

DATE: July 30, 2024

---

In Re: )  
          [REDACTED] ) Claims Case No. 2023-WV-031402.2  
                                  )  
Claimant )

---

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 10 U.S.C. § 2774, and that statute’s implementing regulations set forth in Department of Defense Instruction 1340.23 (February 14, 2007) at enclosure 4, when a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the Government.

The fact that a debt arose due to an administrative error does not entitle a member to waiver or relieve the member of the responsibility to verify the correctness of the payments received.

**DECISION**

A retired member of the U.S. Navy requests reconsideration of the DOHA appeal decision in DOHA Claim No. 2023-WV-031402, dated January 30, 2024.

**Background**

On September 30, 1997, the member retired from the Navy and became eligible to receive military retired pay effective October 1, 1997. The member subsequently began a federal civil service career and later became eligible to retire from the federal civil service. On March 3, 2021, the member completed the CBC-12830-23, *Waiver of Retired Military Pay*, requesting to waive military retired pay for civilian service retirement purposes effective April 30, 2021.

Specifically, under the section of the form entitled “Effective Date of Waiver,” the member acknowledged the following:

I am retiring from a federal civil service position and am combining my military and civilian service for purposes of retirement benefits. I hereby waive my military retired pay for civil service retirement purposes. The effective date of this waiver is: 30 APR 2021.

Further, under the section of the form entitled “Agreement,” right above the member’s signature, was the following:

I hereby authorize the Office of Personnel Management to withhold from my civil service retirement annuity any amount of military retirement pay granted beyond the effective date of this waiver due to any delay in receiving or processing this election.

In addition, I request that your office notify the Retirement Division, Office of Personnel Management, Washington, D.C. of the effective date of termination of my military retired pay and furnish me with a copy of such notification.

I understand that if I have current allotments from my retired military pay that I am responsible for making arrangements for the payments. These allotments will not transfer to my federal civil service retirement annuity.

On April 30, 2021, the member retired from federal civilian service and became entitled to receive federal civil service retirement pay effective May 1, 2021. Since he elected to waive his military retired pay in order to credit his military service period towards his federal civilian service period, the member was no longer entitled to receive military retired pay effective May 1, 2021. However, due to an administrative error, the member continued to receive military retired pay paid to him by the Defense Finance and Accounting Service (DFAS) during the period May 1, 2021, through January 31, 2022, causing him to be erroneously overpaid \$17,160.00. Specifically, the member continued to receive monthly payments of military retired pay in the gross amount of \$1,882.00 from May 1, 2021, through November 30, 2021, for a total of \$13,174.00, and monthly payments of military retired pay in the gross amount of \$1,993.00 during the period December 1, 2021, through January 31, 2022, for a total overpayment of \$17,160.00 (\$13,174.00 + \$3,986.00).

On June 15, 2022, the member requested waiver of the indebtedness in the amount of \$17,160.00. In that request, the member stated that he became aware of his debt on May 25, 2022. He stated that the debt resulted from DFAS’s error in not stopping his military retired pay in a timely fashion, not due to any negligence or deception on his part. He requested waiver of the debt based on the financial hardship of repayment. On September 9, 2022, DFAS denied the member’s waiver request. DFAS found that the member’s election to waive his military retired pay while effective on April 30, 2021, was not received by DFAS until February 10, 2022, resulting in him being overpaid. However, DFAS determined that waiver was not appropriate

because the member reasonably should have been aware that any military retired pay issued after May 1, 2021, was a duplication of benefits requiring repayment to DFAS.

In the member's appeal of DFAS's denial of his waiver request, he stated that DFAS was aware of his waiver of military retired pay request 21 days before his retirement, as evidenced by an email sent from Navy Human Resources to DFAS on April 9, 2021. He stated he has no knowledge of the internal workings of the Navy Human Resources, DFAS, and the Office of Personnel Management (OPM), and he assumed that all three agencies had time to sufficiently calculate and coordinate his civilian retirement. In an administrative report dated December 15, 2022, DFAS sustained its denial of the member's waiver request. DFAS acknowledged the delay in processing the member's waiver of military retired pay request. However, DFAS held that the member knew that his military retired pay should have stopped effective May 1, 2021.

In the appeal decision, the DOHA adjudicator sustained DFAS's denial of the member's waiver request on the basis that the record is absent any official documentation from OPM or the DFAS Retired Pay Office advising the member that he was entitled to receive military retired pay during the period May 1, 2021, through January 31, 2022. The adjudicator referred to the language in the CBC-12830-23, signed by the member, acknowledging that he authorized OPM to withhold, from his civil service retirement annuity, any amount of military retired pay granted beyond the effective date of the waiver, April 30, 2021, due to any delay in receiving or processing his election. The adjudicator found that, although OPM did not finalize the member's retirement and initiate full payments until March 2022, he has not provided any official documentation from the DFAS Retired Pay Office advising him that he was entitled to continue to receive military retired pay, which he requested to be waived, pending the calculation of his civil service retirement pay.

In the member's reconsideration request, he states that if he did not sign the CBC-121830-23, his retirement annuity application would not have been processed. He states that OPM and DFAS employees, who are paid to understand and be experts in the multi-agency process should be liable for their errors, not the member. He believes it defies common sense to hold him liable for the overpayment because he did not question the pay experts concerning their errors. He questions why, in good conscience, can the Government hold him accountable for an error on the part of OPM and DFAS employees.

### **Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member or former member of the uniformed services if 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 former member. *See* Enclosure 4 of the Department of Defense Instruction 1340.23 (February 14, 2006). In this context the legal definition of "fault" does not imply a moral lapse on the part of the member. It merely indicates that the member is not entirely without responsibility in the accrual of the debt and therefore the equitable remedy of waiver is not available to the member. The standard we employ to determine fault is whether a reasonable

person would or should have known that he was receiving payments in excess of his entitlements. We consider fault to exist if, in light of all the circumstances, the member should have known that an error existed and taken action to have it corrected. In such situations, waiver is precluded. *See* B-193375, Dec. 11, 1978.

In this case, the member was aware when he completed the CBC-12830-23 on March 3, 2021, that he was waiving receipt of his military retired pay so that he could add his military service credits to his civil service time for annuity computation purposes. Therefore, the member is considered to have been on notice that effective May 1, 2021, he would no longer receive military retired pay. However, the record reflects that the member continued to receive military retired pay, in the same amount, in the same monthly intervals, deposited into the same account, paid to him by DFAS as he did before May 1, 2021. Although there was a delay in OPM completing the calculation of his civil service annuity payments, in March 2022 the member received his first civil retirement payments from OPM, retroactive to May 1, 2021. Essentially, the member received duplicate payments since he continued to erroneously receive military retired pay for the same period. The member clearly knew that he was not entitled to receive the full civil service annuity plus his military retired pay. Since the member did not take any action in the matter, such as questioning why his military retired pay continued to be paid to him when he had submitted a waiver of military retired pay to receive credit toward his civil service annuity, he is not without fault and the resulting debt may not be waived. When a member is aware or should be aware that he is being overpaid, he must be prepared to return the excess amounts when requested to do so by the Government.

## Conclusion

The member's request for relief is denied, and we affirm the appeal decision dated January 30, 2024. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

---

Catherine M. Engstrom  
Administrative Judge  
Chair, Claims Appeals Board

Signed: Richard C. Ourand, Jr.

---

Richard C. Ourand, Jr.  
Administrative Judge  
Member, Claims Appeals Board

Signed: Charles C. Hale

---

Charles C. Hale  
Administrative Judge  
Member, Claims Appeals Board