

In Re: [Redacted]

Claimant

DATE: June 6, 1997

Claims Case No. 97011409

CLAIMS APPEALS BOARD DECISION

DIGEST

Waiver of an indebtedness arising from erroneous payment of pay and allowances is appropriate when collection would be against equity and good conscience and not in the best interest of the United States but may not be exercised if there is an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the service member or employee. An individual is at fault if he/she knows or should know that a payment was erroneous and failed to set aside the overpayment for its eventual return to the government.

DECISION

, the service member, appeals the settlement of the U.S. General Accounting Office (GAO)⁽¹⁾ which disallowed his application of waiver of an indebtedness owed to the government because of erroneous payment of pay and allowances. 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 all of the authority transferred or delegated to the Secretary of Defense through this Board, which is part of DOHA.

Background

The record indicates that the service member retired due to disability on September 14, 1993, but that he received active duty pay and allowances through October 15, 1993.⁽³⁾ A debt of \$2,457.84 resulted from the erroneous payments involved. The service member filed an application for waiver of this indebtedness, and under title 10, United States Code, Section 2774 (10 U.S.C. 2774), the GAO agreed with the recommendation of the Defense Finance and Accounting Service (DFAS), Indianapolis Center, to allow \$137.73, but disallow \$2,320.11.⁽⁴⁾

The service member's spouse appealed on his behalf. Although she was not specific about the timing of these events, the spouse contends that her husband would not have known that he was receiving an erroneous payment of pay and allowances because he had received a disability retirement and had to deal with numerous operations and hospital stays. The service member's spouse also stated that it was a very confusing time in their lives and that they were primarily concerned about her husband's health. She pointed out that the paperwork was slower than the pace of events and suggests that the pay records were confusing even under normal circumstances for an educated person. She said that it was insulting for GAO and DFAS to conclude that her husband knew that he was overpaid for one month, and referred to language in the letters as accusatory.

Discussion

While GAO's and DFAS's correspondence was direct and business-like, we do not believe that either Agency intended anything accusatory. Some of the direct language about the service member's responsibility to review his pay voucher may stem from the statutory language itself which requires adjudicators to make a finding that there is no "indication of fraud, misrepresentation, fault, or lack of good faith" by the service member. See 10 U.S.C. 2774(b).

We appreciate the stress that the service member and his family may have experienced around the time of his discharge. However, the service member's immediate notification of DFAS and his state National Guard headquarters about the

erroneous overpayment was indicative of his attentiveness to his pay matters just after his retirement, as well as his professionalism and experience as a noncommissioned officer. The service member knew that there was a problem, and the Comptroller General's long-standing practices in this regard have recognized that persons receiving money erroneously paid by a government agency or official acquire no right to the money. An individual who should have known or did in fact know that a payment was erroneous has a duty to set aside the overpayment for its eventual return to the government. The service member is at fault if he does otherwise. Therefore, collection action of the erroneous payment is neither against equity and good conscience nor contrary to the interests of the United States. See Dennis R. Nix, B-249371.2, April 30, 1993; Commander Franklin D. Julian, USN, B-193367, Jan. 10, 1979, and Phillip W. cNany, B-198770, Nov. 13, 1980.

While this long-standing precedent set by Comptroller General may impose a hardship in some instances, overall it applies the waiver statute in an objective manner and balances the fiscal interests of the government with fairness to the individual.

Conclusion

We affirm GAO's Settlement.

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-2942933(025), dated October 19, 1995.
2. See also B-275605, March 17, 1997.
3. The administrative report of the Director of Debt and Claims Management, DFAS, Indianapolis Center, indicates that the service member received an end of month payment of \$1,777.75 at the end of September 1993, and a mid month payment of \$1,142.36 for the first half of October 1993. This report also notes that on October 5, 1993, the service member notified the both his state National Guard Command and DFAS Retired Pay Operations that he received an erroneous payment. See member's July 27, 1994, Application for Waiver (DA Form 4943-R).
4. The \$137.73 arose in connection with a miscalculation of the service member's final active duty pay.