

DATE: March 8, 2001

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In Re:

[Redacted]

Claimant

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Claims Case No. 01010906

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A retired service member requests waiver of his indebtedness to the government caused by the erroneous overpayment of military retired pay. The member was overpaid because his combined civilian salary and military retired pay exceeded the pay cap in 5 U.S.C. § 5532(c). Waiver is not appropriate where the member knew or had reason to know that he exceeded the pay cap even though he properly alerted his civilian employing agency and DFAS about the possibility of overpayment and both agencies incorrectly failed to act on the member's inquiry.

### DECISION

A retired Army officer appeals the November 28, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals in DOHA Claim No. 00080806, in which DOHA accepted the recommendation of the Defense Finance and Accounting Service (DFAS) to waive \$1,601.62 of the government's claim against the member for erroneous overpayment of pay and allowances, and deny waiver of the remaining \$27,926.11 of the overpayment.

### Background

The record indicates that the member retired from the United States Army on January 1, 1980, under conditions which entitled him to retired pay. On January 7, 1981, the member accepted employment with the Department of State (DOS). The member's retired pay was subject to the retired pay cap restriction in title 5, United States Code, Section 5532(c) (hereafter 5 U.S.C. § 5532(c)).<sup>(1)</sup> This restriction required a reduction of military retired pay when the combined compensation of the salary for the civilian position and the military retired pay exceeded the rate of pay for Level V of the Executive Schedule during a pay period. The record shows that the member's combined compensation began to exceed the pay cap on arch 1, 1996, and DFAS should have started to reduce his retired pay at that time to keep the

combined compensation within the pay cap. However, due to administrative error, the member's combined compensation exceeded the pay cap from March 1, 1996, until the pay cap limitation expired on September 30, 1999. As a result, the member became indebted in the amount of \$29,527.73.

DFAS recommended that DOHA waive \$1,601.62, the amount of overpayment accrued through the end of 1996, because the member may not have been aware that he exceeded the pay cap. DOHA waived this amount, and it is not in issue. On appeal, the member disagrees with the decision not to waive the balance. He contends that DOHA overlooked the fact that he sent the Retired Pay Directorate (at DFAS-Cleveland Center) a copy of the letter that he sent to DOS pay officials on February 8, 1997, which clearly advised both agencies that he was subject to Dual Compensation and that his latest pay raise caused his combined compensation to exceed Level V of the Executive Schedule. He asked DOS officials to advise DFAS at a provided address of his salary so that they would be able to adjust his retired pay accordingly.

The member provided additional detail. He contends that he called DFAS in January 1997, and he advised DFAS officials that he thought he had exceeded the pay cap. The member relates that he was advised by these officials that his employing agency had to generate official notice to DFAS before DFAS could reduce his pay. This caused the member to generate the above letter to DOS. The member stated that after he received no response after 4-6 weeks, he contacted a named DOS pay official. The individual advised him that his office had received the member's letter, but DOS was not taking action because the member had not exceeded the pay cap when the locality adjustment was applied to Level V salary. The named individual then assured the member that his office would notify DFAS if his civilian salary caused him to exceed the pay cap. The member also believes that because he made DFAS aware of his situation, it had an affirmative duty to correct any error.

### **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 member 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).

By January 1997, the member believed that he had exceeded the pay cap, and in such circumstances, he knew that his military retired pay had to be reduced. For purposes of this appeal, we accept the member's statement concerning his verbal discussions with DOS and DFAS officials, and we agree that the member properly alerted DFAS and DOS concerning his situation. In prior cases we noted the poor quality control that DFAS and its predecessors had exercised in enforcing the former requirements of 5 U.S.C. § 5532, but we also noted that administrative error, by itself, does not justify waiver. Where DFAS does not correct its error, the member's actual or constructive knowledge of the overpayment carries with it an obligation to return the overpayment, or set aside an equivalent amount for refund to the government when government officials finally realize that they have made an error and correct it. *See DOHA Claims Case No. 99020211* (February 18, 1999) and the references therein.

The member's statement suggests the possibility that his debt should be waived due to erroneous advice; *i.e.*, notwithstanding the member's own doubts concerning his entitlement, such doubts were reasonably dispelled because the member was assured by a responsible official that he was entitled to the amounts received. However, the record does not support waiver relief on this basis, even where, as here, the member specifies the individual who provided the erroneous advice. Assuming that the DOS representative's advice was relevant to military retired pay, the record still lacks statements by the DOS representative or any other pay/disbursing official corroborating the member's statement and specifying what the member told the official(s) and what the official(s) told the member. *Compare* DOHA Claims Case No. 97042817 (July 1, 1997). Finally, there is no indication that the member raised this issue again at a later date as the civilian component of his total compensation grew ever larger in 1998 and 1999. [\(2\)](#)

### 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 pay cap restriction in Section 5532(c), along with the Dual Compensation Act reduction in Section 5532(b) that had applied to retired regular officers, was eliminated effective October 1, 1999. Section 5532 was repealed by Pub. L. No. 106-65, Div. A, Title VI, § 651(a)(1), 113 Stat. 664 (1999), but the repeal was not retroactive.
2. It appears that the member's annual civilian salary was \$87,191 in January 1997, and grew to \$97,201 by the beginning of January 1999. The Level V rate for 1997 was \$108,200, and was increased to \$110,700 effective January 1998. It remained at \$110,700 for 1999.