

DATE: June 5, 2002

In Re:

[Redacted]

Claimant

Claims Case No. 02052001

CLAIMS APPEALS BOARD DECISION

DIGEST

A former service member's application for waiver of an erroneous overpayment of pay and allowances is denied when the member separated on August 1st but received a payment in the approximate amount of his normal mid-month payment on August 15th. The member states that he believed that the mid-month payment was for travel, and he demonstrated a reasonable basis for expecting an additional \$1,931.50 for travel which was paid on September 20th. However, the difference between the travel claim and the erroneous additional mid-month payment (\$2,141.72), plus the timing of the mid-month payment, should have alerted the member to verify that the erroneous payment was for his travel. The member's subsequent failure to question the second payment is also indicative of his partial fault in this matter.

DECISION

A former service member appeals the April 24, 2002, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 02040416, in which DOHA sustained the decision of the Defense Finance and Accounting Service (DFAS) to deny waiver of the government's claim against him for the erroneous overpayment of pay and allowances.

Background

The record indicates that the member separated from active duty on August 1, 2001. On August 15, 2001, the member received a payment of \$2,141.72, representing a regular mid-month payment of active duty pay and allowances that was paid in error. ⁽¹⁾ DFAS denied waiver because the member had no reasonable expectation of receiving additional active

duty pay and allowance payments, and this amount was approximately equal to the mid-month active duty pay payments that he had received prior to his separation.⁽²⁾

The member contends that he reasonably expected payment of a travel claim in the approximate amount of the erroneous overpayment and around the period of time it was paid. On appeal he emphasizes that he was advised by finance officials at Davis-Monthan Air Force Base not to expect payment on the travel until "shortly after [his] separation was effective," and August 15th was shortly after his separation was effective. The member says that he and his wife had just purchased their first home, and since there was no indication at that time that the \$2,141.72 payment was improper, they reasonably relied on it in meeting expenses incident to the home purchase. The member acknowledges that he also received a payment of \$1,931.50 on September 20, 2001, as the correct payment for his travel, but he contends that the amount in issue is the one paid on August 15th and that there was no reasonable basis for him to have retained that amount for repayment.

Additionally, the member contends that some of the decisions cited in the Settlement Certificate either are inapposite or actually support his position. The member distinguishes DOHA Claims Case No. 98012301 (February 3, 1998) from the facts in his case because in 98012301 the member could not reasonably have expected to receive pay and allowances for the first half of February when he had already received his final pay which included pay and allowances for February 1-7. Unlike that service member, the member here argues that he still expected to receive his final "pay"⁽³⁾ (travel) from the Air Force, and he received the erroneous payment within the approximate time reasonably expected.

He distinguishes DOHA Claims Case No. 00070318 (October 6, 2000) in both timing and dollar amount. In 00070318, the member should have received \$71.65, but received \$2,009.35 instead. Additionally, the payment was received only three days after the member submitted his claim by mail. In contrast, the member received his erroneous payment at a point in time that he was advised he would receive it and in the approximate dollar amount.

The member contends that DOHA Claims Case No. 01072001 (August 21, 2001) actually supports his position. In that case, the member, a reservist, was released from active duty on March 21, 2000. At the end of the month, the reservist was due \$638.59, but he received his normal end-of-month pay (\$1,466.56) instead. The member also erroneously received mid-month and end-of-month payments for the next two months. The member in the present case points out that we had not disturbed the portion of the DOHA Settlement Certificate that waived repayment of the erroneous payment to the 01072001 applicant for the remainder of March, refusing to waive only the erroneous overpayments thereafter. The member here argues that our decision in 01072001, therefore, had established a precedent that we waive an erroneous overpayment of pay and allowances when a member is paid a normal pay installment in situations where he separates between pay days and reasonably expects to receive a part of the installment. To treat him any differently with regard to the period between August 1-15, 2001, would be inconsistent with equity and good conscience.

Discussion

As the Settlement Certificate advised, Section 2774 of title 10, United States Code (10 U.S.C. § 2774), provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are met by a finding that a claim arose from an administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member

or any other person having an interest in obtaining waiver.

