

DATE: February 28, 2001

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In Re:

[Redacted]

Claimant

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Claims Case No. 01012202

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A service member retired on September 30, 1997, and in mid-1998, began receiving a series of checks that were forwarded to him from the installation at which he had been assigned prior to retirement. Waiver is not appropriate when the member has not articulated any basis to show a reasonable expectation of receipt of any of the checks in the approximate amounts involved that long after retirement.

### DECISION

A retired chief petty officer of the United States Navy appeals the December 7, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 00101602, in which DOHA accepted the recommendation of the Defense Finance and Accounting Service (DFAS) to waive \$591.44 of the government's claim for erroneous overpayment of active duty pay and allowances, and to deny waiver of \$12,818.93. An additional amount of \$322.78, which was paid to the Internal Revenue Service (IRS) on the member's behalf in January 1998, appears to be unrelated and was not considered. [\(1\)](#)

### Background

The record shows that the member retired from the Navy on September 30, 1997. At the time, he was entitled to a final separation payment in the net amount of \$781.07. However, due to administrative error, the member erroneously received payments totaling \$1,372.51 (October 2, 1997, \$611.79; and October 10, 1997, \$760.72). As a result, the member was overpaid \$591.44. DOHA's Settlement Certificate waived this amount, and it is no longer in issue.

In mid-1998, DFAS-Cleveland Center erroneously issued eight Treasury checks in various amounts to the member. DFAS obtained copies of the presented checks showing that the member had endorsed and cashed each of the eight checks. Each of the checks showed the member's address at a nearby Navy installation. The member indicates that he worked at that installation prior to retirement, and that these checks were forwarded to him.

In his appeal, the member says that he was not aware that he received active duty pay. He points out that he received the checks sporadically, and that the amounts/timing of receipt do not suggest active duty pay. The member states that he sought professional advice and that he even returned some checks (presumably different ones). The member states that DFAS was not aware of what had happened even after they stopped issuing the erroneous checks. The member states that he cannot be considered to be at fault for not being aware of the proper procedures for handling DFAS' mistakes when he sent checks back and tried to solve the problem as best as he could.

### **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).

For purposes of this decision, we assume that DFAS is at fault for initiating the process that resulted in the issuance of the checks. Similarly, we accept, for purposes of this appeal, the member's statement that he returned some checks. Even so, the member has not articulated any basis upon which he could demonstrate a reasonable expectation of receipt of any of the eight checks that he cashed in the approximate amounts involved so long after retirement. Moreover, he did not identify the "professionals" who advised him on this matter or the specific advice he received from them. We do not understand why the member would have returned some of the checks if he reasonably expected to receive payments. Thus, any reasonable expectation of receipt of such amounts remains uncorroborated. *Compare* DOHA Claims Case No. 97041401 (June 26, 1997); and *Petty Officer Ricky Johnson, USN*, B-256417, July 22, 1994. While this may be another unfortunate instance in which DFAS paid a member active duty pay and allowances after separation, that fact, by itself, is not a sufficient basis upon which we can predicate equitable relief. *See* DOHA Claims Case No. 00082301 (October 4, 2000). The member should have suspected an error, and his actions in returning some checks and obtaining professional advice, suggest that he did in fact suspect error. Accordingly, he had a duty to return or repay all of the proceeds once responsible officials finally became aware of the problem, and requested repayment. Under the circumstances, waiver is not appropriate.

### **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. DFAS has informally advised us that \$111.73 of the amount paid to the IRS in 1998 was for taxes on the 1997 lump sum leave payment. While we are uncertain about the nature of the balance, the \$322.78 payment was made in January 1998. The checks that are the subject matter of this waiver application were issued later in 1998.