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DATE: October 4, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 00082301

CLAIMS APPEALS BOARD DECISION

DIGEST

When a 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 them 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 Hearing and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 00062302, dated July 31, 2000, in which we partially denied a former member's application for waiver of an indebtedness of \$5,879.59. The debt arose when he received erroneous payments after his discharge from the Navy.

Background

The record indicates that the member was discharged on May 31, 1999. At that time, he was entitled to receive a final separation payment in the net amount of \$3,580.60. However, due to an administrative error, he was paid \$4,424.63. As a result, he was overpaid \$844.03. This amount was waived in our Settlement Certificate and is not in dispute.

In dispute on appeal is the \$5,035.56 debt which resulted from the former member receiving mid-month active duty pay for June and July 1999 and end-of-month active duty pay for June 1999. On appeal the member argues that the Defense Finance and Accounting Service (DFAS) and his finance office should accept some responsibility for disbursing the

erroneous payments. He states that he repeatedly inquired of these offices concerning pay issues after discharge, in particular because he believed he was entitled to more funds than he received upon discharge. He also states that his disbursing clerk informed him that he was going to receive pay over a period of time for back pay due. Additionally, he explains the hardship that would be caused by his having to repay this 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, the former member is at least partially at fault. There is no indication in the record to support the member's claim that he was entitled to additional funds upon discharge, in particular for back pay, or that DFAS gave him other reasons why he might have been entitled to continued pay after his discharge. In order for him to be justified in relying on any vague assurances they might have given him, he would have to have been able to articulate a plausible reason why he thought he was entitled to further compensation in the amounts he was receiving. In the absence of that, he should have continued to press for an explanation for the continuing payments or asked for an audit of his pay account. Two of the erroneous payments were mid-month and one payment was at the end of a month, and all three were in amounts similar to those the member received on active duty. The timing of these payments alone should have alerted the former member to question the finance officers specifically about these payments. Additionally, even though the government may have made a mistake in issuing the erroneous payments, waiver is not appropriate when the member was aware of information indicating an overpayment. In such instances, the member must have sought corrective action until the matter was resolved. *See DOHA Claims Case No. 97062629* (July 17, 1997) and the decisions cited therein. In the meantime, he did not acquire title to the questionable payments. He should have held them until a final determination was made that they were his or until the government asked for repayment. In such a situation, waiver is not proper. *See DOHA Claims Case No. 99033117, supra.*

Finally a personal or family financial hardship is not a basis for waiver. *See DOHA Claims Case No. 97071007* (July 21, 1997). We note, however, that DFAS has the authority to adjust the member's repayment schedule if the member requests the adjustment and provides sufficient justification.

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

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