

DATE: March 22, 2004

In Re:

[REDACTED]

Claimant

Claims Case No. 04031102

CLAIMS APPEALS BOARD DECISION

DIGEST

A military member continued to receive pay and allowances after her separation, and a discretionary savings allotment continued to be paid to her bank on her behalf on the two months after the month of she separated. Waiver of the debt for the discretionary allotment under 10 U.S.C. § 2774 is not appropriate, since the member should have been aware that she was receiving amounts to which she was not entitled.

DECISION

A former member of the United States Air Force appeals the August 27, 2003, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 03072501, in which DOHA waived \$1,071.83, and denied waiver of \$732, of a total of \$1,803.83, that was erroneously paid to the member after she separated from the service. The member seeks waiver of the additional \$732.

Background

The record shows that the member separated from the service on November 6, 2002. At the time, she was entitled to receive a final separation payment of \$5,873.45. On November 15, 2002, and on November 18, 2002, the member received payments totaling \$6,945.28, or \$1,071.83 in excess of her final separation payment. Additionally, the member's savings allotment in the amount of \$366 was erroneously paid on her behalf in December 2002 and January 2003, causing an overpayment of \$732. Therefore, the total amount of erroneous payments to or on behalf of the member was \$1,803.83. We waived \$1,071.83, leaving only the \$732 at issue.

Following the Settlement Certificate, the member requested reconsideration on the basis that she had no idea that allotment payments were still being made to her financial institution. Apparently the allotment was for a loan, and the member indicated that she directly paid the loan. On September 12, 2003, DOHA advised the member in writing that

before her waiver would be considered, DOHA needed copies of the member's cancelled checks (front and back) for December 2002 and January 2003 loan payments. Additionally, DOHA asked her to provide a letter from the financial institution showing that it had received duplicate payments for these two months. On December 31, 2003, the member provided a copy of a check payable to Chrysler Financial dated November 24, 2002, in the amount of \$366 for a "car payment." The member also provided a printout of what she represents to be her "payment history" showing that two payments, one for less than the standard amount, were made to Chrysler Financial in December 2002.

An examination of this payment history indicates that it was in the name of a person other than the member (with the same last name), that there was a payment described as a "MAC payment" for \$366 on December 2, 2002, and a "split chk" payment for \$340.26 for the balance of the loan on December 3, 2002.

DOHA contacted the Defense Finance and Accounting Service (DFAS) to obtain details concerning the allotment. DFAS reports that the allotment was set up as a discretionary savings allotment with a specified bank and under a different account number than the one shown on the payment history provided by the member.

The member responded with written correspondence, dated March 9, 2004, stating that the allotment for Chrysler Financial was administered through a payment processing center called Military Assistance Company (MAC) and that she had no "direct access" with the allotment account at the bank and received no monthly statements.

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 she was receiving payments to which she was not entitled. The standard we employ to determine fault is whether a reasonable person would or should have known that she was receiving payments to which she was not entitled. If she knew or should have known about such overpayments, she has a duty to bring the overpayments to the attention of the proper authorities. If she does not do so, she is considered to be partially at fault and waiver is not available to her. *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 her responsibility for knowing that she received the payments. *See* DOHA Claims Case No. 03041511 (May 7, 2003); DOHA Claims Case No. 00112010, *supra*; and DOHA Claims Case No. 97011408 (June 10, 1997).⁽¹⁾

The evidence is that the member set up a discretionary savings allotment payable to a bank. The member did not define what she meant by "direct access," and it makes no difference. As long as she set up a discretionary allotment, she could request an accounting, and there is no evidence that she attempted to do so here. In our view, the fact that there is a discretionary allotment to a bank, by itself, is a sufficient basis to sustain the Settlement Certificate.

The burden is on the member to prove, by clear and convincing evidence, that she is without fault (total or partial) in this matter and did not know or have reason to know that she was being overpaid through her bank. Measured against this standard, her position is not persuasive.

The member makes various assertions about her lack of knowledge, but provides little in the way of clear and convincing documentation or other evidence, especially from third parties. Uncorroborated assertions are not evidence. She did not provide any January 2003 payment data or a letter of explanation from her bank as requested by DOHA.

The payment history that the member provided is flawed. We will assume for purposes of this appeal that the person named on the account in the payment history was a spouse with whom she was jointly liable, but nothing in the payment

history indicates that it was with Chrysler Financial as the member claims. Moreover, a review of that payment history itself is not helpful. It does not indicate a direct payment for \$366 in December 2002, as the member contends. It shows payment in that amount from "MAC" received on December 2, 2002, and a split check payment for the balance of the account (\$340.26) received on December 3, 2002. The document does not indicate what is meant by a split check. This split check could be the member's check for \$366 dated November 24, 2002, and in that case, Chrysler Financial would have remitted the difference to the member. If so, the member should have questioned the basis for the remission and early pay off of the loan. Another possibility is that the member wrote a separate check for \$340.26, the balance due on the account, knowing that \$366 had already been paid from a source that she knew or should have known was no longer be available.

In any event, repayment by the member would simply make the government whole for the money it paid on the member's behalf. The member received a direct benefit from receipt of the allotments; therefore, repayment of the allotments is not inequitable. *Cf* B-193400, Jan. 31, 1979. In that decision, the government sent allotment checks to the member's wife after the member attempted to stop the allotments. The member was unaware of the continuation of the allotments. Because the member had a "moral or legal obligation" to support his wife, the Comptroller General stated that the member had received a benefit from the allotments and therefore was liable to repay them. In this case, the member had a legal obligation to make her car payments, and she received a benefit when the government made car payments on her behalf. Therefore, it is not inequitable for her to repay her debt to the government. It is inappropriate to grant a waiver in such a situation.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board

Signed: Jean E. Smallin

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.