

December 20, 2002

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In Re:

[Redacted]

Claimant

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Claims Case No. 02120917

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Under 38 U.S.C. § 5305, a retired member of the Uniformed Services must waive receipt of his retired pay in an amount equal to any compensation he is otherwise eligible to receive from the Secretary of Veterans Affairs as a condition precedent to receipt of Veterans compensation. The possibility that Congress may amend the law sometime in the future to allow concurrent receipt of both entitlements does not justify waiver of a debt incurred by the member when administrative officials failed to reduce his retired pay to reflect an increase in the member's Veterans compensation as required under current law.

### DECISION

A retired Army officer appeals the January 17, 2001, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 00111314, wherein DOHA sustained the Defense Finance and Accounting Service's (DFAS) decision to deny the member a waiver of his debt for overpayment of retired pay.

### Background

The record shows that on September 30, 1996, the member retired under conditions that entitled him to retired pay. On October 23, 1996, he signed Veterans Administration (VA) Form 21-526, wherein he waived military retired pay to the extent of any VA compensation to which he was entitled. <sup>(1)</sup> Subsequently, he was awarded compensation from the VA, and his military retired pay was reduced accordingly. In December 1999, the member received an increase in his VA compensation, but due to administrative error, his military retired pay was not reduced to reflect the increase in his VA compensation. As a result, the member was overpaid \$1,898.72 from December 1, 1999, through January 31, 2000.

In his appeal the member explains that when the VA raised his disability rating in December 1999 to 100 percent, he believed that he had to "forfeit" all of his retired pay. Yet DFAS still deposited retired pay to his bank account. The member says that when he saw his bank statement, he immediately called DFAS-Cleveland Center and brought the problem to the attention of a customer service representative. The representative assured him that he was entitled to keep the retired pay even after the member asked the representative to verify this advice. After thinking about the advice for a few days, the member telephoned the Cleveland Center and asked to speak to a supervisor. The supervisor also advised him that he was entitled to keep the retired pay. The member notes that he questioned the supervisor's advice because he was sure that he was not entitled to the retired pay, but the supervisor reassured him that he was entitled to it. Then in August 2000, the member received a letter from DFAS asking for the refund. The member indicates that he had

deposited the questionable amount into his savings, but when an emergency arose, he was forced to use it. The member states that he is facing financial hardship, but notes that he avoided the hardship of a lump sum repayment by obtaining a repayment agreement from DFAS. Of relevance to our Office, the member asks that the debt be forgiven because the Congress was expected to pass legislation to permit concurrent receipt of both retired pay and VA compensation. <sup>(2)</sup>

### Discussion

Under 10 U.S.C. § 2774, we have the authority to waive a claim for an erroneous payment of pay and allowances to a member or former member of the Uniformed Services if payment would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. The legal definition of "fault" does not imply any ethical lapse on the part of the member or former member. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person; if such a person knows or should know 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. In such a situation, waiver is precluded. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996).

For purposes of this appeal, we accept the member's statement that he alerted DFAS's Cleveland Center to the overpayment and that he received incorrect advice. Even so, in this case the member knew when he completed his application for VA compensation that he had to waive that portion of his retired pay which equaled the amount of the VA compensation, and if his VA compensation increased, his retired pay had to change commensurately. His understanding of this rule was so clear that even after he obtained the supervisor's incorrect verbal advice, he still attempted to escrow the questionable payments. This is exactly what he should have continued to do because he had the duty to return or repay the improper disbursements once responsible officials finally became aware of the problem. Our decisions and those of the Comptroller General have consistently held that there is no basis for waiver based on reliance on incorrect advice unless the official(s) providing the advice are identified and the member's version of the events is corroborated in the written record by pay and disbursing officials with evidence of his statement(s) to them and their statement(s) to him. *See* Claims Case No. 01010906 (March 8, 2001). *See also* DOHA Claims Case No. 97042817 (July 1, 1997) and the Comptroller General decisions cited therein. Such a record does not exist here.

Moreover, we cannot relieve a member of a debt based on his belief that the Congress might change the law in a manner that is favorable to him. *Compare* DOHA Claims Case No. 00102419 (May 1, 2001) where we declined to use our waiver authority to allow a member to retroactively benefit from the repeal of the Dual Compensation Act, to a point in time prior to the effective date of the repeal of this Act, to relieve the member of a debt he incurred when pay and disbursing officials failed to reduce his retired pay as then required under the Act. There we indicated that if the Congress intends that an entitlement is to apply retroactively, it will use express language in the statute to obtain that result. Waiver is not intended as an alternative means to obtain such treatment. The member's appeal is less meritorious because our research indicates that Congress did not repeal 38 U.S.C. § 5305 during the last session of the Congress. <sup>(3)</sup>

Finally, we acknowledge the member's financial hardship situation. However, it is well-established that personal or family financial hardship is not a basis for waiver. *See* DOHA Claims Case No. 00091208 (October 25, 2000) and decisions cited therein.

### Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: William S. Fields

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William S. Fields  
Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

1. Waiver is required under 38 U.S.C. § 5305 (formerly 38 U.S.C. § 3105).
2. The member also asks for other relief beyond our scope of authority; e.g., removing derogatory credit information involving this debt from his credit report.
3. In fact, in enacting a new provision allowing for special compensation for certain combat-related disabled service members, Congress referenced the reduction under 38 U.S.C.

§ 5305. *See the Bob Stump National Defense Authorization Act for Fiscal Year 2003* , Pub. L. No. 107-314, Div. A, title VI, § 636(b)(2), 116 Stat. 2458 (2002).