

DATE: March 10, 2004

In Re:

[REDACTED]

Claimant

Claims Case No. 04022402

CLAIMS APPEALS BOARD DECISION

DIGEST

A former member of the Air Force was convicted by court-martial and sentenced to confinement, and as a result, he forfeited all pay and allowances under Article 58b of the Uniform Code of Military Justice (UCMJ) while confined. However, the convening authority waived the forfeiture and remitted the pay and allowances to the member's dependents in accordance with Article 58b(b) of the UCMJ. The Air Force Court of Criminal Appeals reversed the forfeiture because the member committed the offenses of which he was convicted prior to the effective date of Article 58b, and Article 58b did not apply to the member. The member seeks reimbursement of most of the amounts remitted to his dependents. The government has the right to be indemnified to the extent that the amounts paid to the dependents discharged an obligation the member owed to them under court order. The member may not be reimbursed.

DECISION

A former member of the United States Air Force appeals the June 20, 2003, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 03042101 that disallowed the member's claim for \$8,817.68 in unpaid pay and allowances that the member believes was improperly paid to the member's former spouse.

Background

The record indicates that the member was convicted by a General Court-Martial on December 5, 1996. He was dismissed and confined for three months. As a result of his confinement, he forfeited pay and allowances in accordance with Article 58b(a) of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. § 858b). The forfeiture was effective on December 19, 1996. However, on December 16, 1996, the convening authority, acting under Article 58b(b) (10 U.S.C. § 858b(b)), waived the forfeiture for three months, beginning that date, so payment could be made on the member's

behalf to the former spouse pursuant to a temporary order for support and maintenance from a state court. ⁽¹⁾ The member states that he was actually incarcerated between December 6, 1996, and February 14, 1997. The member entered a non-pay status in April 1997.

On February 11, 1999, the United States Air Force Court of Criminal Appeals dismissed two of the specifications on which the member was convicted in his General Court-Martial. It affirmed the other findings of guilt, the sentence of dismissal and the confinement for three months. Significantly, the Court ordered the restoration of the total forfeiture of pay and allowances for the period of confinement because the forfeiture provision in Article 58b of the UCMJ had not been enacted at the time that the member had committed the offenses. Application of a forfeiture against the member in this case would have constituted punishment under an *ex post facto* law. *See United States v. Gorski*, 47 M.J. 370 (1997).

⁽²⁾ The Air Force officially approved these modified findings and sentence in General Court-Martial Order No. 2, dated October 19, 1999. Based on the reversal of the forfeiture, the member originally sought payment in the amount of \$8,817.68, the total paid to his former spouse.

The Defense Finance and Accounting Service (DFAS) and our adjudicators calculated the member's obligation under the terms of the temporary order at a total of \$13,623.50 for the period of December 1996 through April 1997, representing the period of time from his conviction until he entered a non-pay status. This amount includes payments for child support and separate maintenance at \$1,600 per month, plus additional amounts of support that the member was required to pay on the former spouse's behalf (house payment, car payment, etc.). Since the member directly paid \$5,505.60 towards the court ordered payments, the amount otherwise owed by the member pursuant to the temporary order was \$8,117.90. DFAS acknowledged that it collected from the member, and disbursed to his former spouse, \$699.78 in excess of the amount provided for under the temporary order (\$8,817.68 - \$8117.90), and it made this amount available for credit to the member. However, the administrative report states that this credit was applied for offset against an unrelated military pay overpayment of \$2,521.04 (an erroneous overpayment of pay and allowances after the member entered a non-pay status while on appellate leave).

On appeal, the member disagrees with the basis of the calculation of the \$13,623.50 amount. Essentially, he contends that the period that we should consider should be limited to his incarceration, as further limited by the period of forfeiture, which he says started on December 20, 1996, and ended on February 14, 1997. It should not be December 1996 through April 1997. Therefore, the debt to the former spouse that should have been paid by DFAS is for child support and separate maintenance for January and half of February, or \$2,400. Based on these contentions, the member claims that the government owes him \$5,717.90 (the \$8,117.90 that DFAS thinks he owes minus \$2,400 which he says was his "real debt" during the period of the forfeiture window).

Discussion

There are two general issues involved in this dispute. The first involves the factual issues, including the reconciliation of all obligations, credits and disbursements; and the second is the legal issue of whether the government obtained good acquittance for any sums otherwise due to the member by payment to the former spouse. On disputed questions of fact, because the administrative office is in a better position to consider and evaluate the facts, we will accept the statement of facts furnished by the administrative office, in the absence clear and convincing contrary evidence offered by the member or other claimant. *See 57 Comp. Gen.* 415, 419 (1978).

