of \$12,060.00 per year for a unit of one. For the VA to continue to collect any of the modest income he currently receives is against the purpose of the law.

### 5. Unjust Enrichment

Mr. [REDACTED] was not unjustly enriched by the VA's continued payment of his NSC benefits. In fact, for some of the short period of time, he was completely unaware that the VA continued depositing his payments into his bank account, and had no access to the funds the VA paid to him. Even after he realized that the monies had been paid him, he utilized the funds to meet basic expenses connected with his move into his current apartment.

D. If His Waiver Request is Granted, the VA Should Promptly Reimburse Mr. [REDACTED] the Amount of Monies it Collected

Mr. [REDACTED] was unable to submit his waiver request within 30 days of his receipt of his overpayment notice. However, he did submit his waiver request before 180 days from the notice had elapsed. Accordingly, if his waiver request is granted, the VA should reimburse him for the VA service connection benefits that have been withheld. 38 C.F.R. § 1.912a(c)(2).

CONCLUSION

We contend that no overpayment was created due to Mr. [REDACTED] timely notice to the VA regarding the changes in his income. It was the VA which, despite being promptly notified of the change in his circumstances, took a number of months to administratively alter his payments. This delay is not Mr. [REDACTED] fault; the fault for the creation of this overpayment lies entirely with the VA.

If the VA should find that an overpayment does exist, we contend that his overpayment should be waived and the service connection benefits now being used to discharge the overpayment be returned to him. He should not be held responsible for the repayment of a debt he did not create. And, as this letter indicates, not receiving his VA benefits is causing Mr. [REDACTED] undue financial hardship.

Please do not hesitate to contact me or my client if you should have any questions relating to his application for a waiver. I can be reached at [REDACTED]. I thank you, in advance, for your timely response to his request.

Sincerely,

[REDACTED]

Connecticut Veterans Legal Center

Enc:

- Exhibit A – VA Form 21-22a
- Exhibit B – Letter to VA, dated [REDACTED]
- Exhibit C – VA Form 5655, dated [REDACTED]
- Exhibit D – VA Form 21-4138, dated [REDACTED]
- Exhibit E – VA Letter, dated [REDACTED]
- Exhibit F – VA Letter, [REDACTED]
- Exhibit G – VA Letter, dated [REDACTED]