

DATE: December 12, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 00101617

CLAIMS APPEALS BOARD DECISION

DIGEST

1. Under Section 4416 of the *Defense Conversion, Reinvestment, and Transition Assistance Act of 1992*, and implementing Department of Defense and Army regulations, a troop program unit member who is involuntarily separated from the Selected Reserve and who has at least 20 years of service creditable for retirement, may receive up to five years of Reserve Special Separation Pay (RSSP) if he loses his position due to reorganization, inactivation, deactivation or relocation of the unit. However, he would be eligible for only one annual RSSP payment if he is separated due to maximum years of service. The orders that transferred the member to the Retired Reserve stated that the Army separated him from the Selected Reserve because he had attained maximum years of service. The member claims he is owed five payments, rather than one annual payment, because a *Personnel Action*, a leave and earnings statement (LES) and other documentation indicated that the unit was reorganized. The member's claim fails where the member had attained maximum years of service for his rank as indicated in applicable regulations; the orders which transferred him to the Retired Reserve due to maximum years of service are facially valid; and the member failed to show that the unit reorganization had an adverse affect on him.

2. Even though the member is entitled to only one and not five years of RSSP payments, we may waive collection of the erroneous payment to him in the second year where official documentation (an acknowledged *Personnel Action* and a LES) indicate that he is due five payments and nothing on the record indicates that the member should have known that he was due only one annual payment.

DECISION

A retired member of the United States Army Reserve appeals the August 16, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 00073109, in which DOHA affirmed the Defense Finance and Accounting Service's (DFAS) denial of the service member's application for a waiver of collection of an erroneous payment made to him.

Background

The record indicates that on April 10, 1995, the member was involuntarily separated from his position in a Troop Program Unit (TPU) in the Selected Reserve of the United States Army Reserve (USAR). Prior to his separation, on April 9, 1995, the member signed a DA Form 4187 (*Personnel Action*) in which he recognized that he would be involuntarily separated after 24 years of qualifying service, and he elected to transfer to the Retired Reserve with Special Separation Pay. Both in the main portion of the DA Form 4187, and in the attached Addendum D-3, the member acknowledged that he was being involuntarily separated from the Selected Reserve for reasons other than unit inactivation, deactivation, reorganization, or relocation, and that he had to be reassigned. He also acknowledged his options including transfer to the Retired Reserve with Special Separation Pay.⁽¹⁾ The member's separation orders⁽²⁾ stated that he was separated because he had attained the maximum years of service. The member received a lump sum Reserve Special Separation Pay (RSSP) payment in the gross amount of \$2,225.92 in 1995, and he then received a second payment in the same amount on April 10, 1996.

DFAS contends that the member was entitled to only one RSSP payment of \$2,225.92, and that the second payment was erroneous. It supports its position with the *Revised Selected Reserve Transition Program Policy Guidance (Army Guidance)* of the Assistant Secretary of the Army (Manpower and Reserve Affairs) dated January 25, 1995, but retroactive to October 5, 1994.⁽³⁾ Paragraph A of the *Army Guidance* stated that eligible soldiers who are assigned to a valid position in a TPU and who are involuntarily separated by virtue of a unit inactivation, deactivation, or reorganization will receive five payments or until the member reaches his 60th birthday, whichever comes first. But paragraph B of the *Army Guidance* stated that if an Army Reserve soldier holding a valid position in a TPU is involuntarily separated for reasons other than unit inactivation, deactivation, or reorganization, he will receive one payment. Paragraph C of the *Army Guidance*, which did not apply to the member's situation, allowed for only one payment to involuntarily separated soldiers in individual mobilization augmentee positions.⁽⁴⁾

The member requested waiver of the debt incurred by the April 1996 payment, but the supporting documentation clearly indicates that he is claiming a legal right to five years of payments. Thus, we will address his legal claim and his waiver request.

The member notes that on a DA Form 4651-R (*Request for Reserve Component Assignment or Attachment*), which the member acknowledged on March 30, 1995, the reason for the transfer was a "Reorganization." Accordingly, the member believes that he is within Paragraph A of the *Army Guidance*. The member also notes that the DA Form 4651-R indicated that his termination of service date was December 16, 1997, and that his *Reserve Special Separation Pay Earnings Statement* that he received from DFAS-Cleveland Center with the April 1996 payment indicated that his final annual payment was April 10, 1999. Finally, the member stated that repayment of the April 1996 payment would result in financial hardship for him and his family.

