

May 7, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03041511

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired member erroneously received active-duty pay in the month after he retired and allotments were erroneously paid on his behalf for the same month. Waiver is not appropriate because the member should have been aware that he was receiving payments to which he was not entitled. The fact that his payments were direct-deposited into bank accounts does not relieve the member of monitoring his statements and questioning any unexpected deposits.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate 02080612, dated September 10, 2002, which denied in part the waiver request of a retired Navy member. The debt arose due to payments he received and allotments paid on his behalf after retirement.

Background

The member retired from active duty on January 31, 1999. After receiving January mid-month and end-of-month payments, he was due \$740.73. He did not receive a final separation payment, but he received a February active-duty mid-month payment of \$946.28, causing an overpayment of \$205.55. We waived that amount in DOHA Settlement Certificate 02080612, and it is no longer at issue. The remaining debt of \$2,131.78 arose when the member received

February active-duty end-of-month pay in the amount of \$930.78 and when three allotments totaling \$1,201 were paid on his behalf for the month of February. The record indicates that two of the allotments went into bank accounts and one was for a savings bond.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of military pay and allowances if repayment would be against equity and good conscience and 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 Standards for Waiver*, 4 C.F.R. § 91.5 (1996). The legal definition of "fault" does not imply any ethical lapse on the part of the member. It merely indicates that waiver is not appropriate if a member knew or should have known that he was receiving payments to which he was not entitled. The standard we employ to determine fault is whether a reasonable person would or should have known that he was receiving payments to which he was not entitled. If he knew or should have known about such overpayments, he has a duty to bring the overpayments to the attention of the proper authorities. If he does not do so, he is considered to be partially at fault and waiver is not available to him. *See* DOHA Claims Case No. 00112010 (March 12, 2001); and DOHA Claims Case No. 00032701 (May 30, 2000). In such a situation, the member does not acquire title to the payments and has a duty to hold them for eventual repayment to the government. *See* DOHA Claims Case No. 03040101 (April 21, 2003); and DOHA Claims Case No. 97090810 (October 1, 1997). The fact that the overpayments are direct-deposited in a bank account does not relieve the member of responsibility for knowing that he received the payments. *See* DOHA Claims Case No. 00112010, *supra*; and DOHA Claims Case No. 97011408 (June 10, 1997).⁽¹⁾

In the case before us, the member retired effective January 31, 1999. After he received an active-duty payment on February 15, 1999, he should not have expected any further active-duty pay. While the member indicates that after retirement he did not plan to utilize the bank account into which the erroneous February 28th payment was deposited, it is our view that a reasonable person would have monitored the account at least monthly until it was closed. *See* DOHA Claims Case No. 00112010, *supra*; and DOHA Claims Case No. 97011408, *supra*. According to the record, two of the allotments made on behalf of the member went into his bank accounts. It is our view that a reasonable person would likewise have monitored the accounts into which those allotments were deposited. *Id.* The bonds purchased through the bond allotment apparently were in the member's daughter's name. However, that would not prevent the member, as a reasonable person, from monitoring the receipt of the bonds. The member thus should have been aware that he was receiving payments to which he was not entitled. He did not acquire title to the money and had a duty to hold it for eventual repayment to the government. *See* DOHA Claims Case No. 03040101, *supra*; and DOHA Claims Case No. 97090810, *supra*.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

William S. Fields
Member, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

1. DOHA Claims Case No. 97011408 involves a civilian employee. The waiver standards under 5 U.S.C. § 5584 are the same as under 10 U.S.C. § 2774.