

This decision was affirmed by the DoD Deputy General Counsel (Fiscal) on December 6, 2001.

DATE: August 22, 2000

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In Re:

[Redacted]

Claimant

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Claims Case No. 00071110

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A retired service member requested that the government issue a check directly to him for his pay and allowances earned during a period of military service because the proceeds of the usual direct deposit check, payable to the member's financial institution on his behalf, were not deposited to his account. Later, the Defense Finance and Accounting Service (DFAS) audited the member's account and produced documentary evidence that the member's financial institution had presented the regularly scheduled direct deposit check for payment. The member does not dispute this documentary evidence, but the member still contends that his account was never credited with the proceeds. Our Office had a reasonable basis for denial of the member's waiver request involving the debt that resulted from the government's erroneous payment of the second check when the member failed to produce his bank statement showing no deposit of the direct deposit check.

### DECISION

A retired service member appeals the April 7, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 00040410, which disallowed the member's request that the government waive \$1,870.77 for an erroneous duplicate payment of pay and allowances.

### Background

The record indicates that the member was entitled to receive pay and allowances in the net amount of \$1,870.77 for the period December 16 through December 31, 1993. On December 28, 1993, United States Treasury Check 14389113, in the amount of \$1,870.77, was sent to the member's financial institution, the Bank of Oklahoma, to the care of the member with a specified account number. The reverse side of the check indicates that the bank presented it to the government on January 3, 1994, and it includes an indorsement that it was "credited to the account of the within named payee." However, the member states that the bank never credited him with the proceeds, and he sought the issuance of another check. Following the direction of his local finance office, on January 14, 1994, the member completed Air Force Form 326, *Request for Replacement Check*, and obtained the signature of a bank official indicating that the bank

had not received the proceeds. A second Treasury check in the same amount was issued directly to the member. A later audit by the Defense Finance and Accounting Service (DFAS) indicated that the member had been paid twice for the same pay period. A DFAS representative spoke with the bank official who signed the AF Form 326 on March 13, 1995, and the official told the representative that she had signed the AF Form 326 without thoroughly checking her records and that the December 28th check had been posted to the member's account on December 29, 1993. [\(1\)](#)

The member does not dispute that his bank may have received the December 28, 1993, check and presented it for payment, but he contends that he was never credited with the funds. Even though he contends that he never obtained credit for this check, the member has not provided copies of his bank statement for the period of time in issue. The member also states that he filed bankruptcy in 1994, and if he had been made aware of the debt in a more timely manner, he could have scheduled the debt in such a way that he could have avoided payment.

### **Discussion**

The government's issuance of the December 28th check, and its negotiation by the bank, appears to be good acquittance of the government's obligation to the member. The December 28th check was drawn in favor to the Bank of Oklahoma, for the care of the member with a specified number account. The indorsement on the back of the check states that it was credited to the account of the within named payee. There is no dispute that the December 28th check was issued and that the bank negotiated it. The bank was acting as attorney-in-fact for the individual. *See* 31 C.F.R. § 240.11. Thus, the only issue is whether the debt against the member that resulted when the government erroneously issued the second check to him, may be waived.

Under 10 U.S.C. § 2774, we have the authority to waive collection of overpayments of pay and allowances if collection from the member would be against equity and good conscience and not in the best interest of the United States and if there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. The standard we use to determine fault is whether a reasonable person knew or should have known that he was receiving payments in excess of his entitlements. *See* also 4 C.F.R. Part 91.

The Settlement Certificate specifically indicated a concern that the member had not provided a copy of his bank statement(s), issued around the time of the event, that would have indicated that proceeds from the December 28th check had not been deposited to his account. The member did not provide such documentary support with this appeal.

As explained above, the record contains irrefutable documentary evidence that the bank presented the December 28th Treasury check for payment. It also contained a DFAS memorandum of the March 1995 conversation between a DFAS representative and the bank official noting that the December 28th check was credited to the member's account on December 29, 1993. In effect, the Settlement Certificate found that the member's position is not supported by the record. For purposes of this appeal, we acknowledge the possibility of waiver when a member does not receive a deposit for his military pay and allowances and reasonably believes that he is entitled to the proceeds of a second check for the same amount because he had not received the first payment. But when there is substantial evidence that the first deposit was made to his account, it is reasonable to ask a member to provide documentary evidence to support his belief that he did not receive the proceeds of the first check. The member suggested that he observed the bank official's computer screen that showed that he had bounced several checks; if so, then his monthly bank statement(s) should reflect such activity along with the failure of the government to make the deposit.

The member relates that he experienced financial hardship, but financial hardship is not an appropriate basis for granting waiver. *See* DOHA Claims Case No. 97090809 (September 23, 1997); and *Frank A. Ryan* , B-218722, Dec. 17, 1985.

### **Conclusion**

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

1. The member disputes this. He stated that he observed the bank official access the full account information at the time she signed the AF Form 326. He contends that the information showed, among other things, all of the checks that he had

written in reliance on the December 28, 1993, check, which were returned for insufficient funds. He also contends that he was charged for each returned check because the bank official believed that it was not the bank's fault that the government had failed to send the Treasury check. Even if the government had failed to send the direct deposit check, the member was responsible for verifying that he had sufficient funds to cover the checks he wrote. *See Robert G. Raske, Jr.*, 60 Comp. Gen. 450 (1981).