

November 19, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 97072502

CLAIMS APPEALS BOARD DECISION

DIGEST

Since an agency may not initiate salary offset to collect a debt more than 10 years after the government's right to collect the debt first accrued, initiation of an offset to collect an employee's debt based on overpayments which arose in 1985 and 1986 is barred.

DECISION

This is in response to an appeal of the U.S. General Accounting Office's (GAO) Settlement Certificate Z-2917609-025, September 29, 1992, which denied in part a retired Army officer's request for waiver of a debt to the government. The debt arose when his retired pay was not reduced under the dual compensation law, 5 U.S.C. § 5532, when he accepted a position as a civilian employee of the United States government.⁽¹⁾ 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 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 member retired from the Army on October 1, 1985. On October 23, 1985, he accepted a position with the federal government. He completed the paperwork necessary to inform the Defense Finance and Accounting Service (DFAS) of his civilian employment, but DFAS did not begin to reduce his retired pay until arch 1, 1986, resulting in a debt of \$12,854.25. Because he had been advised by personnel officials that reductions would not begin until January 1, 1986, GAO waived the overpayments he received before January 1 (\$7,562.73) and denied waiver of overpayments received after that date (\$5,291.52). Although the record indicates that GAO sent a copy of the Settlement Certificate to the member, he states that he received no notice of the determination until May 1997, when DFAS contacted him regarding the debt.⁽²⁾ It appears that DFAS made no attempt to collect the debt during the intervening years. The member appeals GAO's determination in 1992, but he also argues that collection of the debt is barred by the passage of time.

Discussion

Under 10 U.S.C. § 2774, we may waive a claim for an overpayment of pay 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. Waiver cannot be granted if the member knows or reasonably should know that he is being overpaid. In such a situation, the member does not acquire title to the amount overpaid and has a duty to hold the overpayment for return to the government. See Colonel Leon K. Pfeiffer, USAF, Retired, B-236753, Feb. 24, 1992. Government regulations, however, preclude an agency from initiating salary offset to collect a debt more than ten years after the government's right to collect it first accrued. See 5 C.F.R. § 550.1106; and Kenneth E. Sullivan, B-232454, Sept. 1, 1989.

In our view, GAO properly waived the portion of overpayments the member received in 1985 because he had been

advised that dual compensation deductions from his retired pay would not begin until January 1986. GAO properly denied waiver of overpayments the member received in 1986. Because of the advice the member had received, he should have expected deductions to begin in January 1986.⁽³⁾ When there was no reduction at that time, he did not acquire title to the excess amounts he was receiving and had a duty to hold them for eventual repayment. We therefore affirm GAO's Settlement Certificate.

The record indicates that DFAS has not yet collected the overpayment from the member by offset from his pay. There is no indication in the record as to why DFAS did not contact the member for five years following GAO's determination in 1992. As noted above, under 5 C.F.R. § 550.1106 (1997), agencies cannot initiate offset to collect a debt more than ten years after the government's right to collect it first accrued.⁽⁴⁾ Since in this instance the government's right to collect accrued when the first overpayment occurred in 1985, collection by offset is barred.⁽⁵⁾

Conclusion

The Settlement Certificate is affirmed, but collection of the member's debt is barred.

_____/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. Under 5 U.S.C. § 5532(b), a retired officer of a regular component of a uniformed service who holds a "position" (defined in 5 U.S.C. § 5531) is entitled to receive the full pay for the "position", but his retired or retainer pay is to be reduced during the period for which he receives such pay by a formula specified in the statute. Section 5532(c) of title 5 of the United States Code limits the total compensation of a member or former member who is receiving retired or retainer pay and holds a "position" to the rate of basic pay for level V of the Executive Schedule.

2. The Settlement Certificate was sent to DFAS when it was issued in September 1992, and GAO's correspondence indicates that a copy was forwarded to the service member at his current address.

3. In Colonel Leon K. Pfeiffer, USAF, Retired, B-236753, supra, the Comptroller General held that the member should have known from the beginning of his civilian employment that he was being overpaid. In Admiral James D. Watkins, USN (Retired), B-235501, June 23, 1989, which the member cites, the Comptroller General held that the member believed that his pay was properly being reduced in accordance with the dual compensation statute because he had instructed his subordinates to see that the deductions were instituted, and he believed that his instructions had been carried out.

4. The exceptions 4 C.F.R. § 102.3(b)(3) referred to in 5 C.F.R. § 550.1106 do not apply in this situation.

5. As the member points out, in the absence of partial payment or acknowledgment of the debt, collection by judicial action of an overpayment to a member is barred unless the complaint is filed within six years after the right of action accrues. See 28 U.S.C. § 2415(d).