The record here clearly indicates partial fault on the part of the member that precludes waiver consideration. First, the member does not dispute that the amount he received on September 20, 2001, \$1,931.50, was the correct amount for his "travel pay." There is still a noticeable difference (about \$210) between this amount and the amount of the normal mid-month net payment for pay and allowances that the member had received while on active duty. This difference, plus the fact that the erroneous payment received in mid-August was in the approximate amount of other mid-month payments and at the exact time it would have been paid, should have prompted the member to investigate and verify that the payment was in acquittance of his travel claim. For purposes of this appeal, we recognize that the member articulated a reasonable basis for expecting an amount near to the amount that he would have received if he continued on active duty, and in this respect, he comes closer to the standard than many previous applicants. However, there was a reasonable basis for the DFAS and DOHA findings that the member should have scrutinized the \$2,141.72 payment more closely. In our prior decisions, we have closely scrutinized deposits of amounts approximating the amount a member would have received as mid-month pay if he had remained on active duty. *See* DOHA Claims Case No. 99033117 (April 15, 1999). The timing of such a payment, by itself, should have alerted the former member to question finance officers. *See* DOHA Claims Case No. 00082301 (October 4, 2000).

Even if the member reasonably could have believed that the erroneous payment was for travel, any doubt in his favor is resolved against him by his subsequent conduct. Upon receiving the \$1,931.50 payment in September 2001, the member had to know that the government made a mistake. The total paid to him at that point was nearly twice the amount he reasonably expected. There is no indication that the member contacted DFAS or installation finance officials to verify the propriety of any payment. Our examination of the record indicates that both payments here were directly deposited into the same account, and this should have made the mistake even more obvious. The member had no reasonable basis for believing that he was entitled to the total amount of what he had then received, and at least should have contacted finance officials before spending the second amount received. It is not against equity and good conscience for the government to pursue its legal rights and recover the full amount of the erroneous overpayment in these circumstances.

The member here should have no better standing than widows or widowers of retired members who, in good faith, continue to receive retired pay for the deceased spouse after the death of the spouse and who later also receive survivor benefits for the same period. In those situations, survivor benefits are subtracted from the erroneous overpayment, and we limit equitable relief only to the net amount of the debt. *See* the Comptroller General's decision in 65 Comp. Gen. 696 (1986). And unlike such widows, the member here knew by the second payment that one of the payments was erroneous yet failed to notify finance officials.

The three decisions in the Settlement Certificate were cited for the general proposition that when a member knows or reasonably should know that he is receiving pay in excess of his entitlement he has a duty to retain such amounts for subsequent repayment to the government, and to make prompt inquiry to the appropriate officials concerning this pay. Further, we question the member's interpretation of DOHA Claims Case Nos. 98012301, *supra*, and 00070318, *supra*, because the erroneous payment here was on the exact day he would have expected to receive it if still on active duty. Also, as stated above, there was still a noticeable difference between the travel claim amount and the amount of the erroneous payment.

DOHA Claims Case No. 01072001, *supra*, does not support the member's position. The decision clearly stated that the amount waived in the Settlement Certificate prior to that decision was "not at issue here." Accordingly, we established no precedent with respect to any amount waived because we did not consider it. Neither the applicant nor the

government in that decision was concerned about the amount waived, and we are under no obligation to examine such waivers on our own initiative. This Board could have decided a waiver matter differently if presented to us *de novo*; however, we generally hesitate to review waivers already competently granted because of the equitable nature of 10 U.S.C. § 2774. Generally, an applicant should be allowed to rely on a written statement from an official, with proper authority, in waiving a specific amount.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. The member is indebted in the total amount of \$2,161.72. The \$20 difference is a debt that the member owes for one day of negative leave, an amount not in issue here.
2. *E.g.*, the member's pay records indicate that his mid-month payment in July 2001 was \$2,132.18.
3. We interpret "pay" or "travel pay" as the member's travel claim.