

June 6, 2006

In Re:

[Redacted]

Claimant

)

Claims Case No. 06052335

CLAIMS APPEALS BOARD

APPEAL DECISION

DIGEST

When a member is aware or should be aware that he has received an overpayment, he is not entitled to the excess amounts, and has a duty to hold the money for eventual repayment.

DECISION

A member of the United States Air Force appeals the April 17, 2006, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 06041203, which denied waiver of the portion of the member's debt related to erroneous payments made to the member after he separated.

Background

The member was discharged on June 18, 2005. At that time, he was entitled to receive a final separation payment in the amount of \$830.45. However, on June 30, 2005, he received a payment in the amount of \$1,809.63. As a result, he was overpaid \$979.18. Our Office agreed with the Defense Finance and Accounting Service (DFAS) and waived this portion of the overpayment. Therefore, this payment is not in issue on appeal.

At issue on appeal are other overpayments totaling \$5,431.79. The member's pay account was not updated to show he was discharged on June 18, 2005. As a result, he continued to receive active duty pay through August 15, 2005. Our Office denied waiver of this portion of the member's indebtedness because the member stated that at the end of June 2005 he went to the military personnel flight office to find out why he had not received his DD Form 214 and was told that the system reflected that he was still on active duty and receiving pay and allowances. Therefore, at that point, when he continued to receive active duty pay from July 1, 2005, through August 15, 2005, he should have known that he was receiving pay in excess of his entitlement.

In his appeal, the member claims that DFAS and the DOHA adjudicator overlooked a vital piece of information that he included in his waiver request.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member of the uniformed service if collection 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 an ethical lapse on the part of the member. It merely indicates that he 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 knew or should have known

that he was receiving payments in excess of his entitlements. It is well-established that a member is not entitled to waiver as a matter of right whenever he receives an overpayment as a result of an administrative error.

See DOHA Claims Case No. 97012103 (June 26, 1997).

The member attaches an e-mail from his former command's chief master sergeant and points to specific language contained within as vital information that was overlooked. In the e-mail, the chief master sergeant writes: "You should know that they will try to recoup the pay and entitlements you have received in error for the 2 months you have been gone. I highly encourage you to appeal this action because this action was not through negligence or deceit on your part. Sorry you got jerked around but hopefully you can recover and continue to serve as you desire." We note that this e-mail was included in the record and available for our Office's review when the Settlement Certificate was issued. Although this e-mail supports the member's continued assertion that these overpayments were a result of an administrative error on the government's part, we have consistently held that when a member is aware or should be aware that he is being overpaid, he must be prepared to return the excess amount when requested to do so by the government. *See* DOHA Claims Case No. 04100402 (October 26, 2004) and DOHA Claims Case No. 00032701 (May 30, 2000). As stated in the Settlement Certificate, the member knew at the end of June 2005 that his status was listed as active duty and that he was receiving pay and allowances in the military personnel flight office system even though he had been discharged. Therefore, when the member continued to receive active duty pay during the period July 1, 2005, through August 15, 2005, he should have know that he was not entitled to the payments. The member did not acquire title to the money and should have held it for eventual repayment when asked to do so. *See* DOHA Claims Case No. 04022401 (February 25, 2004).

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board