
In Re:

[Redacted]

Claimant

DATE: April 4, 1997

Claims Case No. 97011404

CLAIMS APPEALS BOARD DECISION

DIGEST

A debt for erroneous payment of retired pay is not waived when the debt arose as a result of the Federal civilian employer's failure to notify the office paying military retired pay of the employment of the retired officer who is subject to the Dual Compensation Act (DCA), 5 U.S.C. 5532, and the retired service member was aware of the possible application of the DCA but did not escrow or otherwise set aside funds to reimburse the government once the office responsible for paying the retired pay became aware of the service member's status.

DECISION

, United States Navy (Retired), appeals⁽¹⁾ the 1992 settlement⁽²⁾ of the U.S. General Accounting Office (GAO) in which GAO denied his application for waiver of an erroneous payment of \$48,794.64 in retired pay due to the failure of the Department of Defense (DoD) to apply the Dual Compensation Act (DCA), 5 U.S.C. 5532. Although service member's debt originally amounted to \$48,794.64, his attorney stated that as of April 1, 1996, the service member had already repaid about \$31,000 to the DoD.

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 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 Section 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 OMB Director delegated this authority to the Secretary of Defense effective December 18, 1996.⁽³⁾ The Defense Office of Hearings and Appeals (DOHA) now exercises all of the authority transferred or delegated to the Secretary of Defense through this Board, which is part of DOHA.

Background

The service member retired from the Navy, effective August 1, 1975. According to DoD records, in 1979, the service member spoke by telephone with the technical director of retired pay at the former Navy Finance Center to inquire about his status under the DCA because he was considering taking a job that might subject him to that act's provisions. The DCA prescribes a formula for the reduction of retired pay when a retiree is employed in a civilian capacity by the federal government.⁽⁴⁾ At that time, the Navy official told him that he would be subject to the Act's provisions, and the Navy provided the service member a formula to estimate by how much his pay would be reduced if he took a Federal civilian job.

As it happened, the service member did not take a civilian position with the government until April 28, 1987. The record indicates that, after he took that position, despite whatever misgivings he may have had with regard to applicability of the DCA, the service member did timely file the administrative paperwork to reduce his pay consistent with the Act. However, through administrative errors that were not his fault, that paperwork was not processed to completion. Several

times, the service member inquired about the status of the paperwork, noting that his pay had not been reduced. Each time he was told that the paperwork was in process, and he was urged to be patient. Four years passed before the paperwork was finally processed and the service member's pay was reduced as it should have been. During those four years, the service member received \$48,794.64 more retired pay than he should have.

When this error was discovered, the service member was asked to repay the excess amount. He sought, but was denied, waiver of his debt under 10 U.S.C. 2774. Since then, the service member has been repaying his debt through installment payments. By his records, approximately \$31,000 has been repaid so far. Counsel asks us to waive the remaining balance of approximately \$17,794.60. In support of this, counsel offers new evidence showing that the errors which delayed initiation of the statutory reduction of the service member's pay were not his fault and might not have been discovered or corrected, but for his repeated efforts to discover the status of the unprocessed paperwork.

From the service member's perspective, there was nothing else that he could have done to rectify the DoD processing error. The service member's long service in the military, counsel argues, compelled him to defer to the "chain of command," rather than take some extreme further actions to force the bureaucracy to focus on his problem. Counsel also argues that, in considering whether to waive the remaining balance, we should give significant weight to the fact that the service member has long believed that his retired pay should not be subject to the DCA⁽⁵⁾, and that the government's long delay in processing his paperwork led him to believe during that period that DOD had finally agreed that the DCA did not apply to him. Counsel completes her arguments in this regard by suggesting that the government has compelled the service member to put off his planned retirement for about two more years in order to earn enough to repay the remnants of his debt. In her view, the service member is "paying the total penalty for another government worker's error." Moreover, counsel suggests, compelling him to continue working in order to repay his debt actually costs the government substantially more than it will recover, since waiving his debt would allow him to "retire now and thereby free up his current position for a younger person who is already on the government's payroll [at a lesser salary]."

Discussion

Section 2774 authorizes the Director of OMB to waive collection of erroneous payments of pay and allowances where collection is not in the best interests of the United States and would be against equity and good conscience, provided there is no fraud, misrepresentation, fault or lack of good faith on the part of the member. 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. 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 carries 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, for example, Major Kenneth G. Brown, USAF, Retired, B-238127, June 28, 1991.

We are inclined to agree that there was little else the service member could have done to speed up the processing of his paperwork, and that it was at least partially due to his efforts that the mistake was found and corrected. Nevertheless, the fact remains that the service member knew DoD's views on applicability of the DCA to him. His long service in the military should also have caused him to recognize that bureaucratic errors happen and that, without some more tangible evidence of a change of position, DoD's failure to reduce his pay should not (and, indeed, could not) have been interpreted as a reversal of its previous advice to him.

More importantly, knowing that DoD believed the DCA required his pay to be reduced and having filed the paperwork to accomplish that, the service member should have realized that he had a duty to set aside the excess amounts for repayment to the government, once the pending paperwork was resolved. At worst, if DoD did not relent in its views on the DCA, the service member could have painlessly and instantly repaid his debt. At best, if DoD did change its views, he would have had a significant "nest egg" to enjoy. Instead, the service member chose to spend excess payments that DOD had made clear did not belong to him. Counsel's argument that the service member is being "penalized" for someone else's mistake overlooks this crucial fact: the service member is not paying a "penalty;" he is repaying money that he was not entitled to, yet chose to spend as his own. Neither is service member being compelled by the government to put off his retirement. His decision to delay retiring reflects his own views on how best to repay his debt, and how financially comfortable he wishes to be in his retirement.

Conclusion

Accordingly, upon review of the record, we find no error of fact or law in the GAO's action on the service member's waiver application, and we affirm its denial of the waiver of his debt.

/s/ Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

/s/ Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. The service member is represented in this appeal by Payton Dickinson Cromwell, Esquire of Huff, Poole & Mahoney P.C. in Virginia Beach, VA (File No. 5913.000196).
2. GAO's settlement is found in Settlement Certificate Z-2917289-050, September 16, 1992.
3. See also B-275605, March 17, 1997.
4. See, for example, Major Charles H. Barton, Jr., USMC, Retired, B-243388, May 22, 1991.
5. Counsel states that the service member served as a limited duty officer, with a temporary officer and permanent enlisted status. By its terms, 5 U.S.C. 5532 applies to retired regular officers. Thus, the service member did not believe at first that the DCA applied to him. Counsel does not argue here that the DCA did not apply to the service member.