

DATE: September 16, 2004

In Re:

[Redacted]

Claimant

Claims Case No. 04091406

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired member received erroneous active duty payments after retirement. He questioned at least one of the payments and received assurances that it was correct. Unless he could articulate a reason why he thought he was entitled to a payment in that amount, he should not have relied on general assurances that the payment was correct. He did not acquire title to the overage and should have held it until his entitlement to it was determined or until he was asked to return it. Under those circumstances, waiver under 10 U.S.C. § 2774 is not proper.

DECISION

A retired member of the United States Air Force appeals the July 27, 2004, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 04061804 in which DOHA waived \$125.06, but denied waiver of \$8,396.72, of an erroneous overpayment of pay and allowances to the member in the total amount of \$8,521.78.

Background

The record shows that the member retired from the Air Force on November 30, 2002, and, at that time, he was due a final separation payment in the net amount of \$1,603.45. On December 6, 2002, the member received a payment of \$1,728.51, an amount \$125.06 in excess of his proper entitlement. That \$125.06 debt was waived and is not in issue here. The member also erroneously received payments of \$7,184.48 and \$1,212.24 in February and March 2003.

The member believes it was erroneous not to waive the 2003 overpayments. He argues that he is without fault and should not have to bear the cost for what he considers to be someone else's "carelessness." He explained that he received a plain white envelope postmarked from Langley Air Force Base with a check inside, and there was no explanation for the payment. He contends that he telephoned the finance office at Langley Air Force Base and an un-named airman told him that the check was "ok to cash." The member advises us that he is unemployed and explains why repayment would

cause severe financial hardship for his family.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay and allowances to a member or former member 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, misrepresentation, lack of good faith or fault on the part of the member or former member. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996).

The record here in no way suggests any moral lapse on the part of the member, and our analysis focuses only on whether he shares responsibility with DFAS for part of the fault. For purposes of this appeal, we accept the member's statement that he contacted the Langley Air Force Base finance office to ascertain the validity of the check. We also assume that DFAS erred in generating the two 2003 checks because DFAS's administrative report acknowledges that it failed to close the member's active duty pay account when he retired. 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, e.g.*, DOHA Claims Case No.01061503 (July 23, 2001), *aff'd* Deputy General Counsel (Fiscal), February 22, 2002.

The fact that DFAS erred in generating the payments, coupled with the fact that the member telephoned the finance office to question the validity of at least one of the checks, are not a sufficient basis, by themselves, to support a waiver. As indicated in the Settlement Certificate, the member did not articulate any reasonable basis for expecting receipt of these payments three months or longer after he retired. *Compare* DOHA Claims Case No. 02061109 (July 31, 2002). The member reasonably contacted the finance office to determine the validity of the check, but even after contacting them, he still did not know why he was receiving the payment. When a member questions a payment, he should not accept general assurances that the payment is correct unless he can articulate a reason to expect a payment in the approximate amount he has received. Instead, he should request a specific explanation of the payment. In the absence of a sufficient, detailed explanation, he does not acquire title to the overpayment and has a duty to hold it until his entitlement to it is determined or until he is asked to return it. *See* DOHA Claims Case No. 04041901 (April 28, 2004).

The member described personal and family circumstances that may involve significant financial hardship, but financial hardship is not a proper basis for supporting waiver. *See, e.g.*, DOHA Claims Case No. 02120917 (December 20, 2002). DFAS may take the member's hardship into consideration in determining an appropriate repayment plan.

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