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August 23, 2000

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In Re:

[Redacted]

Claimant

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Claims Case No. 00081801

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

1. In order for waiver to be considered under 10 U.S.C. § 2774, a member or former member must make a waiver request within three years of the discovery of the debt by finance officials.
2. When a member or former member receives a payment to which he knows or should know that he is not entitled, he has a responsibility to bring the payment to the attention of the appropriate authorities and to persist in questioning it until appropriate action is taken. If he does not do so, he is not without fault, and waiver cannot be granted.

### **DECISION**

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 99112207, dated December 9, 1999, which denied a former Army member's request for waiver of a debt which arose when he received an erroneous payment after his discharge from the Army.

### **Background**

The member was discharged on February 28, 1992. At that time, his pay records at the Defense Finance and Accounting Service (DFAS) indicated that he was due \$539.95. He received payments of \$300 and \$13,747.47 on February 28 and \$204.98 on March 16, 1992 (a total of \$14,252.45). On June 2, 1992 DFAS notified the former member that he had been overpaid in the amount of \$13,712.50 (\$14,252.45 minus \$539.95). When he questioned the debt, DFAS reviewed his records and discovered that his entitlement to a Special Separation Benefit (SSB) in the gross amount of \$18,425.44 had not been reflected in his pay records at the time of his discharge, but had subsequently been added to his records. DFAS recalculated the amount the former member was due at separation. After federal and state tax withholding of \$4,606.36,

he had been entitled to a net SSB of \$13,819.08 plus \$539.95. His \$300 allotment had been returned. DFAS calculated that he was entitled to an additional \$406.58. DFAS sent letters dated July 9, 1992, and September 15, 1992, informing the former member that the June 1992 debt notice to him had been in error.

As indicated above, the former member was owed \$406.58 after his entitlement to the SSB was added to his pay records. DFAS had withheld a total of \$4,606.36 from his SSB for federal and state income tax and remitted the amounts withheld to the taxing authorities. However, when DFAS reviewed his records again in June 1992, the records incorrectly indicated that the tax withholding had been retrieved from the taxing authorities. In effect, the former member was credited with two times the amount of the withholding. DFAS sent him a check on June 22, 1992 for \$9,619.30 (\$4,606.36 + \$4,606.36 + \$406.58). Since the former member was only entitled to \$406.58 at that time, he was overpaid in the amount of \$9,212.72. In February 1993, DFAS adjusted his pay account to correct the \$9,212.72 error. On October 29, 1993, DFAS established a debt in that amount and notified the member in a letter dated two days later and in subsequent correspondence. <sup>(1)</sup> DFAS indicates that the member called their customer service department in October 1994 to question the debt, pointing out that he had received a letter in 1992 that he was not indebted to the government. DFAS indicates that a customer service representative told the former member that the June 1994 letter involved a later calculation and a different debt than the 1992 correspondence. There is no indication that the former member pursued the debt further or requested waiver at that time. DFAS indicates that he was informed in December 1996 that DFAS's debt collection function was consolidated in Denver. The record indicates that the former member requested waiver in April 1999. The former member argues that the debt should be waived because it was caused by administrative error.

### Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of pay and allowances to members or former 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 fault on the part of the member or former member. *See Standards for Waiver* 4 C.F.R. 91.5(b) (1996). 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 or former 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 Barry L. Wells*, B-228828, Mar. 23, 1988. Waiver must be requested within three years of the discovery of the debt. *See* 10 U.S.C. § 2774. *See also John W. Acree*, B-223704, Nov. 25, 1986; and *Lieutenant Commander Stephen V. Wilkins*, B-182846, Nov. 14, 1975. The fact that a debt arose due to administrative error does not entitle a member to waiver or relieve him of the responsibility to verify the correctness of payments he receives. *See Wells*, B-228828, *supra*.

As stated above, the waiver statute, 10 U.S.C. § 2774, requires that a member or former member request waiver within three years of the discovery of the debt. In the case before us, DFAS corrected an overpayment of \$9,212.72 in the member's pay records in February 1993 and entered it in their debt management system in October 1993. While he called DFAS in October 1994 to question existence of a debt, he did not request waiver at that time. There is no record of any response from the former member when he was notified of DFAS's consolidation of the debt collection system in December 1996. <sup>(2)</sup> We note that he took no further action to question the debt or request waiver until April 1999. While we appreciate the fact that earlier errors made the \$9,212.72 debt hard to understand, we do not have the authority to waive the former member's debt because he did not request waiver within the three years allowed by the statute. *See Wilkins*, B-182846, *supra*; and *Acree*, B-223704, *supra*.

Even if the member's debt could be considered for waiver, however, waiver would not be appropriate. The member had received an SSB payment of \$18,425.44, minus income tax withholding at the time of his discharge. According to the record, his only other entitlement at that time was \$539.95. Therefore, when he received an additional payment of \$9,619.30 in June 1992, he should have known that the payment was in error. Even if he inquired about the payment as he suggests in his April 1999 waiver request, he should have persisted in questioning the payment. Since he had no reason to believe that he was entitled to the \$9,619.30 and did not persist in questioning the payment, he is not without fault under the waiver standards. Accordingly, waiver is not appropriate. *See Wells, B-228828, supra.* When a member receives a payment in excess of his entitlements, he does not acquire title to the excess amount. He has a duty to set the overage aside and return it when asked to do so. *Id.*

### **Conclusion**

We affirm the Settlement.

/s/

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Michael D. Hipple

Chairman, Claims Appeals Board

/s/

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Christine M. Kopocis

Member, Claims Appeals Board

/s/

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Jean E. Smallin

Member, Claims Appeals Board

1. While DFAS indicates that the former member was notified of the debt in June 1994, the record contains a debt notification letter dated November 1, 1993. After a debt is discovered, a member or former member usually receives a series of letters regarding repayment.
2. By December 1996, the three-year period for requesting waiver would have expired. However, the letter would have put the former member on notice, if he had not received other letters in the months preceding December 1996, that DFAS believed that a debt still existed.