

DATE: April 10, 1996

In Re:

[Redacted]

Claimant

Claims Case No. 97012159

CLAIMS APPEALS BOARD DECISION

DIGEST

A Navy member left the service before completing the term of service for which he had received a selective reenlistment bonus (SRB). Under an "early out" program, he received a special separation benefit at discharge and was erroneously advised that he would not have to repay the unearned portion of the SRB. Because the unearned portion of the SRB should have been collected from his final pay, the final pay is erroneous to the extent of the unearned portion of the SRB. Due to the erroneous information the member received about repayment of that amount, he was without fault in receiving his final pay, and his debt may be waived.

DECISION

This is in response to an appeal of the U.S. General Accounting Office's (GAO) Settlement Certificate Z-2943522-025, March 5, 1996, which denied a former Navy member's request for waiver of his debt in the amount of \$3,988.60 for the unearned portion of a selective reenlistment bonus he received from the Navy. Pursuant to Public Law No. 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 (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 before us indicates that the member received a selective reenlistment bonus (SRB) incident to reenlistment in the Navy. In April 1993, prior to completing the term of service for which he received the SRB, he was discharged voluntarily from the Navy pursuant to an "early out" program under which he was paid a special separation benefit.⁽¹⁾ Subsequent to the member's discharge, the Navy determined that he had received overpayments totalling \$2,737.02 due to administrative errors made in computing his final pay and paying him for active duty beyond the date of his separation from the Navy. The Navy also determined that he was in debt for the unearned portion of the SRB because he had not completed the term of service for which he received the SRB.

GAO accepted the recommendation of the Navy regarding the member's \$2,737.02 debt for the erroneous payments of pay he received and waived this debt under the authority provided by 10 U.S.C. 2774 to waive a claim "arising out of an erroneous payment" made to a member of a uniformed service, the collection of which would be against equity and good conscience and not in the best interest of the United States. As to the member's debt for the unearned portion of the reenlistment bonus, GAO also agreed with the Navy that this debt is not subject to waiver under 10 U.S.C. 2774, citing the Comptroller General's decisions holding that a debt arising from the requirement to repay the unearned portion of a reenlistment bonus does not arise out of an "erroneous payment" within the meaning of the waiver statute since the payment was proper when made.⁽²⁾

Through his attorney, the member appeals the determination regarding the unearned portion of the selective reenlistment bonus, arguing that this debt is subject to waiver because the unearned amount should have been collected at the time

the member was separated from the Navy by setoff against the special separation benefit he received in the amount of \$ 26,082.26 under the "early out" program. The attorney states that the member recognized at the time he was considering participating in the "early out" program that he would be separating from the Navy prior to completing the service for which he had received the SRB, and that in good faith he specifically raised the issue with several personnel responsible for addressing such matters on the ship to which he was then assigned, the U.S.S. Kalamazoo. These personnel repeatedly advised the member that, as part of the "early out" offer, the Navy was waiving any right it might have to seek refund of the unearned portion of the SRB, and it was only subsequent to his discharge and acceptance of the special separation benefit that the Navy advised him that the advice he received was incorrect and he would be required to refund the unearned portion of the SRB. The attorney argues that if the advice the member received was incorrect and the unearned portion of the SRB was required to be refunded, it should have been collected at the time of his discharge by setoff against other amounts payable to him, in particular the special separation benefit, from which it could have been collected in full. Thus, in effect, he argues that since this was not done, the payment to the member of the special separation benefit was erroneous to the extent that it should have been reduced to collect the unearned SRB and is therefore an erroneous payment subject to waiver under 10 U.S.C. 2774. In support of that argument, the attorney cites Comptroller General decisions Timothy Piekarski, B-261958, Nov. 8, 1995; James W. Parker, B-259696, Jan. 25, 1995; and Charles E. Raiford, Jr., B-254196, Dec. 23, 1993.

Discussion

The statutory authority for the SRB the member was paid is 37 U.S.C. 308, which requires that a member who voluntarily does not complete the term of enlistment for which the bonus was paid shall refund that percentage of the bonus applicable to the unexpired period for which it was paid. 37 U.S.C. 308(d)(1). It has long been held that an amount correctly and legally paid to a member in the form of a bonus as an incentive for him to remain on active duty may not later be considered an "erroneous payment" within the meaning of the waiver statute where the member becomes legally obligated to refund all or a part of the amount received because he does not complete the active duty commitment for which the payment was made. See Spc. Wayne Susumu Enomoto, B-180028, July 9, 1974; Thomas S. Miller, B-271951, Dec. 17, 1996; and decisions cited therein. Therefore, as GAO indicated, the requirement that a member refund the unearned portion of an SRB because he did not complete the term of service for which it was paid does not constitute a debt arising out of an erroneous payment subject to waiver under 10 U.S.C. 2774.

As the attorney asserts, however, it has been held that where the unearned portion of such a bonus is required to be collected by setoff against a member's final pay at time of discharge, and due to administrative error the final pay is paid without reduction for the amount to be collected, to that extent the final payment is erroneous and may be considered for waiver. In the case before us, such an erroneous payment appears to have occurred, since the member was paid the special separation benefit without setoff for the unearned portion of the SRB. The attorney states that prior to his separation the member repeatedly questioned whether he would be required to refund the unearned portion of the SRB and was advised that refund would not be required. Although the Navy later determined that this advice was erroneous, that determination was not made and communicated to the member until a substantial period of time after his discharge and receipt of the full special separation benefit. Since it appears to have been reasonable for the member to have relied on the erroneous information, we do not consider him to be at fault in receiving the erroneous payment, and we find that his debt otherwise qualifies for waiver.⁽³⁾

Conclusion

Accordingly, the member's debt in the amount of \$3,988.60, if otherwise correct, is waived.

_____/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Joyce N. Maguire

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. Authority for special separation benefits programs is provided by 10 U.S.C. 1174a.

2. The determination was further explained in GAO Office of General Counsel letter

B-272276, Oct. 1, 1996.

3. The waiver statute precludes waiver if there is an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member seeking waiver. 10 U.S.C. 2774(b)(1). In this situation, we find no such indication on the member's part in regard to his acceptance of the special separation benefit without setoff for the unearned portion of his SRB.