

**This decision was reversed by the Deputy General Counsel (Fiscal), Department of Defense, on August 7, 2002.**  
June 22, 2001

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In Re:  
[Redacted]

Claimant

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Claims Case No. 01032705

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

An Air Force member was retroactively restored to active duty by the Air Force Board for the Correction of Military Records. While Air Force regulations generally provide for the offset of interim civilian earnings in such a situation, the member is entitled to his retroactive military pay and allowances without offset of civilian earnings. Deductions from military entitlements must be based on applicable statutes and regulations, and no regulations requiring offset were in place at the time the member's records were corrected.

### **DECISION**

This is in response to an appeal by the Defense Finance and Accounting Service (DFAS) of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claims Case No. 00120415, dated February 22, 2001, which excluded a civilian earnings offset from the military pay and allowances payable to an Air Force member incident to his restoration to active duty by the Air Force Board for the Correction of Military Records (AFBCMR).

### **Background**

The member was involuntarily separated from the Air Force on November 30, 1996. In May 2000, the AFBCMR corrected his record to indicate that he had not been separated in 1996, but had remained on active duty. He resumed his military duties in May 2000. In the interim period he earned \$163,030.82 from civilian employment. After the offset of the member's civilian earnings and recoupment of a lump-sum leave payment and separation pay which the member had received at separation, DFAS determined that he was not due any retroactive military pay and allowances for the interim period. The member objected to the offset of his civilian earnings from the retroactive military pay and allowances and claimed the net amount of his military pay and allowances without any offset for civilian earnings. Air Force regulations formerly found at 32 Code of Regulations (C.F.R.) § 865.25(a) required the offset of civilian earnings. When the regulations were revised effective March 1, 1996, the offset requirement was inadvertently omitted. In our Settlement Certificate, we allowed the member's claim on the grounds that there was no regulatory basis for offset at the time the correction was made. DFAS has appealed the determination in the Settlement Certificate. DFAS argues that the offset of

civilian earnings is a long-standing practice and that all affected Air Force members, including the member before us, are advised of the offset requirement before their entitlements are calculated. DFAS calls our attention to *Bates v. United States*, 453 F. 2d 1382 (Ct. Cl. 1972), in which the court did not require offset, and argues that the court would require offset when faced with a similar situation today.

### Discussion

Under 10 U.S.C. § 1552, a Service Secretary, acting through a board of civilians may correct a Service member's record to correct an error or remove an injustice. When a member is retroactively restored to active duty, DFAS calculates the amount, if any, which is due the member to put him in as good a position as he would have been in if he had remained on active duty, using the appropriate Service regulations and Comptroller General decisions. *See, e.g., Lieutenant Colonel Louis D. Gaddini, AUS, B-195558, Dec. 14, 1979.* Because significant civilian employment would be incompatible with military service, Service regulations have generally required that the member's interim civilian earnings be setoff from the military pay and allowances to which he becomes entitled as a result of the correction. Despite the incompatibility of civilian employment and military service, the Comptroller General has held that the offset cannot be performed in the absence of a statute or regulation requiring it. *See Reynaldo Garcia, B-207299, Oct. 6, 1982. See also Bates v. United States, supra.* In *Garcia* the member was allowed to retain both his civilian and military earnings because the Coast Guard had not issued a regulation requiring offset. We agree with the Comptroller General that a statute or regulation must be in place in order for offset to be proper. We applied the same principle in a different context in DOHA Claims Case No. 96103001 (April 21, 1997).

In 48 Comp. Gen. 580 (1969), the Comptroller General stated that the offset of civilian earnings was in accordance with the equitable purposes of 10 U.S.C. § 1552. While Congress had not addressed the issue of offset in the statute, the Comptroller General indicated that he would give effect to Service regulations requiring offset. In 49 Comp. Gen. 656 (1970), the Comptroller General found that in a memorandum dated March 12, 1969, the Assistant Secretary of Defense had “plainly instructed” the highest financial officials of the military services to take immediate action to require deduction of interim civilian earnings. Although the Navy regulation issued pursuant to that memorandum was not signed until October 28, 1969, the Comptroller General approved offset of the civilian earnings of two Navy members whose records had been corrected on September 17. In that case, however, the two members had previously filed suit in the Court of Claims, and the court had determined that their civilian earnings should be offset. *See Ricker v. United States*, 396 F. 2d 454 (Ct. Cl. 1968). The Comptroller General specifically stated that the calculation of the members' entitlements pursuant to records correction should be based on the applicable statutes and regulations, including the DoD policy of March 12, 1969. *See* 49 Comp. Gen. at 660. *See also* 63 Comp. Gen. at 388; and *Garcia, B-207299, supra.* DFAS has not directed our attention to any current mandatory DoD policy that would apply here in the same manner as the March 12 memorandum, and we are aware of no such policy.

The situation in *Bates v. United States, supra*, is similar to the one before us, especially because of changes in regulations regarding offset which affected both the member in *Bates* and the member before us. In *Bates*, the member's records were corrected to retroactively restore him to active duty in 1966. An Air Force regulation requiring offset of civilian earnings was implemented prior to the Air Force's calculation of the settlement due the member incident to the records correction, but the regulation had not been in effect when the member's record was corrected. The court granted the member's claim for military pay and allowances without offset of civilian earnings. In arguing for the offset, the Air Force pointed out prior decisions of the Court of Claims in which the court required offset under a general rule of damages in the absence of a military regulation requiring it. The court responded that it would look at any applicable Air Force regulations, rather than a general rule of damages, to determine the intent of the Air Force. Because the offset regulation was not promulgated until after the member's record was corrected, the court inferred that the Secretary of the Air Force did not intend to require offset of the member's earnings. *See also Robert L. Smith, B-177924, Jan. 27, 1975.*

We are not persuaded by DFAS's argument that the court would require offset today because offsets were routinely performed for over 25 years. Based on *Bates*, it is our view that the court would look at the fact that the Air Force had in place for over 25 years a regulation which required offset and then removed the offset provision. In accordance with *Bates*, the court could infer that the Air Force intended to halt offsets.

In the case before us, the member's civilian earnings are not subject to offset because no regulation requiring offset was in effect at the time the correction was made. While we agree with DFAS that our decision results in a windfall for the member, we cannot overlook the principle that calculation of the amounts due a member must be based on the applicable statutes and regulations.

### **Conclusion**

We affirm the Settlement Certificate.

/s/

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Michael D. Hipple  
Chairman, Claims Appeals Board

/s/

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Christine M. Kopocis  
Member, Claims Appeals Board

/s/

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Jean E. Smallin  
Member, Claims Appeals Board