

March 14, 2002

In Re:

Redacted

Claimant

Claims Case No. 01021404

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired service member was placed into a civilian position with the federal government, through a decision of the Merit Systems Protection Board (MSPB), and his military retired pay became subject to the Dual Compensation statute. Because the first two salary amounts the member received were paid retroactively, his military retired pay was not reduced as was required under 5 U.S.C. § 5532. Waiver is not appropriate because the member was aware of the Dual Compensation statute and should have questioned his entitlement to unreduced military retired pay.

DECISION

A retired service member requests a waiver of a \$612.36 overpayment which occurred as a result of the Dual Compensation Act. Because of the legal issues involved in this case, we are directly settling this matter for administrative convenience.

Background

The service member retired from the Navy. After retirement, he unsuccessfully applied for a Staff Counsel position with the Navy's Office of General Counsel (OGC). On May 5, 1999, the United States Merit Systems Protection Board (MSPB), found that the Navy's OGC unlawfully discriminated against him in excluding him from consideration for the position as Staff Counsel to the Commander of the Great Lakes Naval Training Center. As a result of this finding, the member was placed in the position, and the OGC was ordered to pay the member interim relief in the form of civilian pay and benefits which he would otherwise have been entitled to receive from the date of the initial decision.

On July 31, 1999, Defense Finance and Accounting Service (DFAS) made an automatic deposit into the member's bank account for the pay and benefits due the member from May 5, 1999, through June 30, 1999. Prior to receipt of this back pay, the member had received retired pay which included an amount of \$612.36 that should have been offset in accordance with the Dual Compensation Act, 5 U.S.C. § 5532. ⁽¹⁾ DFAS notified the member of this debt. The member responded by requesting waiver. DFAS denied waiver, and the member now appeals his claim to us. In his argument, the member raises several issues. First, he asserts that he did not receive any pay for the period in question. Secondly, he questions whether the receipt of interim relief constitutes federal pay as defined by the dual compensation statute. Finally, he asserts that the collection of the claim would be against equity and good conscience.

Discussion

Under 10 U.S.C. § 2774, we may waive a claim of the United States against a member or former member of the uniformed services for erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. Waiver cannot be granted if there exists any indication of fraud, fault, misrepresentation, or lack of good faith by the member or former member. *See* DOHA Claims Case No. 00051708 (August 22, 2000). The standard we employ, under the particular circumstances involved, is to determine whether a reasonable person would have been aware he was receiving more than his entitlement.

In this instance, while the member questions actual receipt of the back pay for May 5, 1999, through June 30, 1999, DFAS has provided us with documentation showing that the member received the back pay through an automatic deposit into his bank account on July 31, 1999. Therefore, absent evidence to the contrary, we believe that the member received the payment. We accept the agency's determination absent clear and convincing contrary evidence. *See* 57 Comp. Gen. 415, 419 (1978).

Secondly, interim relief in the form of back pay constitutes "federal pay" within the meaning of the Dual Compensation Statute. Paragraph 031303 of volume 8 of the *Department of Defense Financial Management Regulation* 7000.14-R (DoDFMR) provides that when an authority directs the correction of an unjustified action, the employee is deemed to have performed service for the employer during the period covered by the corrective action. Therefore, the employee is entitled to receive the pay and allowances he would have been entitled to receive if the unjustified or unwarranted personnel action had not occurred. *Id.* However, any outside earnings received by the employee during the period in question must be offset against the back pay in order that the employee not be unjustly enriched. The Dual Compensation Act was an additional authority requiring the member to partially forgo part of his retired pay if employed as a Federal Civilian employee during the period. It is not permissible for the employee to be granted more pay and allowances than he or she would have been entitled to had the unjustified action not occurred. *Id.*

Finally, we turn to the issue of waiver. Waiver is not appropriate if a reasonable person would or should have known that he was receiving payments in excess of his entitlements. In the instant case, the member claims that he was well aware of the laws and regulations affecting his retired pay. Therefore, after the member received the MSPB ruling, he should have been aware that the military pay exceeded his entitlements under the Dual Compensation Act. That said, the member had a duty to question the payment in this instance and to retain the excess amounts for eventual repayment to the government. *See* DOHA Claims Case No. 00051708, *supra*, and B-244505, January 14, 1992. Further, the fact that a debt occurred through administrative error does not entitle the member to waiver. *Id.*

Conclusion

Accordingly, under the provisions of 10 U.S.C. § 2774, we hereby deny waiver of the \$612.36 overpayment.

/s/ _____

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ _____

Jean E. Smallin

Member, Claims Appeals Board

/s/ _____

Jennifer I. Campbell

Member, Claims Appeals Board

1. 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.