

AFF'D BY DEPUTY GENERAL COUNSEL (FISCAL) ON MARCH 21, 2007

August 22, 2000

In Re:

[Redacted]

Claimant

)

Claims Case No. 00051708

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired Army officer accepted a civilian position with the federal government, and his military retired pay became subject to the Dual Compensation statute. Due to administrative error, his pay was not reduced as was required under 5 U.S.C. § 5532. Waiver is not appropriate because the member was aware of the Dual Compensation statute and should have questioned his entitlement to unreduced military retired pay.

DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 00010405, dated March 20, 2000, which denied the request of a retired Army officer for waiver of a debt which accrued when his military retired pay was not reduced when he undertook a civilian job with the United States government.

Background

The member was commissioned as a reserve officer in 1970. He retired from the regular Army in 1991. On February 6, 1994, he accepted a civilian position with the Department of Justice (DOJ). His military retired pay then became subject to the Dual Compensation statute. He states that he informed DOJ of his military status and the need to inform the Defense Finance and Accounting Service (DFAS) of his civilian employment with the government. He states that a letter was sent to DFAS in February 1994 informing them of his government employment. The member's monthly military retired pay should have been reduced under the Dual Compensation statute, but was not. The error was discovered in July 1999. By the time the error was corrected, the member's debt amounted to \$39,982.92. The member states that he was aware of the Dual Compensation statute; however, when his retired pay was not reduced, he assumed that the statute did not apply to him because of his reserve commission. At the time his civilian employment began, he believed that the notification sent by DOJ complied with the requirements, and he contends that DFAS was negligent in not initiating Dual Compensation reductions for five years.

Discussion

We have the authority under 10 U.S.C. § 2274 to waive collection of overpayments of pay and allowances to a member or former member of the uniformed services, the collection of which is against equity and good conscience and not in the best interest of the United States. Waiver may not be granted, however, if there is any indication of fault on the part of the member. For the purposes of § 2774, we interpret "fault" to include more than a proven overt act or omission. We consider fault to exist if in light of all the circumstances it is determined that a member should have known that an error existed and taken steps to have it corrected. The standard we employ is whether a reasonable person should have been aware that he was receiving payments in excess of his entitlement. *See Rear Admiral Harvey E. Lyon*, B-198955, Apr.

13, 1981. In *Lyon*, a retired officer accepted a civilian position with the federal government and therefore became subject to the Dual Compensation statute. ⁽¹⁾ In that case, the member was aware of the Dual Compensation statute. While he personally did not inform the Navy of his employment, he took care that his employing agency did so. The Navy did in fact receive notification from the employing agency, but did not initiate the required reduction. Due to a misunderstanding over the application of the word "exempt," the member believed that he had been granted an exemption from the Dual Compensation statute and therefore did not question the failure of the Navy to reduce his retired pay. In denying waiver, the Comptroller General stated that the member was at fault for not inquiring of the proper authorities whether he had been granted an exemption and whether his retired pay was correct.

The existence of administrative error does not by itself entitle a member to waiver. Most erroneous payments involve administrative error. The Comptroller General consistently held that the fact that the government was partially at fault in the accrual of a debt does not provide a basis for waiver, since a member who knows or should know that he is receiving erroneous overpayments does not acquire title to the excess amounts and has a duty to return the excess when asked to do so. See *Colonel Bruce R. Rauhe*, B-244505, Jan. 14, 1992; and *Major Kenneth G. Brown*, B-238127, June 28, 1991. As a general principle, we note that waiver is an equitable remedy, and equity is available only to one who is without fault in a case or controversy. If a claimant is at least partially at fault, waiver is not proper.

The situation of the member before us is similar to the that of the member in *Lyon*,

B-198955, *supra*. Both members were aware of the Dual Compensation statute. While the member before us did not notify DFAS of his position directly, he notified DOJ of his military status and saw to it that DOJ notified DFAS. While in *Lyon* the member assumed that his unreduced military pay was correct because he thought he was in an "exempt" position, in the case before us the member assumed his unreduced military pay was correct because of his reserve commission. As in *Lyon*, the member should have contacted DFAS and verified that he was entitled to unreduced military retired pay instead of assuming that it was correct. Therefore, he was at least partially at fault for the accrual of the debt, and waiver is not proper. The fact that DFAS was partially at fault does not provide a basis for waiver, since the member should have at least questioned his receipt of unreduced military retired pay. He did not acquire title to the excess amounts he received; he had a duty to refund them to the government when asked to do so. See *Rauhe*, B-244505, *supra*; and *Brown*, B-238127, *supra*.

Conclusion

We affirm the Settlement.

/s/

Christine M. Kopocis

Acting Chairman, Claims Appeals Board

/s/

Arthur A. Elkins

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. Under the Dual Compensation statute, 5 U.S.C. § 5532, the member's retired pay was subject to reduction by a formula in the statute while he held a "position" in the federal government. Section 5532 was repealed by § 651 of the National Defense Authorization Act for Fiscal Year 2000, effective October 1, 1999. The repeal is prospective only.