

In Re:

[Redacted]

Claimant

DATE: June 26, 1997

Claims Case No. 97012103

CLAIMS APPEALS BOARD DECISION

DIGEST

When a former service member erroneously continues to receive active duty pay and allowances after discharge, his request to waive the debt of repayment of these amounts is denied because he does not acquire title to the money he receives and is obliged to return it.

DECISION

[Redacted], a former service member in the United States Army, appeals the settlement of the United States General Accounting Office (GAO) which denied his application for the waiver of a debt which arose from the erroneous payment of pay and allowances to him after he had been discharged.⁽¹⁾ Under Section 105(b) of Public Law No. 104-316, Congress transferred to the Director of OMB the Comptroller General's authority to consider applications from service members for waiver of a debt to the government resulting from the erroneous payment of pay and allowances. The OMB Director delegated this authority to the Secretary of Defense effective December 18, 1996.⁽²⁾ The Defense Office of Hearings and Appeals (DOHA) now exercises the authority transferred or delegated to the Secretary of Defense through this Board, which is part of DOHA.

The record as constructed by DFAS - Indianapolis Center and GAO shows that the service member was discharged on July 19, 1991, but due to an administrative error, he received mid-month and end-of-month payments for pay and allowances through September 15, 1991. Net payments from July 15 through September 15, 1991, totaled \$7,180. DFAS-Indianapolis Center determined that the service member was entitled to a net payment of only \$ 2,015.49 when he was discharged on July 19, 1991. This left a balance of \$5,164.51 as the debt due to the United States. DFAS - Indianapolis and GAO found that waiver was not appropriate because the former service member knew that he was receiving payments in error and had the duty to retain such amounts for refund. A service member is not entitled to waiver as a matter of right whenever he receives an overpayment as a result of administrative error.

A closer examination of the discharge worksheet provided by DFAS - Indianapolis indicates that the service member was owed a gross amount of \$1,369.05 for 15 days of accrued leave and \$1,734.13 for 19 days of active duty base pay in July 1991. After crediting the service member with appropriate BAQ, BAS and other credits, then deducting for Federal wage, FICA and other debits, DFAS arrived at the \$2,015.49 amount. It appears that this worksheet was constructed well after the service member was discharged.

The service member appeals because GAO did not consider the approximately 30 days of leave that he claims was owed to him when he was released from active duty. The service member also contends that GAO's decision is "invalid" because an administrative hearing officer found that the correct amount of the debt was approximately half of the \$5,164 claimed by the government and that in 1991, as a matter of policy, the Army waived all overpayments. In his appeal, the former service member provided a copy of correspondence dated April 15, 1994, from the DFAS - Denver Center, which indicates that a hearing officer found, among other things, that the service member had not received any payment in September 1991; that the service member had accumulated 15 days of leave as of July 19, 1991 and had not received credit for them; and that it appears that the service member had been charged twice in the final Leave and Earnings Statement (LES)⁽³⁾ (issued in January 1992 for July 1-19, 1991) for receiving an August mid-month payment (\$1,456).⁽⁴⁾

In view of the hearing officer's findings, we asked DFAS -Denver, which is now responsible for processing waiver applications throughout the Department of Defense (DoD), to verify whether the service member was sent any payment in September 1991. DFAS-Denver provided a copy of an LES for September 1991 which indicates that the service member did not receive a mid-month payment for September 1991. This confirms the lack of any reference on the final LES (January 1992) to any collection for such a payment in September 1991. We have attached this to the record. We also asked DFAS - Denver to verify whether the service member received any payment incident to his outprocessing, but it was unable to provide any additional pay records.

Discussion

Under 10 U.S.C. 2774, we may waive collection of erroneous payments of pay and allowances made to a member or former member if collection would be against equity and good conscience and not be in the best interest of the United States. The statute further provides that waiver cannot be granted if there is any indication of fraud, fault, misrepresentation or lack of good faith on the part of the member or former member. See 4 C.F.R. 91.5(b).

