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DATE: May 26, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 00022208

CLAIMS APPEALS BOARD DECISION

DIGEST

Waiver of overpayment of active duty pay and allowances received after discharge is denied. A reasonable person would know that deposits had been made in his bank account. Under the circumstances, collection is not against equity and good conscience.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate No. 00010404, dated January 11, 2000, which denied a former Navy member's waiver request. The member's debt arose when he was overpaid at separation and then received erroneous payments of pay and allowances after separation.

Background

The record indicates that the member retired on January 30, 1998. His final separation payment was miscalculated, resulting in an overpayment of \$415.61. He then erroneously received active duty pay through February 1998 in the amount of \$2185.15 and received allotments totaling \$300 for the month of February 1998.

In our Settlement Certificate, we waived the \$415.61 overpayment at separation, and stated that waiver of \$2485.15 was not appropriate. We determined that the member reasonably could be expected to know that he was receiving pay to which he was not entitled after his separation. Therefore he had a duty to retain the amount for subsequent refund to the government, and to make prompt inquiry to the appropriate officials concerning his pay.

In his appeal, the member states that upon separation he expected to receive a direct deposit of approximately \$1100, a final check for a travel claim, and one for the difference in pay from active duty to retirement. He states that he monitored his account and was aware of receiving the direct deposit as expected, but that there was no other change in his direct deposits. He argues that he had never been through a separation discharge and was totally unfamiliar with the process involved. He also states that he did not receive any paperwork concerning his pay entitlement and that he contacted the Defense Finance and Accounting Service (DFAS) on numerous occasions during 1999. As a result, he reasons that he had no way of knowing that he was not entitled to receive the pay, especially without a leave and earnings statement or a change in his direct deposit.

Discussion

Under 10 U.S.C. 2774, we have the authority to waive collection of erroneous payments of pay and allowances to a member or former member if collection would be against equity and good conscience and not in the best interest of the United States. Waiver is not appropriate if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. *See Standards for Waiver*, 4 C.F.R. 91.5(b). 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. We have consistently held that when a member knows or reasonably could be expected to know he is receiving pay in excess of his entitlement, he has a duty to retain such excess amounts for subsequent refund to the government. *See DOHA Claims Case No. 00031401 (May 10, 2000) and DOHA Claims Case No. 00021411 (April 13, 2000).*

The member states that upon separation he expected some additional funds for travel and pay, but provides no documentation to indicate approximate amounts expected. He does state that he monitored his accounts and that there was no change in his direct deposits, apparently other than the one deposit of approximately \$1100. We acknowledge the member's statements in the record that he contacted DFAS on numerous occasions prior to and after receiving notice of his debt questioning his entitlements. But, upon separation a member should reasonably expect a change in his direct deposit. A member should not expect to see mid-month and end-of-month amounts deposited in his account that are similar to the amounts he received on active duty. When, after separation, the member observed no significant change in his direct deposits and he was provided no paperwork from DFAS that accounted for the deposits, he appropriately should have questioned DFAS. In the present case, the member should have continued to press for an explanation of his entitlements or asked for an audit of his pay account. In the meantime, he did not acquire title to the payments received for February 1999. In such a situation, waiver is not proper. *See DOHA Claims Case No. 99033117 (April 15, 1999).*

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board