

DATE: February 13, 2001

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In Re:

[Redacted]

Claimant

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Claims Case No. 00111318

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

Upon retirement from the Navy at the end of a month, a chief petty officer received a separation payment of \$4,654.56. His normal end-of-month payment was approximately \$870, and he was entitled to only \$1,512.75 at separation. The member's application for waiver of the overpayment is denied when the member had used almost all of his accrued leave prior to separation, and he supported his position with a general statement that he was advised by some unidentified individual that he should expect a larger payment than normal when he separated. The member's position also is undermined by a statement that he considered certain "pay factors" in determining the reasonableness of the separation payment, and a reasonable member with similar rank and experience would not have reasonably considered such "pay factors."

### **DECISION**

A retired member of the United States Navy appeals the September 27, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 00082103, wherein DOHA disallowed the member's request that the government waive collection of the erroneous overpayment of pay and allowances that he received upon retirement from the Navy.

### **Background**

The record shows that the member, a chief petty officer, retired from the United States Navy on September 30, 1999. Earlier in September 1999, the member received his regular mid-month payment in the amount of \$869.98, and at the

end of the month when he separated, he was entitled to a net payment of \$1,512.75, representing pay and allowances for 15 days, plus a half day of accrued leave and other entitlements. The member was in a leave status up to the day he retired and had used all of his leave except for the half day. However, due to administrative error, the member received a payment of \$4,654.56. As a result, the member was overpaid \$3,141.81.

On appeal, the member asks us to consider his financial condition - essentially he has been unemployed. Additionally, he states that he had visited his wife who had traveled to another part of the country, and there was no personnel office to advise him on the correctness of the amount he received. Moreover, he contends that personnel officials at his final duty station were unable to advise him on the amount he should have expected. The administrative report from the Defense Finance and Accounting Service (DFAS) also relates a statement from the member contending that he was advised that his final pay would be larger than normal. The record contains an after-the-fact statement from the member stating that he considered certain "pay factors" when he determined that his final pay was not too large. Some of these "pay factors" were retirement from overseas duty, house hunting leave, job hunting leave, travel time, travel pay, per-diem, terminal leave, and regular leave.

### Discussion

Our Office has authority under 10 U.S.C. § 2774, to waive claims of the United States against service members arising out of erroneous payments of pay and allowances only when collection would be against equity and good conscience and not in the best interest of the United States and only when there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee or any other persons having an interest in obtaining a waiver. *See Standards for Waiver*, 4 C.F.R. § 91.5 (1996). The standard employed to determine whether a person was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person should have been aware that he was receiving more than his entitlement. *See George S. Winfield*, 66 Comp. Gen. 124, 126 (1986); DOHA Claims Case No. 97122313 (February 24, 1998). An individual who should have known or did in fact know that a payment was erroneous has a duty to set aside the overpayment for its eventual return to the government. The member is at fault if he does otherwise. In such circumstances, collection action of the erroneous payment is neither against equity and good conscience nor contrary to the interest of the United States. *See Dennis R. Nix--Reconsideration*, B-249371.2, April 30, 1993; and DOHA Claims Case No. 97011409 (June 6, 1997).

The member knew that the amount he received at the end of September 1999 (\$4,654.56) was significantly larger than the amount he normally received at the end of the month (approximately \$870). Even if the member had not received a satisfactory explanation of his entitlements prior to embarking on separation leave, upon receipt of the separation payment a reasonable person in the member's position would have inquired about the basis for such a significantly different amount. The member had used all but a half day of accrued leave for separation or "terminal leave." The member states that he had no reason to suspect a problem because some unidentified person told him to expect more at separation than the amount he normally received each month. But the member did not identify the individual, and we do not know that person's official position or exactly what he told the member particularly with regard to an amount. We cannot corroborate the member's suggestion that he reasonably expected the amount involved because he was advised to expect it. *Compare* DOHA Claims Case No. 97041401 (June 26, 1997); and *Petty Officer Ricky Johnson, USN*, B-256417, Jul. 22, 1994.

Also, while we do not question the member's subjective belief about his separation entitlements, some of the "pay factors" the member considered are unrealistic for a senior enlisted member with the member's longevity. For example, a member who voluntarily applies for retirement reasonably should expect the military service to charge his leave account when he travels away from his duty station to search for post-service civilian employment and housing. Moreover, there is no reasonable basis for believing that the "terminal leave" that the member referred to is a separate

entitlement not chargeable to a member's leave account. [\(1\)](#)

As DFAS advised the member, financial hardship is not a proper basis for granting waiver. *See* DOHA Claims Case No. 00090606 (January 22, 2001); DOHA Claims Case No. 00053006 (August 18, 2000); and DOHA Claims Case No. 97090809 (September 23, 1997). The member should inquire with DFAS about the possibility of a repayment agreement or other arrangements to lessen the impact on his finances.

### **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 Navy's *Naval Military Personnel anual* (MILPERSMAN) contains detailed rules for implementing leave policy. For example, Article 1050-010 indicates that only convalescent leave and graduation leave (Naval Academy graduates) are not chargeable to the member's leave account, and Article 1050-120 provides policy for granting separation leave when the member requests it, including special rules when a member is in an overseas assignment.