Discussion

In determining whether a member is entitled to a benefit provided by statute, we are guided by the statute and implementing regulations. Congress first authorized the RSSP benefit in the National Defense Authorization Act For Fiscal Year 1993, Pub. L. No. 102-484, division D, § 4411 - § 4422 (1992), and modified it thereafter. ⁽⁵⁾ Section 4416 involves the benefit available to members with more than 20 years of service, and subsection 4416(f) authorizes limitation of benefits in accordance with the regulations of the Secretary of Defense and policy of the service secretary with respect to categories of personnel. Statutorily authorized implementing regulations have the force and effect of law. *Compare Morton S. Smith*, B-259543, July 14, 1995; *Linda Towson Hillard*, B-259606, June 12, 1995; *Lieutenant General, U.S. Army (Retired) Robert D. Chelberg*, B-258033, Nov. 8, 1994; and *William R. Walberg*, 58 Comp. Gen. 539 (1979). Thus, if the member's involuntary separation from the select reserve, in fact, was based on years of service, and not on a reorganization, the *Guidance* limited his benefit to one year.

The member's orders clearly state that he was being separated from the Selected Reserve due to years of service. This is confirmed by data concerning the member in the DA Form 4651-R and in his orders that indicate that he was approaching 28 years of service. ⁽⁶⁾ Additionally, we were informally advised by the Office of the Chief of the Army Reserve that the unit identification code for the member's unit shows that it was reorganized to HHD, 2nd Battalion, 323 Regiment, 108th Division, from the HHD, 1st Battalion, 108th Regiment, a unit under the 108th Division (Institutional Training), but it was still the same type of unit located at the same location. The member has not demonstrated, and we are not aware of, facts showing that the member was displaced by this reorganization. The member's orders appear to be facially valid and are supported by other facts of record; therefore, we conclude that he was separated due to years of service as stated in the orders.

The member's waiver application is a separate matter. 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.

Addendum D-3 to the DA Form 4187 ⁽⁷⁾, which the member signed, suggested that he could receive RSSP payments until he reached his 60th birthday, and the *Reserve Special Separation Pay Earnings Statement* the member received with the erroneous April 1996 RSSP payment indicated that his final payment was in April 1999. Other than the "XJ" program code on Orders 110-01, the record contains no evidence suggesting that the member should have known that he was entitled to only one payment, and there is no indication that the member should have been aware that this program code meant that he was limited to only one payment. In the absence of such evidence, these official documents (though erroneous) were a reasonable basis upon which the member believed in good faith that he was entitled to the April 1996 payment. Accordingly, we waive collection of the debt that resulted from the erroneous April 1996 payment.

Conclusion

We disallow the member's claim for five years of RSSP payments. He is entitled to payments for one year only. We reverse the Settlement Certificate and waive collection of the debt that resulted from the erroneous April 1996 payment.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. In D-3, "Special Separation Pay" was defined as a lump sum payment computed by multiplying 12, by an applicable percentage (seven percent in this instance), by the monthly basic pay to which the member would be entitled if serving on active duty as of the date of transfer to the Retired Reserve (\$2,649.90). It also stated that the lump sum payment was to be adjusted to represent 1/12 of the product of this calculation (\$2,225.92) multiplied by the number of full months the service member would be in the Retired Reserve prior to his 60th birthday (when he would start receiving retired pay).

2. Orders 110-01 (April 20, 1995), Headquarters, 108th Division (Institutional Training) stated that effective April 10, 1995, the member was released from his assignment because he had attained the maximum years of service, and he was authorized to receive benefits under Selected Reserve Transition Program "XJ;" *i.e.*, one payment for soldiers involuntarily separated after October 5, 1994, for reasons related to the quality retention, selective retention, or maximum years of service.

3. The governing Department of Defense policy is the *Revised Selected Reserve Transition Program Policy Guidance* issued by the Assistant Secretary of Defense (Reserve Affairs) dated November 30, 1994. *See particularly* Section 6.

4. In a letter to the member's congressional representative dated August 26, 1998, concerning this issue, DFAS Cleveland incorrectly cited Paragraph C of the *Army Guidance* when it should have cited Paragraph B.
5. In relevant part, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, division A, §518 (1994) amended §4416 of division D of Pub. L. No. 102-484 to allow the service secretary to exercise discretion concerning the number of years (between one and five) in which this benefit is payable to any category of individual. Division D of Pub. L. No. 102-484 is also known as the *Defense Conversion, Reinvestment, and Transition Assistance Act of 1992*.
6. The member was a sergeant first class, with a date of rank of December 16, 1979, and a pay entry basic date of June 29, 1967. According to Message Change 291156Z September 1994 to Army Regulation 140-10, *Assignments, Attachments, Details, and Transfers*, which added paragraph 7-2G (1.1), the maximum years of service at the time for a sergeant first class was 27 years. We were unable to determine why the member was permitted to remain in his TPU position beyond 27 years.
7. The supporting standard addenda were revised in April 1995, but do not appear to have been available in time to have been presented to the member.