

KEYWORD: General; waiver of indebtedness

DIGEST: When a member is aware or should be aware that she is receiving payments in excess of her entitlement, she does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 05042707

DATE: 5/31/2005

DATE: May 31, 2005

In Re:

[Redacted]

Claimant

Claims Case No. 05042707

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member is aware or should be aware that she is receiving payments in excess of her entitlement, she does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 04092014, dated November 2, 2004, which denied a member's request for waiver of a debt which arose when she received erroneous payments after her discharge.

Background

The member was discharged on September 2, 2003. She was entitled to receive a final separation payment in the net amount of \$58,564.43. [\(1\)](#) Due to an administrative error, she received payments totaling \$64,525.47. Therefore, she was overpaid \$5,961.04.

In the Settlement Certificate, the adjudicator denied waiver of the \$5,961.04 overpayment. The adjudicator based this decision on the fact that the member received a separation work sheet reflecting the total she was due and therefore should have expected the three payments she received after separation, totaling \$9,034.58, to be deducted from her final

pay. Thus, when she then received the exact amount reflected on the separation work sheet after already receiving the three payments, she should have questioned the accuracy of the payment.

On appeal, the member seeks reversal of the Settlement Certificate on the basis that she was sick at the time of the overpayment and was unable to manage her finances. In addition, she states that she was assured by a finance person that she was cleared of all the debt she owed.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of pay and allowances to service members if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fault on the part of the member. In this context, we interpret "fault" to include more than a proven overt act or omission. We consider fault to exist if in light of all the circumstances it is determined that a member should have known that an error existed and taken steps to have it corrected. The standard we employ is whether a reasonable person should have been aware that she was receiving payments to which she was not entitled. If she knows or should have known about such overpayments, she had 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.

The member states that the overpayment was not her fault. She argues DFAS knew she was separated following a medical board review due to a disabling injury but erroneously continued to pay her and that a finance person erroneously told her that the debt would be collected from her severance pay. While the payments occurred due to administrative error, the member is not without fault, because she should have been aware that she had received more than her entitlement. Prior to her separation, she received a separation worksheet that listed her entitlement as \$55,490.59. After her separation, she received a payment of \$152.39 on September 10, 2003; a payment of \$5,899.87 on September 30, 2003; and a payment of \$2,982.32 on October 15, 2003. Since she had been told that she was entitled a total of \$55,490.89, she should have known that she was overpaid when she received a check for that amount on October 23, 2003, because the three payments she had already received had not been deducted from the total due her. Although the member indicates that she failed to check her direct deposits in the bank during the period of overpayment because she was too sick (suffering from an injured ankle, chronic fatigue and fibromyalgia), she is considered to be partially at fault absent clear and convincing evidence in the form of medical documentation that she was continuously in such poor medical health that it was unlikely that she knew or could have known of the overpayments. Under such circumstances, the member should have held the payments for repayment to the government. *See* DOHA Claims Case No. 04031001 (March 17, 2004); DOHA Claims Case No. 03102401 (October 28, 2003); and DOHA Claims Case No. 01111311 (November 30, 2001).

Conclusion

We affirm the Settlement Certificate.

_____/s/
Michael D. Hipple
Chairman, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

/s/

Catherine M. Engstrom
Member, Claims Appeals Board

1. The member indicates that she was informed at separation that she was entitled to \$55,490.59. The figure of \$58,564.43 was a later DFAS calculation.