

July 18, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03071401

CLAIMS APPEALS BOARD DECISION

DIGEST

When a service member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

This decision responds to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 03041105, dated May 22, 2003, which granted in part and denied in part an Army member's application for waiver of an erroneous overpayment of basic pay.

Background

The record shows that the member is an officer in the Army. The member entered active duty on May 31, 1997, and his pay entry base date (PEBD) was established as of that date. In March 2000, while serving at Fort Campbell, Kentucky, he submitted documentation to the appropriate officials, requesting that his PEBD be reviewed to determine if his time served in the inactive reserve, the U.S. Military Academy Preparatory School, and the U.S. Military Academy were creditable service for pay purposes. After a review of the documentation, it was erroneously determined that the service was creditable, and his PEBD was changed to October 23, 1991. As a result, the member's years of creditable service went from two to eight, and he received a large retroactive payment compensating him for the period May 31, 1997, through May 2000. He also continued to receive basic pay based upon the erroneous PEBD of October 23, 1991, until October 30, 2002.

In May 2002, the member was notified that he was under investigation by the Army's Criminal Investigation Division (CID) with respect to his creditable years of service for pay. At that time, he gave a sworn statement to the CID investigator explaining the circumstances surrounding his request for the changed computation and provided the investigator with copies of the relevant documentation. Following completion of the investigation, the member was informed by his brigade commander that he had been absolved of the criminal allegations, but that finance officials had stated that the member's years of service might have to be adjusted, and he might have to pay back whatever debt he

may have incurred because of any erroneous overpayments.

The member then contacted legal and personnel officials at his current duty location, Schofield Barracks, Hawaii, to verify whether or not he had been receiving erroneous payments and to determine what his legal obligations were with respect to any such payments. He also provided them with the prior documentation and executed the new documentation necessary to process his request. Although the member was initially advised that his adjusted years in service, as computed by the officials at Fort Campbell, appeared to be correct, and that he did not appear to have been erroneously overpaid, official approval was held in abeyance pending review by the unit's chief financial technician who was then on leave. As a result of the more in-depth official review, it was determined that the member's creditable years of service had been miscalculated. He was not entitled to credit for his time as a cadet at the U.S. Military Academy, and his correct PEBD should have been September 26, 1995, instead of October 23, 1991. This meant that the member had been overpaid basic pay in the amount of \$16,736.15, from May 31, 1997, through October 30, 2002.

In the Settlement Certificate, our Office granted waiver with respect to the \$14,595.95 erroneous overpayment for the period May 31, 1997, through April 30, 2002. It denied waiver with respect to the \$2,140.20 erroneous overpayment for the period May 1, 2002, through October 31, 2002. On appeal, the member seeks reversal with respect to the \$2,140.20 erroneous overpayment.

Discussion

Pursuant to 10 U.S.C. § 2774, we have the authority to waive the collection of erroneous payments of pay and allowances to an employee if collection would be against equity and good conscience and not in the best interest of the United States. Waiver is not appropriate if there is any 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(b) (1996). The standard we employ to determine fault is whether a reasonably prudent person knew or should have known that he was receiving payments in excess of his entitlements. Our decisions indicate that waiver is not appropriate when a member is aware that he is being overpaid, or had no reasonable expectation of payment in the amount received. *See* DOHA Claims Case No. 00091501 (December 29, 2000); and DOHA Claims Case No. 97032501 (June 9, 1997). A member is considered to be aware of an erroneous overpayment when he possess information which reasonably suggests that the validity of the payment may be in question. Once a member has received information which reasonably suggests that the validity of a payment may be in issue, he should be prepared to return to the government any amounts received from that time forward. *Id.*

In this case, the member was unaware of the erroneous nature of the overpayments for basic pay prior to the Army CID investigation in May 2002. Therefore, it was reasonable to conclude that he accepted the overpayments from May 31, 1997, through April 30, 2002, in good faith, and waiver of the \$14,595.95 in overpayments occurring during that time period was appropriate.

However, with the commencement of the Army CID investigation in May 2002, the member was in possession of sufficient information for a reasonable person to conclude that the validity of his recomputed basic pay was in question. That information was later reinforced by his brigade commander's warning that he be prepared to pay back whatever debt he may have incurred as a result of erroneous overpayments. Under such circumstances, the member has the burden of obtaining clear and thorough advice in writing from an appropriate official, or continuing to press for an explanation of the discrepancy in the information before him. In the meantime, he does not acquire title to the questionable overpayments merely because the government made an administrative error, and should have held them until final, official determination was made that they were his or until the government asked for repayment. *Id.* Since he knew that the government was questioning the overpayments, waiver of the \$2,140.20 in overpayments made to the employee from May 1, 2002, through October 31, 2002, is not proper. *Id.*

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