

DATE: March 30, 2005

In Re:

[Redacted]

Claimant

Claims Case No. 05032801

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member is aware or should be aware that he has received an overpayment, he does not acquire title to the excess amounts, and he has a duty to hold the money for eventual repayment. In such circumstances waiver is not proper under 10 U.S.C. § 2774.

DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 05012605, dated March 14, 2005, in which we partially denied a retired member's application for waiver of \$7,409.87. The debt arose when he received erroneous payments after retirement from the Army.

Background

The member retired from active duty on November 30, 2000. At that time, he was overpaid in the amount of \$2,470.38. That amount was waived in the Settlement Certificate and is no longer in issue. After retirement, the member received two erroneous active duty payments. On December 15, 2000, he received \$2,311.23, and on December 30, 2000, he received \$2,628.26. Therefore, the amount in question is \$4,939.49.

In his appeal, the member states that he questioned his entitlement to receive active duty pay subsequent to his retirement on numerous occasions. He also requests that he be able to enter into a 36-month repayment plan as indicated in a January 25, 2005, correspondence from the Defense Finance and Accounting Service (DFAS). In addition, he states that because of fairness (since DFAS caused the error and he did not) any interest, penalties and administrative costs should be waived.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive the 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. In this context the legal definition of "fault" does not imply a moral lapse on the part of the member. It merely indicates that the member is not entirely without responsibility in the accrual of the debt and therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is whether a reasonable person would or should have known that he was receiving payments in excess of his entitlements. We consider fault to exist if, in light of all the circumstances, the member should have known that an error existed and taken action to have it corrected. *See* DOHA Claims Case No. 00081801 (August 23, 2000). In such situations, waiver is precluded.

In the present case, the member received his final separation pay in November 2000 but continued to receive his mid-month and end-of-month pay in December 2000. A reasonable person who has retired should be aware that he is not entitled to receive regularly scheduled mid-month and end-of-month payments after his retirement. *See* DOHA Claims Case No. 99020212 (April 27, 1999). When a member is aware or should be aware he is being overpaid, he must be prepared to return the excess amount to the government when requested to do so. *See* DOHA Claims Case No. 04100402 (October 26, 2004).

The member states in his appeal that he questioned his entitlement to receive active duty pay subsequent to his retirement on numerous occasions and lists people he contacted regarding pay issues. However, there is no indication that he brought the December mid-month and end-of-month payments to the attention of DFAS. The member states that he expected a large basic allowance for housing (BAH) payment, but he received a large retroactive BAH payment in November 2000. Even though the member states that he was expecting further payment of BAH after the November payments, he still should have questioned receipt of mid-month and end-of-the month payments in the approximate amount of his active duty pay. Since he had no reason to believe he was entitled to the payments, he is not without fault under the waiver statute. *See* DOHA Claims Case No. 00081801, *supra*. Even if he inquired about the payments, he should have held the money for eventual repayment and persisted in questioning the payments until appropriate action was taken.

The member asks that repayment take place over 36 months and that interest, penalties and administrative costs be waived. This Office only has authority to render a waiver decision with regard to the member's debt. The member should contact DFAS for details on their procedures concerning terms of repayment of the debt, including the rate of repayment and other costs involved.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

Jean E. Smallin
ember, Claims Appeals Board

/s/

Catherine M. Engstrom
ember, Claims Appeals Board