

DATE: December 2, 2003

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In Re:

[REDACTED]

Claimant

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Claims Case No. 03111712

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Waiver of collection of an erroneous payment of civilian pay is precluded when an employee, who was on an extended period of military active duty and who was in a leave without pay (LWOP) status from his civilian position, returns for a brief period of time to attend to his civilian duties while still on an extended active duty military status. The record indicates that the employee was promptly notified of the debt, that he did not inquire as to his right to payment of the civilian pay even though there is evidence of considerable government experience, and that he was in LWOP status for over 6 months prior to his brief return.

### DECISION

A civilian employee of the Navy appeals the September 17, 2003, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 03072104. In that Settlement, DOHA affirmed the decision of the Defense Finance and Accounting Service (DFAS) to disallow the employee's request that the government waive collection of an erroneous overpayment of salary in the amount of \$1,654.40.

### Background

The employee was a member of the Reserve component and was ordered to an extended period of active duty starting on December 10, 2001, and ending on October 25, 2002. During this period of extended active duty, the employee was on leave without pay (LWOP) from his civilian position. In July 2002, the employee was granted military leave and returned to his civilian job for one week to attend to matters that required his immediate attention. The employee received both his usual military pay and allowances for that week and his civilian pay for the period he was on duty in the pay period ending July 13, 2002. The employee was advised in late July 2002 that his civilian pay was paid to him erroneously.

On appeal the employee contends that his situation is distinguishable from the decisions cited in the Settlement Certificate. <sup>(1)</sup> The employee stresses that he performed actual duties for his civilian employer, and his civilian supervisor clearly expected him to be paid for such work. The employee characterizes the decisions cited as inapplicable because they involved over-compensation for permanent change of station moves or payment for days worked when no actual duties were performed. By contrast, his work resulted in benefit to the government, and he gave up the opportunity to use his military leave for personal or family purposes. Also, by using his military leave, he forfeited his right to cash in days of unused military leave. The failure to pay the five days of civilian pay means that he worked for one week without pay and that this result is against equity and good conscience.

### **Discussion**

The Secretary of Defense has authority under Section 5584 of title 5, United States Code (5 U.S.C. § 5584), to waive, in whole or in part, the government's claim for recovery of an erroneous payment of pay and allowances made to a Department of Defense employee if the collection would be against equity and good conscience and not in the best interests of the United States. But the statute does not permit waiver when there exists an indication of fault, even partial fault, on the part of the employee. The decisions cited in the Settlement Certificate were correctly cited for the proposition that it is not against equity and good conscience to recover the erroneous overpayment when the government promptly notifies the employee of its error, as it did here.

Additionally, it is well-established that, in the absence of specific statutory authority, <sup>(2)</sup> any agreement or arrangement by a member of a uniformed service for the rendition of services to the government in another position or employment is incompatible with a uniformed service member's actual or potential duties. *See* the decisions of the Comptroller General in B-251541, July 21, 1993; and in 64 Comp. Gen. 395, 399 (1985). The fact that the employee's civilian duties and military duties do not directly conflict is not a relevant consideration. *See* 64 Comp. Gen., *supra* at 399-400. Also, the fact that the employee was in the reserve component, as opposed to the regular component, makes no difference here because he was on extended active duty. *See* B-207109, Nov. 29, 1982. When a member receives such additional compensation, it is erroneous, and persons who receive public funds erroneously acquire no right to those funds and are liable for restitution. *See* 64 Comp. Gen. *supra* at 401.

In cases where an employee received erroneous payments in contravention of the dual compensation laws, the Comptroller General looked favorably on requests for waiver when the individual made no secret of his dual employment and, in the circumstances, he had no reason to know that he was in violation of the law. *See* 64 Comp. Gen. *supra* at 406. Here, the employee and his civilian supervisor state that they reasonably believed that the employee could have been paid his civilian salary during military leave because, in their experience, service members sometimes receive simultaneous payments of military and civilian compensation. *See, e.g.*, footnote 2 *supra*. However, the record also indicates that the employee was a senior officer in the pay grade of O-6, and as a civilian, he was a supervisory administrative specialist in a pay grade equivalent to GS-13/14. We believe that a reasonable person of ordinary prudence in these circumstances would have inquired as to his right to receive his civilian pay. We note that the employee had been in an LWOP status for over 6 months prior to his one-week return to civilian duties, and presumably he immediately returned to that status for the balance of his active duty tour.

### **Conclusion**

For the reasons stated herein, we affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: William S. Fields

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William S. Fields  
member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
member, Claims Appeals Board

1. DOHA Claims Case No. 98062401 (October 13, 1998), and the following Comptroller General decisions: B-265874, May 22, 1996; B-230423, Mar. 13, 1989; B-204974, June 24, 1982; and B-188492, Feb. 16, 1978.

2. Congress has encouraged Federal employees to participate in Reserve programs by providing for up to 15 days per year without reduction of civilian compensation and leave to attend training and field exercises. *See* B-207109, Nov. 29, 1982. This is a specific exception that allows members to receive military and civilian compensation simultaneously, but is limited in time and applies only to training types of military duty, not to extended active duty.