

March 12, 2001

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In Re:

[Redacted]

Claimant

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Claims Case No. 00112010

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A military member continued to receive pay and allotments after his discharge, and allotments continued to be paid to financial institutions on his behalf. Waiver of the resulting debt under 10 U.S.C. § 2774 is not appropriate, since the member should have been aware that he was receiving amounts to which he was not entitled.

### DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 00050407, dated June 8, 2000, which denied the request of a former member of the United States Army for waiver of a debt which arose when he continued to receive military pay and allowances after his separation from the Army.

### Background

The former member was discharged on June 20, 1988. At that time he was due a final separation payment of \$2,595.29, but was erroneously paid \$2,784.85, resulting in an overpayment of \$189.56. He was not due any further payments from the Army. However, he received end-of-month pay of \$972 in June, and his June allotments totaling \$783 were paid on his behalf. In July through September, he received end-of-month pay (\$1,642, \$1,418, and \$1,419) and allotments (\$782 per month) and income tax and Social Security tax withholding (\$365.40 per month) were paid on his behalf. The resulting debt totaled \$9,865.76. In the Settlement Certificate, we waived \$2,025.56--*i.e.*, the \$189.56 overpayment of June 20, all June allotments (\$783), and the July through September allotments for child support, Army Emergency Relief, and Combined Federal Campaign (\$351 x 3). The amount of the debt at issue here is therefore \$7,840.20, which consists of active duty pay and allowances for the months of June (partial), July, August, and September including the taxes withheld plus two allotments paid on the member's behalf to financial institutions for the months of July through September. [\(U\)](#) The former member states that he was not aware that he was being overpaid because his family was in transition to civilian life.

## Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of pay and allowances to members and former members if repayment would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fault, misrepresentation, fraud, or lack of good faith on the part of the member or former member. *See Standards for Waiver*, 4 C.F.R. § 91.5 (1996). 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 remedy of waiver is not available to him. The standard we employ to determine fault is whether a reasonable person would know or should have known that he was receiving payments to which he was not entitled. *See DOHA Claims Case No. 00032701* (May 30, 2000). If the member knew or should have known that he was receiving payments to which he was not entitled, he is at fault if he fails to bring the erroneous payments to the attention of the appropriate authorities. In such a situation, the member does not acquire title to the payments and has a duty to hold them for eventual repayment to the government. *See DOHA Claims Case No. 97090810* (October 1, 1997).

In the present case, the member should have been aware that he was not entitled to further pay and allowances after he had received his final separation pay. The member states that he was not aware of the payments at the time he received them because he was in the process of relocating and the payments were deposited directly into his bank account. The fact that a service member or former member receives direct deposits does not relieve him of the responsibility for knowing that he continued to receive payments from the Defense Finance and Accounting Service (DFAS) after discharge, since a reasonable person would be aware of the approximate amount in his bank account. *See DOHA Claims Case No. 97011408* (June 10, 1997); [\(2\)](#) and *MSI Johnny Singletary, USN (Ret.)*, B-254328, Nov. 17, 1993. The same reasoning applies to the allotments which DFAS continued to pay to two financial institutions on the former member's behalf. A reasonable person would be aware of activity in those accounts as well. *Id.* The former member did not acquire title to the erroneous payments of pay and allowances or the allotments paid to financial institutions on his behalf and had a duty to return them when asked to do so. Waiver is therefore not appropriate. *See DOHA Claims Case No. 97090810, supra.*

## Conclusion

We affirm the Settlement Certificate.

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Christine M. Kopocis

Acting Chairman, Claims Appeals Board

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Michael H. Leonard

Member, Claims Appeals Board

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Jean E. Smallin

Member, Claims Appeals Board

1. The Settlement Certificate incorrectly indicated that the income tax and Social Security tax withholding could not be considered for waiver. The amounts withheld are part of the gross amount of the debt and can be considered for waiver along with rest of the erroneous payments.
2. The standards for waiver for civilian employees under 5 U.S.C. § 5584 are the same as for military members under 10 U.S.C. § 2274.