

DATE: December 28, 2000

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In Re:

[Redacted]

Claimant

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Claims Case No. 00112801

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

A retired service member's request under 10 U.S.C. § 2774 that the Department of Defense waive collection of erroneous overpayments of active duty pay and allowances paid to him by direct deposit after he retired is denied, and the member is partially at fault, where the member merely contends, without documentary support, that he expected a bonus check from an outside source.

### **DECISION**

A retired service member of the United States Navy Reserve appeals the January 6, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 99120605, wherein DOHA waived \$832.65 but denied waiver of \$10,135.62 in erroneous overpayments of active duty pay and allowances.

### **Background**

The record indicates that the member performed active duty during the period January 1, 1998, through October 1, 1998. During this period, the member was entitled to pay and allowances in the net amount of \$46,307.29. However, due to administrative error, he actually received payments totaling \$47,139.94. As a result, he was erroneously overpaid \$832.65. After he was released from active duty, on November 15, 1998, and on November 30, 1998, the Defense Finance and Accounting Service (DFAS) erroneously deposited two payments of \$136.93 (each) to the member's bank account. Also, on December 15, 1998, DFAS deposited another payment of \$9,861.76 to the member's account.

In this appeal, the member recounts that a few days before Christmas 1998, his new civilian employer "announced" that Christmas bonuses would be paid shortly, and a few days later "\$9,000" appeared in his bank account. The member explains that he was the third senior person in the company and that he held a position of high responsibility. The member says that he believed that the \$9,000 was his bonus and that he thought that the amount was not "out of line with the immediate contributions" that he had already made to the company. The member explains that in the middle of January (1999) he learned that the money came from DFAS and that by that time he had already used the money to pay off bills and buy Christmas presents. A few months thereafter the company's fortunes had changed and his job was eliminated. The member admits that he never received a Christmas bonus from his company.

The member believes that the decisions cited in DOHA's Settlement Certificate are inapplicable to him because they involve different fact patterns; that administrative error was also involved in the portion that was waived (\$832.65) and that it was "absurd" to conclude that the larger erroneous overpayment was different; and that the DFAS mistake resulted in a severe financial hardship for him and his family. The member states that he is unemployed except for a week-to-week consulting assignment.

### Discussion

We may grant waiver of a debt arising out of an erroneous payment of pay and allowances to members or former members 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. *See* 10 U.S.C. § 2774. The standard employed to determine whether a member was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person should have been aware that he was receiving payments to which he was not entitled. This does not necessarily suggest a moral lapse on the part of the applicant. *See* Standards for Waiver, 4 C.F.R. §§ 91.5(b); and DOHA Claims Case No. 98072002 (October 29, 1998) and cases cited therein. We have consistently held that when a member knows or reasonably could be expected to know he is receiving pay in excess of his entitlement, he has a duty to retain such excess amounts for subsequent refund to the government. *See* DOHA Claims Case No. 98051107 (July 28, 1998).

We have considered a number of waiver applications in which the member's debt arose after DFAS erroneously overpaid the member through direct deposit. In one of those decisions, a Marine Corps member separated from the service, and one and a half months after he separated, DFAS erroneously deposited a substantial sum (\$3,120) into the member's account. The member contended that he had reasonably assumed that this amount was a payment of his outstanding claim for vehicle storage expenses, but he did not offer any documentary evidence to support the reasonableness of his assumption in terms of the source, timing or amount of the deposit. Since the member did not question such a substantial payment, we held that it was not against equity and good conscience to hold the member liable for the debt, notwithstanding the administrative error. *See* DOHA Claims Case No. 99121406 (January 19, 2000).

In our view, no reasonable person would simply acquiesce to a direct deposit of \$9,861.76 into his bank account without a well-founded basis to expect a deposit in that approximate amount from a specific source. A person who expects such an amount generally can articulate a basis for the exact amount and its source and timing, or even if he did not know the final exact amount prior to the deposit, he can demonstrate afterward through documentary evidence that he had a reasonable basis for his assumption concerning the source, timing and approximate amount. Assuming (without deciding) that we may consider the alleged activity of actors beyond the Department of Defense on a waiver applicant's bank account, this member offered no objective evidence to support the amount, source and timing of an assumed bonus. We will not overturn the DFAS/DOHA administrative findings that the member was at least partially at fault for

not verifying the propriety of the \$9,861.76 deposit when he offered no documentary support, especially, as it turned out, when the member never received any bonus from his company. The only thing supporting the member's position on the amount of the \$9,861.76 deposit is his subjective statement that it was not out of line with his contribution. While the sums were significantly less substantial, there is no indication that the member attempted to verify the basis of the two \$136.93 deposits, both of which were deposited to the member's account well before Christmas 1998. The member did not act in a reasonable manner with respect to the monitoring of his bank account.

Personal or family financial hardship is not an appropriate basis for waiver. *See* DOHA Claims Case No. 97071007 (July 21, 1997). The member may wish to contact DFAS to discuss the possibility of a repayment plan.

### **Conclusion**

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom

Member, Claims Appeals Board

Signed: Jean E. Smalin

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Jean E. Smallin

Member, Claims Appeals Board