

KEYWORDS: waiver of indebtedness; fault

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

CASENO: 08121001

DATE: 12/23/2008

DATE: December 23, 2008

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In Re: )  
          ) )  
          ) )  
          [REDACTED] ) Claims Case No.08121001  
          ) )  
          ) )  
          ) )  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

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

**DECISION**

A member requests reconsideration of the November 14, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08081301. In that decision, DOHA sustained the Coast Guard's denial of the member's request for waiver in the amount of \$18,698.73.

## Background

The member retired from the United States Coast Guard Reserve as a chief warrant officer (W-2), effective April 16, 1991. The member retired with over 31 years of service, and due to prior service, his retired pay was to be computed at the rank of a lieutenant commander. Due to an administrative error, the member's retired pay was erroneously based on the pay grade of an O-5 (commander), instead of an O-4 (lieutenant commander), during the period April 16, 1991, through April 30, 2008, causing an overpayment of \$29,345.99. The member is liable for the period May 12, 1998, through April 30, 2008, in the amount of \$18,698.73.<sup>1</sup>

In the appeal decision, the DOHA adjudicator sustained the Coast Guard's denial of waiver of the overpayment on the basis that the member was provided information in the form of a letter which listed his retired grade as an O-5. In his request for reconsideration, the member states that he never held the rank of a lieutenant commander in the Coast Guard as referenced in the appeal decision. He states that he had conversations with Headquarters prior to retirement in order to find out if his records indicated his prior service in the Navy as a lieutenant commander. He felt confident that his records were correct when he received his retirement letter reflecting that he would be retired as a warrant officer and paid as a lieutenant commander. He indicates that he is at least partially at fault in the matter, but suggests that fault should be apportioned to reduce the amount of his reimbursement.

## Discussion

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience and not in the best interest of the United States, provided there is not indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1. In the present case, the erroneous payments were made as a result of administrative error and there is no indication of fraud, misrepresentation, or lack of good faith on the member's part. However, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting a waiver. *See* ¶ E4.1.3 of the Instruction. A member is considered to be at least partially at fault, and waiver is precluded, if in light of all the circumstances, it is determined that he should have known that he was being overpaid.<sup>2</sup> Thus, if the member is furnished with documentary records or information which, if reviewed, would cause a reasonably prudent person of the same rank and experience to be aware of or suspect the existence of error, but the member fails to review the documents carefully or

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<sup>1</sup>Government regulations preclude an agency from collecting by administrative offset a debt that has been outstanding for more than 10 years after the agency's right to collect the debt first accrued. *See* 31 C.F.R. § 901.3(a)(4).

<sup>2</sup>The legal definition of "fault" in waiver decisions does not imply any ethical lapse on the part of the member. It merely indicates that he is not entirely without responsibility for any resulting overpayment and that, therefore, the equitable remedy of waiver is not available to him.

otherwise fails to take corrective action, the member is not without fault and waiver is precluded. *See* B-219004, Dec. 17, 1985, B-216951, April 12, 1985, and DOHA Claims Case No. 07110102 (November 26, 2007).

The fact that the overpayments were made through administrative error does not relieve the recipient of the responsibility of reviewing documents provided him and taking corrective action. We have consistently held that if the recipient is even partially at fault, waiver is precluded even though the overpayments were the result of administrative error. *See* DOHA Claims Case No. 06110603 (November 16, 2006), and B-219004, *supra*. There is no basis for apportioning fault under the waiver statute. *See* DOHA Claims Case No. 08061603 (June 24, 2008), and DOHA Claims Case No. 00081602 (November 22, 2000).<sup>3</sup> A member acquires no entitlement to an erroneous payment because the government makes a mistake.

In the present case, the member was furnished with documentary evidence in the form of a letter from his personnel service center in June 1991 that stated the highest pay grade he held was an O-5. The member should have questioned why the personnel service center listed his highest grade held as an O-5, when he was retired as a chief warrant officer and knew his retired pay was to be computed on the pay of a lieutenant commander, an O-4. The member had information that would lead a reasonably prudent person of his rank and experience to conclude there was an error in the computation of his retired pay. Under these circumstances, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

### Conclusion

The member's request for relief is denied, and we affirm the November 14, 2008, appeal decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

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<sup>3</sup>These cases were decided under 5 U.S.C. § 5584 because the claimants were civilian employees. However, the standards for waiver are the same for service members and civilian employees.

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board