

December 3, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03100612

CLAIMS APPEALS BOARD DECISION

DIGEST

A former member received military pay and allowances while in a non-pay status in civilian confinement. When he learned that the payments had been deposited in his bank account, he was initially told that he was entitled to the money. Because he was in a non-pay status and not performing any military duties, he should have further questioned his entitlement to the payments. Under those circumstances, he did not acquire title to the money and should have held it until he received a definitive explanation of his entitlement to it.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate No. 03081805, dated August 25, 2003, which denied in part the waiver request of a former member of the United States Army. [\(U\)](#) The debt arose when the former member received military pay and allowances while in civilian confinement.

Background

The former member entered civilian confinement on September 11, 2000. Because he was not performing military duties, he was placed in leave without pay status until he returned to active duty on July 24, 2001. Due to administrative error, military pay and allowances totaling \$15,692.32 were erroneously deposited in his bank account during that period. In addition, allotments totaling \$330 were paid on his behalf. The former member also owed a debt of \$1,302.95 to the Army and Air Force Exchange Service (AAFES). Thus, the former member's total debt was \$18,599.14. When the former member returned to active duty on July 24, 2001, he was removed from leave without pay status, and he

accrued pay and allowances until his discharge on October 12, 2001. However, the \$2,992.90 he earned during that period was first applied to his AAFES debt and then to his debt to the government, reducing his total debt to \$15,606.24, which was the amount our adjudicator considered for waiver in Settlement Certificate No. 03081805.

In the Settlement Certificate, we waived the overpayment the member received for the month of September 2000 (\$1,273.87), since the member did not enter non-pay status until September 11 and might not have known the amount of his entitlement for the month of September. We also waived allotments totaling \$330, since the member might not have been aware that the allotments continued while he was in confinement. We denied waiver of the remaining debt of \$14,002.37.

The former member questions the fact that he was not given notice that a hearing would occur regarding his debt so that he could be present or hire an attorney to represent him. He questions the basis of the decision and argues that the debt should be waived because it arose from administrative error. He states that he is unable to repay the debt.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of debts of members and former members if collection 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 or former member. *See Standards for Waiver*, 4 C.F.R. § 91.5 (1996). Waiver is not appropriate when a member or former member knows or should know he is receiving payments to which he is not entitled. *See* DOHA Claims Case No. 02052309 (June 18, 2002); and DOHA Claims Case No. 98033023 (June 25, 1998).

The former member states that because of his confinement he did not realize that he was erroneously receiving military pay and allowances until shortly before his release. He indicates that at that time he questioned his receipt of payments and was erroneously told that he was entitled to them. In light of the fact that he was in non-pay status and was performing no military duties, it is our view that he should have continued to question his entitlement to the payments. Our decisions and those of the Comptroller General indicate that he did not acquire title to the money under such conditions and should have continued to press for an explanation of his entitlement to it. Waiver under those circumstances is not appropriate. *See* DOHA Claims Case No. 02052309, *supra*; and DOHA Claims Case No. 98033023, *supra*. [\(2\)](#)

We agree with the former member's assertion that his debt arose through administrative error. However, that does provide a basis for waiver. *See* DOHA Claims Case No. 98051811 (August 21, 1998).

The former member's waiver request was handled in accordance with DOHA's waiver procedures. While the former member believes DOHA denied him the opportunity to be present at a hearing or to hire an attorney to represent him, our procedures state that waiver determinations are based only on the written record, and the procedures are designed so as not to require the assistance of an attorney. [\(3\)](#)

The former member states that his former spouse took legal action to receive from him a portion of the erroneous payments as child support. Such legal action is outside our jurisdiction. Resolution of a dispute over child support rests with the parties to the dispute.

The former member argues that repayment of his debt would cause him severe hardship. Hardship does not provide a basis for waiver. *See* DOHA Claims Case No. 98051310 (May 27, 1998). However, in cases of hardship, the Defense Finance and Accounting Service (DFAS) has the authority, at its own discretion, to reduce the size of the installments it collects from a debtor, *i.e.*, to extend the payment period. DFAS may also suspend or terminate collection when it deems it appropriate.

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. The former member did not indicate in his letter that he wished to appeal the Settlement Certificate. Rather, he indicated that he had "questions and concerns" as to how the determination was made. We are treating his letter as an appeal and will answer his questions in the course of our decision.
2. In the cited decisions, the members became aware of erroneous payments earlier in their confinement. The waiver principles we applied in their situations became applicable to the member in the case before us at the time that he became aware of the erroneous payments he had received.
3. Apart from the issue of whether the former member may have been entitled to a hearing to determine the validity of the debt at the time of its discovery, the validity of the debt is an issue separate from the waiver process.