

Date: April 18, 1997

In Re:

[REDACTED]

Claimant

Claims Case No. 97011403

CLAIMS APPEALS BOARD DECISION

DIGEST

Debt of service member who was aware of receiving overpayments of active duty pay subsequent to his retirement may not be waived under 10 U.S.C. 2774.

DECISION

This is in response to an appeal of the U.S. General Accounting Office's (GAO) Settlement Certificate, Z-2942507-056, which denied waiver under 10 U. S. C. 2774 of \$2,602 of a service member's debt to the United States resulting from erroneous payments of active duty pay subsequent to the member's retirement made by the Marine Corps. Pursuant to Public Law 104-316, October 19, 1996, the authority of the Comptroller General to waive a claim of the United States against a person arising out of an erroneous payment of pay (salary) or allowances, including travel, transportation or relocation expenses and allowances, was transferred to the Director, Office of Management and Budget (OMB). The Director of OMB delegated his waiver authority involving all uniformed service members and civilian employees of the Department of Defense to the Secretary of Defense. The Defense Office of Hearings and Appeals exercises the authority of the Secretary.

Background

The record shows that the service member was released from active duty on January 6, 1994, and transferred to the Permanent Disability Retired List on January 7, 1994. His indebtedness occurred when active duty direct deposit payments were issued February 1, 1994, and February 15, 1994. [\(U\)](#)

The member acknowledged that he was aware of receiving the erroneous payments. He called his old command upon learning from his bank of the overpayments. His old command advised him that the payments were money due him, but the member stated that he knew it was wrong. He then contacted other offices, including the Defense Finance and Accounting Service (DFAS). The error occurred, he later learned, because his old command did not submit the final paperwork to take him out of the system until February 15, 1994. The member attempted to return the overpayment, but neither his command nor DFAS was able to accept the money at the time.

The member is appealing the GAO's denial of his request for waiver of the \$2,602, stating that he feels an injustice has occurred. In addition, the member states that DFAS reported an adverse credit rating to the his credit borrower which is affecting his chance of purchasing a home.

Discussion

We may grant waiver of a debt arising out of an erroneous payment of pay and allowances to members or former members 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. See 10 U.S.C. 2774 (1995). 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 in that regard.

The standard employed to determine whether a member was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person should have been aware that he was receiving payments to which he was not entitled. See Standards for Waiver, 4 C.F.R. 91.5(b)(1996); DOHA Claims Case No. 97013103 (February 18, 1997) and Jeffrey S. Hopf, B-260184, Jul. 28, 1995. We have consistently held that when a member knows or reasonably could be expected to know he is receiving pay in excess of his entitlement, he has a duty to retain such amounts for subsequent refund to the government.

The service member readily admits that he was aware that he was receiving payments to which he was not entitled. With this knowledge, he should be holding the overpayments aside for eventual return to the government. It is unfortunate that the member received incorrect advice when he initially contacted his unit and DFAS and was unable to return the money to the government when he first offered, but these events do not relieve him of his responsibility. Where the member is aware of the overpayment, we believe collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States.

The fact that DFAS sent the adverse credit rating while the service member's waiver appeal was pending is a procedural issue for the member to discuss with DFAS.

Conclusion

We uphold the denial of the waiver request.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member Claims Appeals Board

1. The service member received a direct deposit payment issued January 14, 1994 resulting in an overpayment of \$457.74 which was waived by the GAO Settlement Certificate. This appeal concerns the \$2,602 debt not waived by GAO.