

October 28, 2003

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In Re:

[Redacted]

Claimant

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Claims Case No. 03102401

## **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. 03013001, dated April 24, 2003, which denied a former service member's application for waiver of an erroneous overpayment of \$10,634.31 in pay and allowances, and did not consider for waiver a \$462.50 non-erroneous payment.

### **Background**

The record shows that the claimant, a former enlisted member in the United States Navy, was placed in a deserter status on January 1, 2000. As a result, he was not entitled to receive any pay or allowances. However, due to an administrative error, he received active duty pay during the 11-month period January 1, 2000, through November 30, 2000, causing an overpayment of \$13,635.25. These overpayments were directly deposited in his Navy Federal Credit Union account. The former member's leave and earnings statements (LESSs) were not available to him during the time he was absent.

Additionally, the former member also became indebted to the government in the amount of \$462.50 for the costs of returning him from deserter status. Upon his return, he was discharged from the service under less than honorable

conditions in lieu of trial by court martial.

The total claim against the former member was \$14,097.75. However, pay and allowance due him from March 1, 2002, through April 23, 2002, reduced his debt to \$11,096.81, which was the amount submitted for waiver.

In the Settlement Certificate, our Office denied waiver with respect to the \$10,634.31 overpayment resulting from the erroneous payment of pay and allowances from January 1, 2000, through November 30, 2000. Although the former member had stated that he was unaware he was receiving the overpayments because of a mental breakdown,<sup>(1)</sup> he had not provided any medical documents attesting to his mental state, or bank statements for the period in question showing that the funds were not deposited in his account. Our Office did not consider the \$462.50 payment for waiver because it was not erroneous when made.

On appeal, the former member seeks reversal of the Settlement Certificate and provides medical documentation for our review. He does not provide any bank records.

### Discussion

Under 10 U.S.C. § 2774, this Office may waive collection of overpayments of pay and allowances to a member of the uniformed services, when collection would be against equity and good conscience and not in the best interest of the United States. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). However, a waiver cannot be granted if there is any indication of fraud, misrepresentation, fault or lack of good faith on the part of the member, or any other person having an interest in obtaining the waiver. Our decisions indicate that in order to determine fault, we must apply the reasonable person standard. In other words, if a member knows or should have known 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. Further, the member is obligated to hold erroneous payments for eventual repayment to the government. *See DOHA Claims Case No. 01111311* (November 30, 2001). While we recognize that the erroneous payments in the instant case were made due to an administrative error, that fact, by itself, does not entitle a former member to waiver. *Id.*

A reasonable person would not expect to receive pay from a military service after having deserted. While the former member indicates that he did not have access to his leave and earnings statements (LESs), and was not aware of the payments, he received them by direct deposit into the same bank account where his pay had been previously deposited. He has provided no bank records to establish that the payments were not made or to otherwise show a lack of activity in the account. Absent clear and convincing evidence in the form of medical records or other proof that he was in such poor health that it was unlikely that he knew or could have known of the overpayments, he is considered to be partially at fault. *See Id.* citing B-217914, June 25, 1986. Under such circumstances, the payments should have been held for repayment to the government and their collection would not be against equity and good conscience. *Id.*

The medical documentation which the former member has submitted with his appeal shows that during the 11-month period of the overpayment, the former member was hospitalized on one occasion for only two days. On July 5, 2000, he was admitted to inpatient care for a condition diagnosed as "substance-induced mood disorder," apparently precipitated by "recent separation (sic) from [his] girlfriend, unemployment, [and] poor social support." He was prescribed medication and discharged to his "home" two days later on July 7, 2000. There is nothing in the records to indicate that his mental condition was so impaired as to render him unable to attend to his ordinary financial affairs or that any type of guardianship was thought necessary.<sup>(2)</sup> On the contrary, during much of the period in question he appears to have been successfully employed at times (apparently as a delivery driver) and to have otherwise discharged the financial responsibilities of living independently in society. Accordingly, we conclude that the records which he has submitted are insufficient to establish by clear and convincing evidence that during the period in question he was in such poor mental or physical health that it was unlikely that he knew or could have known of the overpayments, or that he was otherwise unable to attend to ordinary financial affairs. *Compare* B-217914, June 25, 1986.<sup>(3)</sup>

### 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.

In his original request for waiver, the former member states that he took no action to correct the situation because he was "homicidal and suicidal" and "wasn't sure how long [he] was going to live." As his reason for requesting waiver, he states: "All military matters should have been resolved when I returned to the Navy. The time elapsed has been considerable. I'm an idiot that doesn't know what I'm doing half the time. And not only am I Elvis, sometimes I'm James Dean."

2. The former member also submitted a one-page record showing that he was hospitalized for two days in 1998--but the record contains no diagnosis or useful information concerning his mental state at that time. Additionally, he submitted an outpatient "Consult Request" dated June 18, 2003. That record states that the reason for the request was "insomnia . . . coinciding with increasing work stress," as well as "decreased interest, concentration, [and] appetite." While it notes a history of depression, there is nothing in it to suggest that the former member is or was unable to attend to his ordinary financial affairs or in need of a guardianship. The "Progress Note" of the Consult Request states in its assessment plan that the former member "refuses any sort of medication and follow-up" and that he was "advised that the VA is always available as a resource and that there are many medications to try." We gave this record little weight because much of information in it was provided by the former member himself, and it was created subsequent to our Office's initial decision in this case, apparently for the purpose of this appeal. We also note that the former member was able to personally prepare and file the extensive paper-work associated with this waiver application without the assistance of a guardian or an attorney.

3. In that case, the evidence established that the waiver applicant had been ill since before the erroneous payments began, and that his illness and the medications prescribed for him had "seriously affected him physically and mentally over the years." During the period of the overpayments he had suffered "blackouts, strange behavior, memory loss and severe depression," had been hospitalized twice for mental problems, and had been rated by the Veterans Administration as "100 percent disabled due to physical and nervous disorders."