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DATE: May 30, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 00032701

CLAIMS APPEALS BOARD DECISION

DIGEST

Four months after discharge, a service member began to receive mid-month and end-of-month direct deposits of pay which continued for 12 months. The service member should have questioned his entitlement to these payments and set aside the amounts for eventual return to the government. Waiver is denied.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claims No. 99110806, dated December 14, 1999, in which we partially denied the member's application for waiver of an indebtedness of \$31,281.83. 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 July 7, 1995. At that time, he was entitled to receive a final separation payment in the net amount of \$32,188.99, for seven days of pay and allowances, four days of lump-sum leave, and a special separation bonus. However, due to an administrative error, the member was overpaid \$2,252.66. In addition, the member erroneously received active duty mid-month and end-of-month payments from November 1995 through November 1996 in the total amount of \$29,029.17. The total claim against the member is \$31,281.83.

Our Settlement Certificate agreed with the Defense Finance and Accounting Service's (DFAS) determination that

waiver of \$2,252.66 is appropriate, after determining that all conditions necessary for waiver of this portion of the claim had been met. We also agreed with DFAS' recommendation of a denial of the waiver request of the \$29,029.17 stating that the member should have questioned his entitlement to receive active duty pay after his discharge.

The member argues that the payments were sent directly to his bank account in Florida. At the time of the overpayments he was living in Texas and states that he was unaware he was continuing to be paid by the military. He states that he notified the finance office when he became aware of the payments and although payments were stopped he was not informed that he would be required to pay the money back. He explains the financial hardship it will cause for him to repay the debt.

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. 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, 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).⁽¹⁾

In the present case, we concur with DFAS's recommendation to waive the erroneous payments of separation pay. However, concerning the remainder of the debt, the member is at least partially at fault. After having received his separation pay, he should have known that he was not entitled to receive mid-month and end-of-month payments. The member provides no evidence to explain why he reasonably thought that he was entitled to the payments. When he became aware of the deposits being made to his out-of-state account, a reasonable person would have contacted DFAS for explanation and been prepared to refund the payments to the government if necessary. The fact that the member has pay sent directly to a bank does not relieve him of responsibility of verifying his bank statement and questioning any discrepancies. *See DOHA Claims Case No. 97011408* (June 10, 1997). If the member had verified his bank statement in November 1995 and contacted DFAS immediately, he could have limited the amount of his debt.

We also point out that when the member became aware of the deposits, the amount of the debt would have been readily available in his account for refund to the government. Although he may not have been advised in 1996 that he would have to repay the money, a reasonable person would have held the money and asked DFAS for an accounting of his entitlements. His argument appears to be that because he was not so advised, he has since spent the money and therefore is unable to refund the payments. As stated in our Settlement Certificate, a member's financial ability or inability to refund the amount of the overpayment is not a factor in determining whether waiver is appropriate under the waiver law. DFAS has the authority to negotiate an appropriate repayment schedule with the member.

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Christine M. Kopocis

Acting Chair, Claims Appeals Board

_____/s/_____

Michael H. Leonard

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. The standards for waiver for civilian employees are the same.