

DATE: June 18, 2002

In Re:

[Redacted]

Claimant

Claims Case No. 02052309

CLAIMS APPEALS BOARD DECISION

DIGEST

Waiver is not appropriate when a member receives pay and allowances, including the erroneous distribution of voluntary allotments in his behalf, after he begins a three-year sentence for the conviction of a felony.

DECISION

A former member of the United States Army appeals the April 26, 2002, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 02041519. The Settlement Certificate affirmed the recommendation of the Defense Finance and Accounting Service (DFAS), and, in part, disallowed the member's request that the government waive his indebtedness for the erroneous overpayment of pay and allowances. The member seeks waiver of \$7,235.56, the entire amount of the indebtedness.

Background

The record shows that on May 14, 2001, the member was incarcerated in the New Jersey State Correctional Facility to serve a three-year sentence following conviction on a felony. As of that date, he was no longer entitled to active duty basic pay and allowances .⁽¹⁾ The member was entitled to pay and allowances for May 1, 2001, through ay 13, 2001, but he continued to receive pay and allowances through the mid-month payment in July 2001. The DFAS administrative report states that the member did receive and review his leave and earnings statements during the periods of

overpayment. These erroneous payments include the following amounts that the Settlement Certificate did not waive: voluntary allotments totaling \$1,376.30 paid in June 2001⁽²⁾, plus mid-month payments paid in June and July 2001 and end-of-month payments paid in May and June 2001 totaling \$5,024.54.⁽³⁾

The member appeals, believing that the amounts he received after incarceration should be the fault of the government "for not thoroughly investigating the whereabouts of its finances." The member also says that he was completely ignorant of the fact that he was not entitled to these amounts, and is concerned that the government believes that he acted unscrupulously.

Discussion

Under 10 U.S.C. § 2774, we may waive collection of a claim for the erroneous overpayment of pay and allowances against a service member if collection would be against equity and good conscience and is not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See also Standards for Waiver*, 4 C.F.R. § 91.5 (1996). In the present case the erroneous pay and allotment overpayments were made as a result of administrative errors, and for purposes of this appeal we assume that there is no indication of fraud, misrepresentation, or lack of good faith on the member's part. However, the member is at least partially at fault and waiver is precluded when, in light of all of the circumstances, it is determined that he should have known that an error existed and taken steps to have it corrected. The standard we employ is whether a reasonable person should have suspected that he was receiving payments in excess of his entitlement. *See* Comptroller General decision B-257862, January 17, 1995. *See also* DOHA Claims Case No. 01111311 (November 30, 2001).⁽⁴⁾ This does not necessarily suggest a moral lapse on the part of the applicant. *See Standards for Waiver, supra*, and DOHA Claims Case No. 00112801 (December 28, 2000). A member is not entitled to waiver as a matter of right merely because he was erroneously overpaid due to administrative error. *Id.* Even where an agency commits substantial and continuous administrative errors, that fact alone is no basis for granting waiver. *See* DOHA Claims Case No. 99020211 (February 18, 1999), *aff'd* by the Deputy General Counsel (Fiscal) on January 9, 2001.

The government committed error in paying him, but when a member is not available to perform active duty because he is incarcerated by civil authorities to serve a three-year sentence on a felony, he cannot reasonably expect to be paid for military service during such a period of confinement. A reasonable person would at least have checked on his entitlement to continued payment. Additionally, as reported by DFAS, the member continued to receive leave and earnings statements and knew that voluntary allotments were being paid on his behalf from money to which he was not entitled. Accordingly, collection of the debt is not against equity and good conscience. The member may request DFAS to consider his present financial circumstances in arranging the repayment of the debt.

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. *E.g.*, the current Volume 7A of the *DoD Financial Management Regulation* (DoD 7000.14R): *Military Pay Policy and Procedures - Active Duty and Reserve Pay*, para. 030204A is indicative of the legal entitlement. When a member is absent from duty because he was tried and convicted, his absence is not excused as unavoidable. Generally, he is not entitled to pay and allowances. *See* Tables 3-2 and 3-3. The member is entitled to all pay and allowances until the day before he is delivered over to civil authorities.

2. The total amount of all June allotments erroneously paid was \$1,395.38, but the Settlement Certificate waived \$19.08 of that amount for reasons not relevant to this appeal.

3. Our Settlement Certificate waived \$834.72, including the \$19.08 above, and denied waiver of \$6,400.84.

4. The DOHA decision involved a member who erroneously received pay and allowances while in an absent without leave status.