

DATE: June 26, 1997

In Re:

[Redacted]

Claimant

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Claims Case No. 97011406

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A retired officer of the Navy who accepts civilian government employment may not reasonably rely on vague assurances concerning an exemption from the Dual Compensation Act, and is instead at fault in drawing military retired pay in an unreduced amount if he fails to notify his agency and his military finance office of his dual status, to obtain a definite determination of his entitlements. Where service member relied on a statement by a personnel technician at the civilian agency that the needs of the agency was the basis for waiver, he is considered partially at fault for not verifying his eligibility for such a waiver. The member completed the appropriate paperwork for the Navy, but never contacted the Navy finance office and never received a Notification of Personnel Action (Standard Form 50) confirming the technician's statement.

### DECISION

This is in response to an appeal of the U.S. General Accounting Office's (GAO) Settlement Certificate Z-2942638-025, October 5, 1995, which denied a service member's request for waiver of a debt of \$41,689.13 in retired pay due to the failure of the Department of Defense to apply the Dual Compensation Act (DCA), 5 U.S.C. 5532. Pursuant to Section 211 of Public Law No. 104-53, 109 Stat. 514, November 19, 1995, the GAO's authority to settle claims for military pay and allowances, including retired pay, was transferred to the Director of the Office of Management and Budget (OMB). The Director of OMB delegated his waiver authority to the Secretary of Defense effective June 30, 1996. The authority of the Secretary of Defense in this regard was later codified in Section 202(n) of Public Law No. 104-316, 110 Stat. 3826, October 19, 1996. Additionally, under 105(b) of Public Law No. 104-316, Congress transferred to the Director of OMB the GAO's authority to consider applications from service members for waiver of a debt to the government resulting from the erroneous payment of retired pay. The Director of OMB delegated this authority to the Secretary of Defense effective December 18, 1996. The Defense Office of Hearings and Appeals exercises the authority of the Secretary.

### Background

The record indicates that the service member was retired from the U.S. Navy on May 1, 1989, and was employed as a financial management specialist by the Department of State (State) beginning April 27, 1989. Dual Compensation deductions should have been deducted from his retired pay from May 1, 1989, through May 31, 1993.

A waiver request was granted by GAO in June 1995 based on a copy of a Notification of Personnel Action, SF-50, submitted by the member, which had "Waiver of Dual Compensation Authorized" typed on the bottom. GAO determined that this notation was erroneously added resulting in the member being paid at the incorrect amount of retired pay.

In August 1995, the Defense Finance and Accounting Service (DFAS) requested GAO amend its determination based on new information. DFAS submitted copies of SF-50's furnished by State. A number of these corrected errors on the member's initial SF-50 from State. None of these SF-50's contained a statement indicating that a waiver of the application of the DCA was authorized. GAO amended its June 1995 settlement and denied the members application of waiver based on the facts as presented by State.

On appeal, the member submits a background summary of events surrounding his employment with State. According to the member's summary, he asked about waiver for dual compensation both prior to his appointment and as he was signing initial paperwork on April 27. At his request and for clarification, the personnel technician on April 27 typed the note "Waiver of Dual Compensation Authorized." The member acknowledges having signed two Statement of Employment forms, DD 1357, which were sent to the Navy Finance Center concerning his employment with State. He acknowledges receiving updated SF-50's in July, September, and March which corrected and updated his employment status and entitlements. In August 1994, the member noticed that his retired pay was being reduced. At that time, he spoke with personnel staff at State to determine how to process a DCA waiver request. Until that time, the member believed that he had an exemption from the DCA due to the needs of the agency (State), which the personnel technician in 1989 had agreed was a basis for an exemption. The member, for the first time in the appeal, raises the issue of his belief that he was exempt from the DCA either because of the nature of the financial management position he held or because he was a warrant officer when he was in the Navy.

### **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). We consider fault to exist if, in light of all of the facts, the debtor should have known an error existed and taken action to correct it. The standard employed by this Office is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See, generally, 4 C.F.R. Part 91; Commander Loyd F. Galyean, USN (Retired), B-224900, Feb. 24, 1987 and cases cited therein. Persons who receive excess payments acquire no rights to the money and are bound in equity and good conscience to make restitution. Moreover, the knowledge of such an overpayment carriers with it the obligation to return that amount, or set aside an equivalent amount for refund to the government when the error is corrected. See DOHA Claims Case No. 97011404 (April 4, 1997).

The Comptroller General has held, and we agree, that a retired officer of the uniformed services who accepts civilian government employment may not reasonably rely on vague assurances concerning an exemption from the DCA, and is instead at fault in drawing military retired pay in an unreduced amount if he fails to notify his agency and his military finance office of his dual status to obtain a definite determination of his entitlements. See Commander Loyd F. Galyean, USN (Retired), B-224900, supra.

The member did submit the required paperwork to inform the Navy of his employment with State, but never contacted that office for verification of his waiver. Based on his conversation with the technician at State and the fact he knew the technician typed in the words "Waiver of Dual Compensation Authorized" at his request, a reasonable person would expect to receive an amended SF-50 with such a notation, or other written verification of the waiver. See Leon K. Pfeiffer, B-236753, Feb. 24, 1992. During the next few months, the member received numerous SF-50's correcting errors made on the initial SF-50 he received from the Department of State. In none of these corrections was there mention made of his dual compensation status being waived. With his awareness of the possibility that his military retired pay could be affected by his acceptance of a civilian government position, our view is that he should have taken affirmative action to determine definitely whether or not he was affected. More was required than accepting the statement of the technician at the civilian agency that needs of the agency is a basis for waiver of the DCA. Under the circumstances, we are unable to conclude that he was without fault in not monitoring his retired pay and the official paperwork he received from State and in accepting the resulting overpayments of retired pay. See Major Albert L. Bagnaschi, USA (Retired), B-240049, Nov. 1, 1990.

### **Conclusion**

We uphold the denial of the application for waiver.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board