DATE: April 26, 2002

In Re:

[Redacted]

Claimant

Claims Case No. 02031801

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired military officer failed to notify the Defense Finance and Accounting Service (DFAS) when he accepted a position with the federal government. Because he had a duty to notify DFAS, he is considered to be at fault for the overpayment which resulted when his military retired pay was not reduced under the former 5 U.S.C. § 5532. Waiver under 10 U.S.C. § 2774 is therefore precluded.

DECISION

A retired service member appeals the February 3, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98011206, that affirmed the action of the Defense Finance and Accounting Service (DFAS) denying waiver of $19,719.26 erroneously overpaid to the member in retired pay.

Background

The record indicates that the member retired as a regular officer from the United States Navy on December 1, 1995, under conditions entitling him to military retired pay. On December 11, 1995, the member accepted civilian

employment with the Department of the Navy. As a result, his retired pay was subject to the provisions of the Dual Compensation Act and associated pay cap as provided in 5 U.S.C. § 5532.[(1)] However, due to administrative error, the service member's retired pay was not reduced during the period December 11, 1995, through July 31, 1997, causing an erroneous overpayment of $19,719.26. DFAS denied waiver because the member was partially at fault for the overpayment. Prior to his retirement, the member had signed a retired pay application, DD Form 2656, acknowledging that he would notify DFAS if he became employed by the Federal government, but he failed to do so.[(2)]

On appeal, the member states that he was forced to retire after 23 years for medical reasons, and that as a result, he was retired with a service-connected, permanent 30 percent disability rating from the Navy. He also states that his Department of Veterans Affairs (VA) rating was 40 percent.[(3)] While awaiting discharge, the member stated that he was told that his Navy retirement "would be cordoned off as tax-free income because of his disability retirement rating." Apparently, the member therefore believed that this income was not considered as retired pay for purposes of the limitations in 5 U.S.C. § 5532. As a result, the member argues that he reasonably expected almost no consequence to his retired pay in terms of it triggering the offsets in 5 U.S.C. § 5532. The member says that he was surprised to learn that disability entitlements only had a limited protection from the offsets provided in 5 U.S.C. § 5532. The statute provided that retired pay was protected only when the retired pay was computed in whole or in part based on disability: resulting from injury or disease received in line of duty as a result of armed conflict; or caused by an instrumentality of war and incurred in line of duty during a period of war. The member believes that this was a "little-known" provision in the law that a disabled retiree would not reasonably be expected to be aware of.[(4)] The member also believes that the law is discriminatory in that it separates people with disabilities by rank and augmentation status (regular vs. reserve status).[(5)] The member provided documentary evidence showing that at least on eight occasions from December 1995 until August 1997, the Navy had provided *a Notification of Personnel Actions*, SF 50, advising the DFAS center in Cleveland that the member was a retired officer.

The member also urges us to ignore his signature on the DD Form 2656. At one point in the record the member stated that he did not remember signing the form. On appeal he argues that he signed the form on August 10, 1995, 100 days prior to discharge and 105 days before initial paperwork for Federal employment, even though he was not due to retire until November 30, 1995.[(6)] He contends that the DD Form 2656 requirements were never briefed to him at check-out. He argues that the print in this small, obscure box, is barely legible and occupies less than 10 percent of the form. He argues that no procedure was specified for notifying DFAS, and he believes that he fully complied with his duty to do so by having his employing agency do it for him.[(7)]

Discussion

We have the authority under 10 U.S.C. § 2774 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. Waiver may not be granted, however, if there exists in connection with the debt, any indication of fault on the part of the member or former member. *See* DOHA Claims Case No. 99100701 (December 7, 1999); and the Comptroller General's decision in B-224900, Feb. 24, 1987.

There is a reasonable basis for the findings of both DFAS and our Office that the member was partially at fault. In our view, there are several significant deficiencies in his position. Preliminarily, the member suggests that he did not know about the Dual Compensation Act because he was inadequately advised about it. However, he knew enough about it to state that he was aware of its purposes in connection with an alleged discrimination against disabled retirees and to

conclude, when he started his civilian employment a few months later, that he was exempt from its effects due to his disability.

