

DATE: April 13, 2000

[AMENDED December 11, 2000]

In Re:

[Redacted]

Claimant

Claims Case No. 00021411

CLAIMS APPEALS BOARD DECISION

DIGEST

Under 10 U.S.C. § 2774, a member is considered partially at fault when he knew or should have known that he was erroneously receiving payments to which he was not entitled. When a member was separated, he expected to receive a lump sum plus payments for an undetermined number of months. He continued to receive pay and allowances for a total of 19 months after his discharge without continuing to question his entitlements. Partial waiver is granted representing a month-and-a-half of payments he reasonably accepted as payment for his accrued leave. Waiver of the remainder of the debt is denied.

DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) August 19, 1997, Settlement Certificate, DOHA Claim No. 97016118, in which we partially denied the member's application for waiver of an indebtedness of \$89,561.98. The member became indebted in this amount as a result of erroneous payments of final pay and of active duty pay and allowances subsequent to his discharge.

Background

The record indicates that the member was discharged on August 10, 1992. After discharge, he was due an accrued leave payment for 60 days and a Special Separation Benefit (SSB) payment in the amount of \$46,014.75. On August 31,

1992, he received a check at his home for the SSB payment in the amount of \$35,321.98, the amount due after taxes were withheld. From August 11, 1992, through March 15, 1994, the member continued to receive electronic payments of mid-month and end-of-month pay and allowances to his bank account. During this period, allotment payments were made on his behalf and federal taxes were withheld. Additionally, federal taxes were overstated on his final leave and earnings statement (LES). In February 1996, he was notified of the \$89,561.98 debt.

The member requested waiver stating that the debt was a result of administrative error that was made because the out-processing center did not know the procedures for the voluntary early out program and because DFAS was very busy with the numbers of veterans processing out during the draw-down after Desert Storm.

Our Settlement Certificate agreed with DFAS's determination that waiver of \$4,726.26 is appropriate. The member knew upon discharge that he was due payments for his accrued leave. The record indicates that the member may have believed he had 115 days of accrued leave, however DFAS documented 60 days. The \$4,726.26 represents the mid-month payments the member received in August and September 1992, the August 1992 end-of-month payment, and the August allotments which he reasonably could have expected to be payment for his leave. Our Settlement Certificate agreed with DFAS' recommendation of a partial denial of the waiver request stating that the member reasonably could not have believed that he was actually entitled to continue to receive active duty pay through March 15, 1994.

On appeal, the member contends that when he was discharged, he was told that he should receive a lump sum amount and pay for a certain amount of months, and that DFAS would calculate the correct amounts and period of payment. The member contends that he did not receive an LES after discharge, and because the payments were sent to an out-of-state bank and his wife handled all the couple's banking, he was not aware there was a problem with any payments he was receiving. In March 1996, the member stated that, "The monies received were assumed to be in accordance with my separation package. When the monies stopped coming in, we assumed that it was the end of the separation program." The member reiterates his contention that he should not be made to suffer due to a mistake on the part of DFAS.

Discussion

Under 10 U.S.C. § 2274, we have the authority to waive a claim for an erroneous payment of pay and allowances to a member or former member of the Uniformed Services if payment would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. The legal definition of "fault" does not imply any ethical lapse on the part of the member or former member. It merely indicates that he is not entirely without responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person; if such a person knows or should know that he is receiving money to which he is not entitled, he is at fault if he fails to bring the excess payment to the attention of the appropriate authorities. In such a situation, waiver is precluded. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996).

We find no evidence in the record to dispute the member's claim that at the time of separation his out-processing center was unable to explain his entitlements specifically. The member states that he did not receive paperwork explaining his separation bonus nor any LES after his discharge, however, we note that the amount of his lump sum separation bonus was listed on his DD Form 214, Certificate of Release or Discharge from Active Duty, which he signed at time of discharge. Although DFAS could not give him specific information upon his requests made soon after his discharge, he should have been expecting a large payment for his bonus plus payments for his accrued leave. After he received a \$35,321.98 check on August 31, he then should have expected only payments to cover his accrued leave.

The member provides no evidence to substantiate his belief that he had 115 days of accrued leave at time of separation. We agree with our Settlement determination to grant waiver of \$4,726.26 which the member received in August and September 1992 and which were reasonably accepted as payment for accrued leave. However, we believe a reasonable person in the member's position would have contacted DFAS for explanation when he continued to receive mid-month and end-of-month payments into 1993. We also believe that the member, knowing that his wife would continue to handle banking matters after his discharge, should have advised her more specifically what his reasonable expectations for payments were, ie., the bonus of approximately \$40,000 for the SSB plus a few months of pay for accrued leave. This would have put her on notice to alert him when she noticed their out-of-town bank account continued to receive deposits of regular mid-month and end-of-month pay beyond these expected sums. Under the present circumstances, not having so advised the person handling his banking nor checking his payments himself, we find the member to have been partially at fault for the debt accrual and therefore waiver is not appropriate. *See* DOHA Claims Case No. 98112018 (January 11, 1999).

Finally, as stated in our Settlement Certificate, a personal or family financial hardship is not a basis for waiver. *See* DOHA Claims Case No. 97071007 (July 21, 1997).

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board