Approaching the member's account from DFAS's viewpoint, the question is whether the \$13,623.50 accurately reflects obligations owed by the member to his former spouse under the temporary order during the period December 1996 through April 1997. The member's challenge of this amount involves the period of consideration, but not whether the components in the total are properly payable by the member to the former spouse under the temporary court order. Therefore, we find that \$13,623.50 represents obligations owed by the member to his former spouse during the period December 1996 through April 1997. There does not appear to be any other disputed accounting issue. It is undisputed that the member should be credited in the amount of \$5,505.60 for all of the direct payments that he made. The difference between these two amounts, \$8,117.90 represents the amount that the member owed to his former spouse under the temporary order for the period December 1996 through April 1997 that was satisfied by disbursements from

DFAS. The member appears to dispute the period of his incarceration, claiming that it ended on February 14, 1997; however, the government's official record, the General Court-Martial Order, states that the member was confined for three months. Therefore, to the extent that it is relevant, we find for purposes of this appeal that the member's confinement ended in March 1997.

For reasons that are not apparent, the member now modifies his original claim to reduce it by \$2,400 as indicated above. However, his position still appears to be that the government had no authority to remit his pay and allowances to his former spouse, notwithstanding any obligation he may have had to remit certain sums to her under the temporary order; therefore, the government must repay him and seek reimbursement from the former spouse. The member offers no legal support for his position.

The member is not entitled to recover the \$8,117.90, even if the legal authority under Article 58b(b) to remit pay and allowances to the member's dependents under waiver did not apply to the member. This amount is an amount that the member was required to pay under the temporary order, whether he paid it directly or through his employer. The member's direct payments to the former spouse (\$5,505.60) would not have satisfied the member's obligations under the temporary order without the additional \$8,117.90. The entire \$8,117.90 (plus an improper excess of \$699.78), was remitted to the former spouse during the period when the member was deemed to be in confinement. In accordance with this request, the convening authority granted a waiver that was within the scope of the statute. There is nothing to indicate a lack of good faith or wrongful conduct on the part of the United States, and without such relief, none of the member's pay and allowances would have been immediately available to help him meet his obligations to his dependents. The member had a clear legal obligation to make support payments, and \$8,117.90 was properly paid for this purpose. If we allow the member's claim, he would be unjustly enriched by a windfall. Under equitable principles, the government may be indemnified to avoid such an injustice. [\(3\)](#)

The concept of indemnification is explained in the *Restatement of Restitution*. When a payor discharges a duty, in whole or in part, to another, but as between the payor and a third person the duty should have been discharged by the third person, the payor is entitled to indemnity from the third person, unless the payor is barred by the wrongful nature of his conduct. *See Restatement of Restitution* § 76 (1937). *See also* 41 AM. JUR. 2d Idemnity §§ 1-2. While this is a case of first impression in our Office, we note that the Comptroller General, who previously settled claims under 31 U.S.C. § 3702, discussed the *Restatement of Restitution* as authority in addressing claims before him. *See* B-202039, May 7, 1982; B-184827, Dec. 9, 1975; and 54 Comp. Gen. 424 (1974). Additionally, in an analogous situation in which a member's request to stop a voluntary allotment to his wife was not implemented, the Comptroller General found that the member cannot be reimbursed for such failure where the member and his wife (the allottee) were determined to be jointly and severally liable on the basis that the erroneous allotment payments inured to the benefit of both. *See* B-193400, Jan. 31, 1 979.

The government discharged a duty owed under the temporary order, and in this case it does not matter that Article 58b did not apply or when the member was incarcerated.

Conclusion

For the reasons explained herein, we affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields
ember, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
ember, Claims Appeals Board

1. A total of \$8,817.68 was disbursed to the former spouse on four occasions between January 31, 1997, and February 21, 1997. We assume for purposes of this appeal that other legal remedies, such as garnishment under 42 U.S.C. § 659 and its implementing regulations, do not apply here.
2. The Court's discussion indicates that the Congressional intent, as reflected in the original bill, was that the amendments to the UCMJ brought about by enactment of Article 58b, effective April 1, 1996, would be deemed not to have been made with respect to offenses committed prior to the effective date. *See Gorski, supra*, at 372.
3. *See United States v. United Technologies Corporation*, 255 F. Supp. 2d 779, 785 (S.D. Ohio, 2003) where the court noted the government's potential election of equitable remedies even where its legal remedies were not necessarily extinguished.