A condition precedent to waiving such a debt is the existence of an erroneous payment of pay and allowances. From the discussion above, it appears that the service member did not receive a mid-month payment in September; therefore, we cannot waive it. We are remanding this matter to DFAS to resolve this factual issue and credit the service member with \$1,456 if otherwise proper.

With respect to the mid-month payment in July 1991, we do not doubt that the service member received at least one mid-month payment of \$1,405, but we do not understand why such a payment is erroneous. The member was still on active duty on July 15, 1991, and should have been paid the mid-month July payment. We do not know whether the service member received any payment on the day of his release from active duty, July 19, 1991, including a duplicate payment of the \$1,405 for the first half of July or payment for his accrued leave. But, our review of the final LES and the erroneous July LES first issued to the service member suggest that he did not. Thus, because there are no LES or other official documents which indicate that there was a duplicate payment for the mid-month payment in July 1991, we will not consider it in our decision on the appeal of the waiver. If DFAS determines that the service member received a duplicate payment for the first half of July 1991, we can revisit this issue.

Having received a mid-month payment for July, and presumably nothing for accrued leave, the question remaining is what should the service member reasonably have expected to receive. The service member states in his appeal that he expected to receive payment for 30 days of accrued leave, but there is no basis for such belief. The LESs leading up to his discharge indicated that he had approximately 15 days of accrued leave, the hearing officer found that he was owed 15 days of accrued leave, and we see no dispute in the record concerning the proper amount of accrued leave. It is a rule of long standing that military members have a duty to verify the information on their LES. See DOHA Claims Case No. 97032501 (June 9, 1997). Thus, the service member should have expected, as a final payment, net pay for four additional days of active duty and 15 days of accrued annual leave (minus tax and allowances). It would not have been reasonable to expect that this amount would be the same as the normal end-of-month amount. When there was no activity until the end of July 1991, and then the service member's account was credited with the exact amount he would have received if he had continued on active duty, and the LES was typical of what it would have been if he had remained on active duty, the service member was, or should have been, alerted to an administrative mistake. Apparently, at some point, the service member called this mistake to the attention of pay officials. For the reasons already indicated in GAO's Settlement Certificate, the service member acquired no right to any money paid erroneously, and had the duty to return it. See Larry V. Brown, B-251935, Feb. 23, 1993.

We are not aware of any Army policy in 1991 which waived collection of all erroneous payments of pay and allowances. The Secretary of Defense has special statutory authority to waive collections of such a debt up to \$2,500, if such indebtedness, as determined by the Secretary, was incurred in connection with Operation Desert Shield/Storm.⁽⁵⁾ Not only did the service member fail to show that his debt was connected with Desert Shield/Storm, but more importantly, even if we limit the erroneous payments to the last 11 days of July 1991 and all of August, the total still exceeded the statutory limit of the special authority. Therefore, the debt involved was like any other application for waiver under the Comptroller General's authority.

Conclusion

Of the amount of \$7,180 of erroneous payments considered by the GAO, we believe for the reasons stated above that only \$4,319, representing the end-of-month payment for July 1991 and the two payments in August 1991, is appropriate for consideration at this time. With that modification, we otherwise affirm the GAO Settlement which denied waiver. We remand this matter to DFAS for a reconstruction of the service member's account and for further consideration as described herein.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. Settlement Certificate Z-2943465-050, August 13, 1996.
2. See also B-275605, March 17, 1997.
3. JUMPS-Army Leave and Earnings Statement (USAFAC Form 5267-R).
4. Block 6b of the final LES was the first indication of payment for accrued leave; blocks 8a-d involve erroneous payments for the entire month of August 1991; blocks 8f-i represent erroneous payments for the last 11 days of July 1991; and block 8j appears to be the tax on the accrued leave payment. Thus, it is not clear that the collection of \$1,456 at block 8e was correct.
5. See Pub. L. No. 104-61, Title VIII, 8052, 109 Stat. 636, 662 (1995).