

KEYWORDS: Waiver of Indebtedness

DIGEST: A member separating from the service properly received separation pay. Subsequently, he applied for and began receiving retired pay. In this situation, recoupment of the separation pay is required by statute. Since the separation pay payment was proper when made, the claim resulting from the statutorily required recoupment is not subject to waiver under 32 U.S.C. § 716.

CASENO: 2010-WV-071601.2

DATE: 1/19/2011

DATE: January 19, 2011

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In Re:	)	
[REDACTED]	)	Claims Case No. 2010-WV-071601.2
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

A member separating from the service properly received separation pay. Subsequently, he applied for and began receiving retired pay. In this situation, recoupment of the separation pay is required by statute. Since the separation pay payment was proper when made, the claim resulting from the statutorily required recoupment is not subject to waiver under 32 U.S.C. § 716.

**DECISION**

A retired member of the Army National Guard requests reconsideration of the November 30, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-071601. In that decision, DOHA upheld the Defense Finance and

Accounting Service's (DFAS) determination that the recoupment of the member's separation payment in the amount of \$65,776.98, cannot be considered for waiver.

### **Background**

On June 30, 1996, the member separated from the Army National Guard and received a separation pay payment in the amount of \$65,776.98. On June 1, 2007, the member turned 60 years old and became eligible to receive military retired pay. On that day, he completed DD Form 2656, *Data for Payment of Retired Personnel*, to receive retired pay. He indicated on the form that he had received separation pay. When the member applied for military retired pay, recoupment of the separation pay in the amount of \$65,776.98 was required. Thus, the member became indebted to the United States in the amount of \$65,776.98. In the appeal decision, the DOHA adjudicator concluded that the \$65,776.98 could not be considered for waiver because it did not represent an erroneous payment. The adjudicator explained that a claim arising from a properly paid separation payment which later must be recouped because of the member's receipt of retired pay, is not a claim arising from an erroneous payment which may be considered for waiver under 32 U.S.C. § 716. The adjudicator explained the member could visit DFAS's website for information regarding separation recoupment, and contact DFAS directly for information on arranging a repayment plan that would take financial hardship into account.

In his request for reconsideration, the member states that he is not requesting an arrangement to repay the debt which would take hardship into account; he is requesting forgiveness of the indebtedness. The member states that the Retirement Services Officer at the Office of the Adjutant General of his state advised him on September 22, 2009, that the law changed on October 1, 1996, reversing the requirement to pay back the full amount, including tax withheld, of the indebtedness arising from separation pay actions. The member states that his forced retirement occurred on July 30, 1996, three months prior to the changes in the law requiring payback of separation pay, including tax withheld. He states that there should be some way of "grandfathering" him in, so that his waiver is approved.

### **Discussion**

Under 10 U.S.C. § 1174, separation pay is a contingency payment to ease the re-entry into civilian life of members of the armed services involuntarily separated prior to becoming entitled to retired pay. *See* Comptroller General decision B-266193, Feb. 23, 1996. The statute requires "coordination" when a member who has received a separation payment later qualifies for retired or retainer pay or VA disability compensation. *See* 10 U.S.C. § 1174(h). Regarding coordination with retired pay, 10 U.S.C. § 1174(h)(1) provides in pertinent part as follows:

A member who has received separation pay . . . based on service in the armed forces, and who later qualifies for retired or retainer pay . . . shall have deducted from each payment of such retired or retainer pay an amount, in such schedule of monthly installments as the

Secretary of Defense shall specify, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship on the member and member's dependents, until the total amount deducted is equal to the total amount of separation pay . . . so paid.

Under the law, Congress clearly did not intend members to receive both separation pay and retired pay for the same period of service. Therefore, a member who receives separation pay is required to repay it if he later qualifies for and receives retired pay.

Under 32 U.S.C. § 716, we have the authority to waive a claim of the United States against a member or former member of the National Guard for erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States. A debt cannot be considered for waiver unless the payment was erroneous when made. Section 716(a) of title 32 specifically requires “an erroneous payment of any pay or allowances made . . . to or on behalf of a member or former member of the National Guard” as a condition for applying the statute. In this case, the separation pay payment was proper when made. Therefore, the claim resulting from the required recoupment of the separation pay payment because of receipt of retired pay cannot be considered for waiver under 32 U.S.C. § 716, because the debt did not arise from an erroneous payment. *See* DOHA Claims Case No. 09082801 (September 21, 2009).

We have examined the change in the law occurring on October 1, 1996, and do not see any change or reversal of the required recoupment of separation pay when a member receives retired pay. However, the member may be referring to the provision in the statute regarding coordination with disability compensation under 10 U.S.C. 1174(h)(2), which provides in pertinent part that a member who has received separation pay shall not be deprived of any VA disability compensation to which he is entitled, “but there shall be deducted from that disability compensation an amount equal to the total amount of separation pay . . . received, less the amount of Federal income tax withheld from such pay . . .”<sup>1</sup> This language is not included in the provision in the statute regarding coordination with retired pay.

The fact that the retirement officer may have given the member incorrect advice concerning recoupment of his separation pay does not change the nature of the payment. The

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<sup>1</sup>Effective October 1, 1996, Congress amended 10 U.S.C. § 1174(h)(2), by adding the language, “less the amount of Federal income tax withheld from such pay . . .” This amendment applied to payments of separation pay made after September 30, 1996. However, this amendment only applied to 10 U.S.C. § 1174(h)(2), the provision concerning coordination of separation pay with disability compensation, not the provision concerning coordination with retired pay. *See* Pub. L. No. 104-201, Title VI, § 653, 110 Stat. 2422, 2583 (September 23, 1996).

separation pay payment was proper when made,<sup>2</sup> and a waiver of the indebtedness created afterwards due to the need to recoup the separation pay is not within the terms of 32 U.S.C. § 716.

### **Conclusion**

The member's request for relief is denied, and we affirm the November 30, 2010, appeal decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense concerning this matter.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

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<sup>2</sup>We note that DFAS temporarily stopped deduction of recoupment under 10 U.S.C. § 1174(h) while they did a formal review of the process. Congress amended 10 U.S.C. § 1174(h) to help limit the financial strain on military retirees as they repay their balances. *See* Pub. L. No. 111-32, Title III, § 318(a), 123 Stat. 1873 (June 24, 2009). Deductions began again on August 2, 2010. The new recoupment rate is a flat 40%. *See* ¶ 040904 of Chapter 4, Volume 7B of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay. However, retirees who submit a claim for financial hardship may have their recoupment rates reduced. Information on how to file for financial hardship is provided on DFAS's website; our Office has no authority in this matter. The DFAS website is: <http://www.dfas.mil/rapay/rafaqs/separationrecoupmentfaqs.html>.