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DATE: March 31, 2000

In Re:

[Redacted]

Claims Case No. 00021501

CLAIMS APPEALS BOARD DECISION

DIGEST

A disbursing office's administrative error or lack of assistance is not a proper basis by itself to allow waiver of a former service member's debt for the erroneous overpayment of pay and allowances under 10 U.S.C. § 2774. The member does not acquire title to any excess payments merely because the government committed administrative error, and when the member suspects error, he has the duty to hold questionable payments until he is requested to repay the excess amount or until the propriety of the payments is established by a proper official.

DECISION

A service member appeals the January 11, 2000, Settlement Certificate of the Defense Office of Hearing and Appeals (DOHA) in DOHA Claim No. 00010309 which allowed waiver of \$92.45, and denied waiver of \$2,455.34, of the \$2,547.79 erroneously overpaid to the member around the time of the member's release from active duty.

Background

The record indicates that the member was released from active duty on May 5, 1998. At the time of his separation, the member was entitled to receive \$887.66 for final pay and allowances for the first five days in May and other entitlements; however, due to an administrative error, the member was paid \$980.11, or \$92.45 in excess of the proper amount. Additionally, on May 15, 1998, the member received an additional direct deposit of \$2,455.34 to his bank account for active duty pay and allowances.

In accordance with the recommendation of the Defense Finance & Accounting Service (DFAS), DOHA approved waiver of the \$92.45 debt and denied the service member's request that the government waive collection of his debt for the erroneous direct deposit of mid-month pay and allowances. DOHA noted that the member had explained that about a month after his discharge the member noticed a deposit that he says he was unable to account for. He further stated that he contacted the disbursing office in Pensacola and that they had advised him that he was probably overpaid. When the

member did not hear again from the disbursing office, he assumed that the payment was proper, but DOHA found that the member should have questioned this matter further until he received written verification of his entitlement to the payment.

On appeal, the member emphasizes that the pay specialist at the Pensacola office told him that he "might have been" overpaid; the pay specialist did not state that he was "probably" overpaid. The member also points out that he made an immediate effort two weeks after release from active duty to determine if there was an overpayment, but he says that he believed that the payment in question was for April 1998 pay. The member says that the pay specialist instructed him to wait and that he would telephone the member if there was any problem.

The member provides additional information for our consideration. He states that prior to and after his conversation with the pay specialist in Pensacola, he tried to contact DFAS-Cleveland Center to resolve this matter. Despite 10-15 attempts to contact Cleveland concerning his pay, the member says that he was "never able to discuss my concerns with a representative;" he was "unable to speak with anyone;" and he never received a return call from Cleveland. The member says that he never received his April 1998 and May 1998 Leave and Earnings Statements (LES), nor a corrected W-2 for 1998. He says that despite a significant effort on his part to obtain help to verify whether the May 1998 mid-month pay was a proper payment for April 1998, he received no help. The debt was identified only after the member obtained Congressional assistance, and now the repayment would result in significant financial hardship.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay and certain allowances made to service members, if collection would be against equity and good conscience and not in the best interest of the United States. Generally these criteria are met by a finding that the claim arose from administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver. *See* 10 U.S.C. § 2774(b)(1) and the *Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). To determine whether "fault" exists we look at whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving more than his entitlement and whether he made inquiries or brought the matter to the attention of the appropriate officials.

Here, the member suggests that he thought that he was still owed pay and allowances from April 1998. But he offered no evidence to support this suggestion (*e.g.*, April 1998 bank statements), and he has not claimed unpaid pay and allowances. We must assume that the member would have been aware of the approximate amount of his mid-month pay and allowances payment while on active duty and how his final payment for five days in May varied from that. He had access to a bank statement or bank balance in May 1998 with enough information to cause him to suspect that there may have been a problem; therefore, he checked into it.

Accepting the member's statement of the facts for purposes of this decision, it was still clear that the member had not obtained a satisfactory resolution of his concerns. The strongest support for the member is his own statement that an unidentified pay specialist told him that the pay specialist would re-contact the member if the specialist identified a problem; however, the member admits that the pay specialist left him with the possibility that he may have been overpaid. Even if DFAS provided the type of poor customer service alleged, and the Pensacola pay specialist failed to do what he had promised, such government conduct falls far short of the type of conduct necessary to grant waiver. *See* DOHA Claims Case No. 97101601 (October 24, 1997); DOHA Claims Case No. 97090810 (October 1, 1997); DOHA Claims Case No. 97042817 (July 1, 1997). When a service member had some basis to question his entitlement but did

not obtain an adequate explanation from appropriate officials, he is not entitled to waiver as a matter of right just because the overpayment resulted from an administrative error. *See* DOHA Claims Case No. 00010501 (January 21, 2000); and DOHA Claims Case No. 97081831 (September 16, 1997). In such circumstances, he does not acquire title to any excess amount, and waiver is inappropriate. *See* DOHA Claims Case No. 00010501, *supra*; DOHA Claims Case No. 99071602 (September 10, 1999); DOHA Claims Case No. 99033117 (April 15, 1999); and *Larry V. Brown*, B-251935, February 23, 1993.

Additionally, it is a long-standing rule that financial hardship is not an appropriate basis for waiver. *See* DOHA Claims Case No. 97101601, *supra*; DOHA Claims Case No. 97042817, *supra*; and *Larry V. Brown*, B-251935, *supra*.

Conclusion

We affirm the Settlement Certificate, allowing waiver of \$92.45 and denying waiver of \$2,455.34. The member should contact DFAS concerning a properly corrected W-2 or any failure to provide him Leave and Earnings Statements.

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

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Member, Claims Appeals Board