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June 8, 2001

In Re:
[Redacted]

Claimant

Claims Case No. 01050903

CLAIMS APPEALS BOARD DECISION

DIGEST

A former member continued to receive active duty pay after retirement. Waiver is not appropriate in the instant case because the former member received a copy of his DD-214, *Certificate of Release or Discharge from Active Duty*, on September 30, 1999, and he should have questioned his entitlement to active duty payments after that time.

DECISION

This is in response to an appeal of DOHA's Settlement Certificate, DOHA Claim No. 01020206 dated March 19, 2001, in which we waived a portion of a retired Navy member's debt of \$7,814.49 that arose when he received erroneous payments incident to his military service.

Background

The former member was scheduled to retire from the United States Navy on July 31, 1999. His retirement was placed on hold June 17, 1999, pending a medical evaluation to be conducted by the Physical Evaluation Board (PEB). The PEB conducted their evaluation and determined member to be fit for service. The member was advised that he could appeal the PEB finding, but did not do so. On September 17, 1999, orders were processed to release the member from duty and place him on the retired list as of October 1, 1999.

At the time of release from active duty, the member was entitled to receive a final separation payment of \$1,412.20, but did not receive the payment at the time of his out-processing. He continued to receive active duty pay allowances through January 15, 2000 and savings allotments continued to be paid on his behalf. Because he did not receive his final separation payment, we waived the active duty payments he received on October 15 and 31. This reduced his debt by \$688.06. We denied waiver of the remaining active duty payment and the allotments. Thus, the remaining portion of the former member's debt to be considered here is \$7,126.43.

The former member appeals the settlement certificate. He asserts that he was not notified that he had been retired from active duty until February 2000 and therefore he was not aware of the overpayment. The former member references a

document from the Navy entitled "First Endorsement on BUPERS MSG 170052z Sep. 99" dated February 4, 2000, as evidence that he did not know he had been transferred to the Fleet Reserve until February 2000. However, the administrative report states that member was presented with a copy of his DD-214 for his signature by a Personnel Support Detachment Supervisor of the U.S. Navy on September 30, 1999 at the time of out-processing in Memphis, but that former member refused to sign the release. The record contains a signed statement from the Personnel Support Detachment Supervisor to this effect.

Discussion

According to Title 10 U.S.C. § 2774, we have the authority to waive collection of overpayments of pay and allowances to a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). However, a waiver cannot be granted if there is any indication of fraud, misrepresentation, fault or lack of good faith on the part of the member, or any other person having an interest in obtaining the waiver. In order to determine fault, we apply the reasonable person standard; in other words, if a person knows or should have known that he is receiving money to which he is not entitled, he is at fault if he fails to bring the excess payment to the attention of the appropriate authorities. The member is obligated to hold erroneous payments for eventual repayment to the government. *See DOHA Claims Case No. 97090810* (October 1, 1997).

At the time of discharge or release, a member generally receives both a discharge certificate and separation pay. *See* 10 U.S.C. § 1168(a). However, if a member has had notice that retirement orders have been issued, those orders are effective even if they are not delivered to the member. *Cf.* 39 Comp. Gen 312 (1959). If the former member was unsure of his status, he should have attempted to ascertain his current status and obtain a definite determination of his entitlement to active duty pay. *See DOHA Claims Case No. 00121101* (January 29, 2001).

In the instant case, the former member was presented with the DD-214 on September 30, 1999 during out-processing in Memphis. According to the record, the member refused to sign the DD-214 with a separation date of September 30, 1999 at the time of out-processing because he did not agree with its terms. In fact, the record contains a signed statement from the Memphis Personnel Support Detachment attesting to this fact. While the former member contests these facts, he has not been able to provide any evidence to the contrary. The form dated February 4, 2000, referenced by the former member, is not persuasive. Contrary to the member's assertion, the fact that the form actually cites the DD-214's release date lends support to the contention that member was released from active duty as of September 30, 1999. Hence, we have no choice but to assume that he was on notice that he was being released from active duty as of September 30, 1999, and should have known the payments were erroneous.

In our view, the former member reasonably accepted payments on October 15 and 31, 1999, since he was owed separation pay. When payments continued in November 1999 through January 15, 2000, the member should have questioned his entitlement. The former member should have known that he was overpaid when he continued to receive active duty pay in an amount that surpassed the amount due him as final separation pay. He should have retained the erroneous payments for refund to the government. Therefore, because the member was on notice that he had been released from active duty and transferred to the Fleet Reserve of September 30, 1999, the collection of the erroneous payments including allotments would not be against equity, and good conscience, or contrary to the best interests of the United States. Under these circumstances, waiver is not appropriate.

Further, financial hardship is not a basis on which we can grant waiver. *See DOHA Claims Case No. 97042817* (July 1, 1997). It should be noted, however, that DFAS may take the former member's hardship into consideration when determining monthly payments, at its own discretion. The former member is directed to contact DFAS for further details.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jennifer I. Campbell

Jennifer I. Campbell
Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board