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DATE: June 1, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 00032404

CLAIMS APPEALS BOARD DECISION

DIGEST

After discharge, a service member received 3 active duty payments and for 5 months allotment payments were made on his behalf. The member took appropriate action and returned the active duty payments to the government upon request. When the member recouped the allotment payments from his ex-wife, he should have refunded that amount to the government. The member did not acquire title to these payments; and under the circumstances, waiver is not appropriate.

DECISION

This is in response to an appeal of the Defense Office of Hearing and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 99112914, dated March 13, 2000, in which we denied the member's application for waiver of an indebtedness of \$6,288.97. The member became indebted in this amount as a result of erroneous payments of active duty pay and allowances and erroneous allotment payments made on his behalf after his discharge.

Background

The record indicates that the member was discharged on May 22, 1998. At that time, he was entitled to receive a final separation payment in the amount of \$12,944.87 for 7 days pay and allowances and a readjustment payment. However, the member was underpaid \$554.64. The member erroneously received active duty end-of-month payments for May and June 1998 and a mid-month payment for June 1998 in the total amount of \$3,548.61. In addition, the member's monthly dependent allotment in the amount of \$659 was erroneously issued on his behalf from June 1998 through October 1998

causing an overpayment of \$3,295. The total claim against the member is \$6288.97.⁽¹⁾

Our Settlement Certificate agreed with the Defense Finance and Accounting Service's (DFAS) recommendation of a denial of the waiver request. We determined that the member should have questioned his entitlement to receive active duty pay subsequent to his discharge. Regarding the allotment payments, we stated that according to the file, the member received leave and earnings statements (LES) which clearly showed the allotments were erroneously released at the end of each month. We noted that the member took his ex-wife to court to recoup the allotments and received these funds back from the court. Since he was aware these funds were issued on his behalf, he should have retained the funds for subsequent refund to the government.

On appeal the member argues that our Settlement Certificate was based on false information. Regarding the active duty payments, the member states that he promptly notified his finance office when he received the end-of-month May and mid-month June active duty payments. He subsequently wrote a letter to his former Commander concerning the erroneous payments. In addition, he states that he held these payments for eventual return to the government and did in fact return the payments. Regarding the allotment payments, the member denies having received LES⁽²⁾ and therefore states that he did not know of the allotments being paid on his behalf until notified of the debt in March 1999. The member states that he was paying child support and the same time the Navy was sending allotments. He states that after overpayment of his active duty pay stopped and without any LES, he had no way to reasonably know that only his court-ordered allotment to his ex-wife for child support would continue for another 5 months. After he received notification of his debt in March 1999, the member went to court and recouped the payments from his ex-wife. The member questions why a service member should be expected to bear the litigation costs to recuperate funds erroneously paid on his behalf by the Service.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay or allowances from members of the Uniformed Services if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no 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) (1996). By itself, the fact that erroneous payments were made due to administrative error does not entitle the member to waiver. *See DOHA Claims Case No. 99033117* (April 15, 1999); and *Lieutenant (JG) Larry L. Butler, USN (Retired)*, B-196548, Jan. 23, 1980. Waiver is precluded when the member was aware or should have been aware that he was receiving payments in excess of his entitlements. *See DOHA Claims Case No. 97030302* (May 13, 1997). In such a situation, the member does not acquire title to the excess amounts and has a duty to hold the excess for eventual repayment to the government. *See DOHA Claims Case No. 99012606* (March 31, 1999).⁽³⁾

In the present case, the member acknowledges that after discharge he was aware that he should not receive mid-month and end-of-month active duty payments. To his credit, he took appropriate action by contacting his finance office and former Commander to question his entitlement and by retaining the payments for refund to the government. And the member returned this overpayment upon request. He did not acquire title to the overpayments of active duty pay, and waiver is therefore not appropriate.

The member was not receiving LESs during the period the erroneous allotment payments were made to his ex-spouse after his discharge, and therefore was not aware of these overpayments until he received notification of the debt in

March 1999. Upon receiving the notification, a reasonable person would understand the need to return the erroneous allotment payments. The member did not have title to these payments that were made on his behalf, and therefore he had a duty to return them after he went to court to recoup the payments from his ex-spouse. He argues that because it cost him more in litigation costs than he recouped, he should not have to repay the government. The record provided by the member indicates that the litigation involved other issues in addition to recoupment of the erroneously-issued allotment payments. Because the member's ex-spouse did not voluntarily return the overpayments to the member, it appears that he had a choice to have had these payments allocated to future months of child-support or to recoup the payments in court.⁽⁴⁾ Under the circumstances in this case, it is not against equity and good conscience for the member to repay the debt due to these payments.

Conclusion

We affirm the Settlement Certificate.

Signed: Christine M. Kopocis

Christine M. Kopocis

Acting Chair, Claims Appeals Board

Signed: Michael H. Leonard

Michael H. Leonard

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. In his appeal, the member questions the accounting procedure for totaling his debt. The member states that he was overpaid $\$3,548.61 - \$554.64 = \$2,993.97$ between May 15, 1998, and June 30, 1998. With the \$3,295 allotment overpayment, the member's total debt remains \$6,288.97.
2. The member adamantly states that LESs for the period June through October 1998 do not exist. As stated in our Settlement Certificate, the file before us includes these LESs. Copies will be sent to the member with this decision. We note that the LESs in the file indicate that they were sent to the member's last tour of duty location after his discharge. For this reason, we do not question the member's statement that he did not receive the LESs which would have indicated the erroneous allotment payments being paid on his behalf.
3. The standards for waiver for civilian employees are the same.
4. Although the member states that he was paying the child support himself during this time, he has provided no documentation to support his claim, and the record does not clearly show that such payments were made.