

Date: February 18, 1997

In Re:

[REDACTED]

Claimant

Claims Case No. 97013103

CLAIMS APPEALS BOARD DECISION

DIGEST

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. Additional information provided on appeal regarding the member's understanding at the time the payments were received and supporting statements from his former counsel provide sufficient evidence that the member was not at fault in accepting the erroneous payments.

DECISION

This is in response to an appeal of the U.S. General Accounting Office's (GAO) Settlement Certificate Z-2927871-056, August 18, 1995, which denied waiver under 10 U. S. C. 2774 of \$1,473.94 of a service member's debt to the United States resulting from erroneous payments of allowances made by the Air Force during his incarceration at Lakenheath RAF Base, England, under a court-martial sentence. Pursuant to Public Law 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 and Budget (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 shows that by court-martial sentence adjudged on September 19, 1992, the member was sentenced to receive a bad conduct discharge from the Air Force, confinement for nine months, reduction in grade to airman basic, and forfeiture of all pay and allowances. By General Court martial Order dated December 1, 1992, the convening authority approved the sentence except that the forfeiture was reduced to a forfeiture of pay in the amount of \$523 per month for the nine months of confinement.

While the member was serving confinement at Lakenheath, the Air Force erroneously paid him basic allowance for quarters (BAQ), cost of living allowance (COLA), and overseas housing allowance (OHA) for the period September 19, 1992, to December 15, 1992, in the total amount of \$1,473.94.⁽¹⁾ The member subsequently requested waiver of the debt, stating that he believed that the reduction in the forfeiture provision in his sentence entitled him to receive the allowances, and that his defense counsel in the court-martial proceeding had so advised him. GAO denied the waiver request on the basis that the member could not have reasonably believed that he was entitled to such allowances while in confinement, and that he should have pursued the matter further, requesting written confirmation from responsible Air Force personnel. Since he did not do so, the Air Force concluded that the member was considered at least partially at fault in the matter, precluding waiver under 10 U.S.C. 2774.

In the appeal, the member indicates that although he now understands that he was not entitled to receive the allowances in question while in confinement, at the time he received them he believed he was entitled to them and had good reason

for that belief. In support of this position, the member refers to the specific provisions of the court-martial order, noting that the original sentence provided for "forfeiture of all pay and allowances," while the reduced sentence approved by the convening authority provided for "forfeiture of \$523.00 of pay per month." The member states that he believed that the intent of this change was to allow him to receive some of his pay plus the allowances as some measure of clemency and to help him provide for his 2- year-old daughter. The member also states that there should be considered the confusion, and legal and physical limitations placed on him at the time. With the appeal, the member provided a letter from the Air Force officer who served as his defense counsel at the time who writes in support of the request for waiver. In his letter, dated February 12, 1996, the former counsel states that things were frustrating and confusing for him and for the member in the weeks following the trial. He states that the finance office at the base where the member was assigned prematurely effectuated the forfeiture portion of the sentence prior to the convening authority acting, and that he worked with the member and Air Force finance and legal officers to have the member's pay reinstated for that period. He notes that contributing to the confusion were the facts that he was either traveling or working on other matters at a different base from where the member was in confinement, and the finance office was at a third location. He notes that it is particularly difficult for a person in confinement to have pay matters resolved, and that he

and the member were concerned about the member's young daughter being adequately supported at that time. Counsel states that these should be mitigating factors, along with no misrepresentation or ill intent on the member's part, that warrant favorable consideration of waiver in this case.

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. In the present case the erroneous payments were made as a result of administrative error in the finance office, and there is no indication of fraud, misrepresentation, or lack of good faith on the member's part in that regard. As to fault, the standard employed to determine whether a member was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person should have been aware that he was receiving payments to which he was not entitled. See Standards for Waiver, 4 C.F.R. 91.5(b)(1996); and Jeffrey S. Hopf, B-260184, Jul. 28, 1995.

In view of the additional information the member has provided regarding his understanding as to the change in the forfeiture provisions of his sentence, and the supporting statement from his former counsel, it does appear reasonable that the member believed he was entitled to the allowances. Therefore, we find that the member was not at fault in accepting the erroneous payments of BAQ, COLA and OHA in question, and that the debt for such payments in the amount of \$1,473.94, qualifies for waiver under 10 U.S.C. 2774.

Conclusion

The debt is waived.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member Claims Appeals Board

1. The member also received several lesser overpayments for which waiver was also found inappropriate in the GAO settlement, however, the member now indicates that he does not disagree with denial of waiver of those amounts, and they are not being given further consideration here.