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May 10, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 00031401

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member suspects that he is receiving overpayments, he does not acquire title to the excess amounts and has a duty to hold them until the validity of the payments is established. If the payments are determined to be erroneous, he has a duty to return them. In such a situation, waiver under 10 U.S.C. § 2774 is not appropriate.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate No. 00010306, dated January 11, 2000, which denied the request of a former Marine Corps member's waiver request. The member's debt arose when he was overpaid at separation and then received three erroneous payments of pay and allowances after separation. Furthermore, three monthly dependent allotments were erroneously issued on his behalf.

Background

The member was on terminal leave from December 13, 1997, until his discharge on December 24, 1997. His final separation pay was miscalculated, resulting in an overpayment of \$49.67. He then erroneously received end-of-month pay for January and February and mid-month pay for March, and dependent allotments for January through March were paid on his behalf. This resulted in a total overpayment of \$5,417.67. In our Settlement we waived \$49.67 overpayment at separation. We waived the January pay and dependent allotment because the member stated that he diligently questioned his entitlement to the money he received in January and attempted to return it. Therefore, the amount of the debt currently before us is \$3,217. The member argues that amount should also be waived because he also questioned his entitlement to the February and March payments and attempted to return them. He states that the money was returned to him each time with a letter stating that he was entitled to the money. He states that he did not save the letters,

and the Defense Finance and Accounting Service (DFAS) has no record of them.

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 standard we employ to determine fault is whether a reasonably prudent person knew or should have known that he was receiving payments in excess of his entitlements. Our decisions indicate that waiver is not appropriate when a member is aware that he is being overpaid or had no reasonable expectation of payment in the amount received. *See* DOHA Claims Case No. 99121406 (January 19, 2000); and DOHA Claims Case No. 99033117 (April 15, 1999).

For the purposes of this appeal, we will assume that the former member questioned the amounts he continued to receive. However, waiver of the amounts he received in February and March is not appropriate. When the former member continued to be paid after he left military service, he suspected an error. There is no indication of what reason DFAS might have given the former member as to why he might have been entitled to continued pay and allowances. In order for him to be justified in relying on any vague assurances they might have given him, he would have to have been able to articulate a plausible reason why he thought he was entitled to further compensation in the amounts he was receiving. In the absence of that, he should have continued to press for an explanation for the continuing payments or asked for an audit of his pay account. In the meantime, he did not acquire title to the questionable payments. He should have held them until a final determination was made that they were his or until the government asked for repayment. In such a situation, waiver is not proper. *See* DOHA Claims Case No. 99033117, *supra*.

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