

DATE: October 27, 2000

---

In Re:

[Redacted]

Claimant

---

Claims Case No. 00071805

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A retired military officer accepted a part-time, intermittent position with the federal government. After thirty days of employment, his military retired pay should have been reduced under 5 U.S.C. § 5532, but was not. While the member may have assumed that he had been granted an exemption, he had a duty to verify the existence of the exemption. Since he did not do so, he is not without fault in the accrual of the resulting debt, and waiver is therefore not appropriate.

### DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claims Case No. 00032803, dated June 7, 2000, which denied the waiver request of a retired Army member. The member's debt arose when his military retired pay was not reduced under the Dual Compensation statute after he accepted civilian employment with the federal government.

### Background

The member retired from the Army in 1972. On March 30, 1997, he entered a part-time intermittent position with the Bureau of the Census (Department of Commerce). After his first thirty days of employment, his military retired pay became subject to offset under the Dual Compensation statute, 5 U.S.C. § 5532, unless he was specifically granted an exemption. Between May 11, 1997, and July 17, 1999, the offset should have been applied but was not. During that period the member was overpaid in the amount of \$20,642.94. The member states that he believed that he had been granted an exemption. No offset was applied to his retired pay from May 1997 through December 1997, and during those eight months he received no notification that an offset ought to be applied. In January 1998, the member received two Retiree Account Statements (RAS). The first, dated January 7, indicated that a monthly Dual Compensation offset

of \$41.32 would be deducted from his retired pay beginning in February.<sup>(1)</sup> The second, dated January 21, canceled the offset. No offset was applied. The Defense Finance and Accounting Service (DFAS) discovered the error in August 1999. DFAS recommended that the member's debt be waived for the period from May 1997 through December 1997, because in DFAS's view it was not unreasonable during that period for the member to believe that he was exempt. DFAS recommended denial of waiver for the portion of the debt which accrued in 1998 and 1999. In DFAS's view, when the member became aware in the first RAS of January 1998 that a Dual Compensation deduction might be made (even though the subsequent RAS deleted the deduction), he should have asked for verification of his assumed exemption and questioned the correctness of his retired pay. In the Settlement Certificate, DOHA accepted DFAS's recommendation and therefore waived \$5,153.72 and denied waiver of \$15,489.22.

### Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of the debt of a military member 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. If a retired member who would otherwise be subject to the Dual Compensation statute<sup>(2)</sup> believed that he had been granted an exemption from the statute, he had a responsibility to verify the exemption; he could not rely on assumptions or oral assurances that he was exempt. *See Captain Gerald E. Green, USN (Retired)*, B-255699, May 9, 1994.

The member in the case before us was aware of the Dual Compensation statute. While he believed that he was exempt from the Dual Compensation offset, he did nothing to verify that he was indeed exempt. In *Captain Gerald E. Green, USN (Retired)*, B-255699, *supra*, the Comptroller General denied waiver to a retired military officer who accepted a temporary position with the Department of Energy. The member stated that he had been advised that he was exempt from the Dual Compensation statute and had been advised that he was exempt by Energy officials. The Comptroller General stated that the member had a duty to verify his status under the statute rather than assuming that he was exempt. The situation before us is similar to the situation in *Green*. In the Board's view, the member had a duty to verify his exact status under the Dual Compensation statute--if not at the beginning of his employment, then at least in January 1998 when he was first notified that an offset was to be initiated. The amount of the offset and the fact that the second RAS rescinded the offset two weeks after it was applied should have further alerted the member to question his status. Since the member did not verify his assumed exempt status, he is not without fault, and waiver is therefore not appropriate.<sup>(3)</sup>

### Conclusion

We affirm the Settlement Certificate.

/s/

---

Christine M. Kopocis

Acting Chairman, Claims Appeals Board

/s/

---

Jean E. Smallin

Member, Claims Appeals Board

/s/

---

Catherine M. Engstrom

Member, Claims Appeals Board

1. Although the RAS seems to indicate that \$41.32 is the amount of the monthly offset, it is actually the daily amount to be offset for each day the member worked. It amounts to 1/30 of the monthly offset of \$1,239.64 which would have applied in the case of a full-time position. The daily deduction changed over the course of the period in question due to pay increases. While the member views a daily offset of \$41.32 as "ridiculous" in view of his daily civilian earnings,

5 U.S.C. § 5532 clearly sets forth the formula which DFAS must use to calculate the offset. It appears that DFAS has correctly applied the formula.

2. Under 5 U.S.C. § 5532 at the time in question, the retired pay of a military officer who accepted a civilian position (including a temporary, part-time, or intermittent position) with the federal government was subject to an offset calculated under a formula set forth in the statute. Congress repealed the Dual Compensation statute effective October 1, 1999. That repeal was prospective only and does not apply to the time period in the case before us.

3. Strict application of the *Green* decision would lead to denial of waiver of the member's entire debt (\$20,642.94 rather than \$15,489.22). If the Board were considering the member's waiver request *de novo*, we might apply *Green* strictly. In this instance, however, we will not disturb the determination of partial waiver which was reached below.