The member tries to diminish the significance of his promise to notify DFAS if he became a Federal employee. But he specifically agreed to do so. We accept the member's statement that the provision occupies only about ten percent of the area of the form, but even a cursory examination of the provision shows that it is prominently displayed in a self-contained block, with a separate signature line, covering half the form's width. Its existence is obvious. The type size is the same as most other type on the form, but the language of the provision, as set forth in the footnote above, is very explicit. The member had the personal duty to notify the respective DFAS center and provide the specified information. The language in the member's agreement clearly distinguishes between "I" and "my" on one hand, and the "employing agency" on the other. If the member could have discharged his duty to notify by relying on the administrative coordination of his employing agency, the language would have so stated. Prior decisions by our Office and the Comptroller General affirm the nature of this personal duty and the existence of fault on the part of the member if he fails to personally notify the DFAS center that pays his retired pay. *Id.See also* B-252523, Aug. 27, 1993.

An even more fundamental error involved the member's unreasonable assumption that he was nearly insulated from the triggering of the 5 U.S.C. § 5532(b)and (c) offsets merely because a portion of his retired pay was tax exempt. The relationship between disability and taxation is one thing; the relationship between disability and its effect on the former 5 U.S.C. § 5532 is a different matter. The member characterizes the limited exemption for disability in 5 U.S.C. § 5532 as "a little-known article in the law," but that is contrary to fact. As noted above, it involved all of a major portion of 5 U.S.C. § 5532, subsection (d), and clearly defined the types of disability that did not trigger offsets under 5 U.S.C. § 5532. Even though the member may not have intended to work for the Federal government in August 1995 when he went on terminal leave, he admits that he was asked at out processing whether he intended to work for the Federal government. While the member contends that the importance of this question was never "emphasized," in our opinion it suggested that he needed to check further, notwithstanding a disability, if his plans changed. When he began Federal employment, he knew that no dual compensation or pay cap offsets were noted on his leave and earnings statements. Instead of relying on his unsupported belief that enough of his retired pay was tax exempt to prevent triggering of any offset against the portion that was not, he should have complied with his duty to notify the DFAS office that paid him retired pay. If he had done so, he could have obtained its official position with regard to his disability.

In a comparable situation where a member sought an employing agency exemption from 5 U.S.C.§ 5532, the Comptroller General found that the burden was on the member to verify that it had been granted. The Comptroller General also noted that a member was partially at fault for relying only on verbal assurances when there were also some indications to the contrary. In such circumstances, a denial of waiver was not against equity and good conscience even though the problem was perpetuated for almost three years by administrative error. *Compare* B-199808, Mar. 23, 1981.

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. Congress repealed section 5532 in the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Div. A, Title VI, § 651, 113 Stat. 512, 664 (1999), effective October 1, 1999. T hat repeal was prospective and not applicable to the time period in this case.

2. The provision is set forth in a self-contained block (Block 11) with its own signature line stating: "My signature signifies that I agree to notify the respective DFAS Center when I become employed by a Federal Agency. I will provide the effective date of employment, name and address . . . of the employing agency, and the amount of my salary."

3. The member states that this afforded him an additional $521 per month in "disability retirement offsets."

4. This provision was clearly specified in 5 U.S.C. § 5532(d).

5. 5 U.S.C. § 5532 contained two major offsets. 5 U.S.C. § 5532(b) contained a reduction which applied only to retired regular officers (the original Dual Compensation Act), but the salary cap in § 5532(c) applied to all service members, regular or reserve, officer or enlisted. Subsection 5532(d)

defined the types of disability that did not trigger offsets under either subsection. Thus, other disabilities were subject to § 5532.

6. The member states that he was on terminal leave between August 1995 and his separation.

7. The member has made an offer of proof that a specified personnel supervisor in his employing agency would state that she did notify DFAS of his employment. For purposes of this decision, we agree that she did advise DFAS of the

member's employment.