
In Re:

[Redacted]

Claimant

DATE: July 10, 1997

Claims Case No. 97052730

CLAIMS APPEALS BOARD DECISION

DIGEST

A service member has no reasonable expectation of receiving pay and allowances once he is released from active duty on appellate leave pending discharge, especially when he received payment in cash for all remaining accrued leave and his service termination date (ETS) occurs shortly thereafter. In the absence of clear proof to the contrary, the service member is at least partially at fault for not questioning his receipt of pay and allowances after both of those events have occurred, and the collection of erroneous payments of pay and allowances made after these events would not be against equity and good conscience and would be in the best interest of the United States.

DECISION

, a former service member in the United States Air Force, appeals the U.S. General Accounting Office's (GAO) settlement which allowed waiver of \$1,266.26 and disallowed waiver of an additional \$934.64 due to the erroneous overpayment of active duty pay and allowances.⁽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 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 effective December 18, 1996. The Defense Office of Hearings and Appeals exercises the authority of the Secretary.⁽²⁾

Background

The Defense Finance and Accounting Service (DFAS) - Denver Center reports that the service member was held in pre-trial confinement (apparently pending court martial) from January 5, 1993 until April 4, 1993. On April 29, 1993, the service member departed on appellate leave, and he should have been in a non-pay status until the date of his discharge, November 1, 1994. The service member was due pay and allowances of \$2,269.72 for April 1-28, 1993, which included pay for 19 days of accrued leave. After normal deductions and a deduction for a forfeiture (\$126.46), the service member was due \$1,757.86. He received a mid-month April 1993 payment of \$421.37, leaving a balance due to him of \$1,336.49. The member received an end-of-month April 1993 payment of \$1,899.32, resulting in an erroneous overpayment of \$562.83. Thereafter, two allotment payments of \$60 each were erroneously released in May and June 1993, and deductions for Servicemen's Group Life Insurance (SGLI) for \$8 and .50 for the United States Soldier's Home were made in May 1993, increasing his indebtedness to \$691.33. Additionally, DFAS reports that the member erroneously received an erroneous mid-month May 1993 payment of \$634.93, an erroneous mid-month June 1993 payment of \$263.99, an erroneous end-of-month June 1993 payment of \$263.46, and an erroneous mid-month July 1993 payment of \$355.69. The erroneous nature of these payments is not in dispute. The record also indicates that the service member's term of service expired (ETS) on May 31, 1993.

DFAS found, and GAO agreed, that the service member acted in good faith in accepting pay until his ETS. The amount waived, \$1,266.26, represents amounts erroneously paid until his ETS. But, \$934.64 represents amounts received after ETS, and both agencies found that he should have questioned an amount he received after that date.⁽³⁾

On appeal, the service member contends that he received the whole amount in good faith, and if part of it was waived because he received it in good faith, then the additional \$934.64 should be waived. He contends that he was confused by all of the "deductions and fines" taken from his pay, and that he was not aware of the proper amounts that he should have received. He has contended elsewhere in the record that he was not aware of any overpayment until 1995.

Discussion

Our waiver authority, 10 U.S.C. 2774, applies to a claim against a person arising out of the erroneous payment of pay and allowances, the collection of which would be against equity and good conscience and not 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, former member or other person receiving the overpayment. See Standards for Waiver, 4 C.F.R. 91.5(b). The standard employed to determine whether a person was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving more than his entitlement. See Petty Officer Ricky Johnson, USN, B-256417, July 22, 1994; Captain Douglas K. Basiger, USAF, B-256600, July 14, 1994; Bryan E. Lippman, B-201816, July 8, 1981.

There is no indication of fraud, misrepresentation or lack of good faith by the service member with respect to most of his debt, but GAO and DFAS correctly found that the service member was at least partially at fault because a reasonable person would have questioned his entitlement to any pay and allowances once he had both left an active status to go on appellate leave and passed his ETS. We also note that the service member had been paid for all of his accrued leave prior to being placed in an excess leave status.

Conclusion

We affirm the Settlement Certificate.

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-2943938-025, June 28, 1996.
2. The legal basis of the transfer is further described in B-275605, Mar. 17, 1997.
3. The SGLI premium and the \$.50 for the Soldier's Home are not eligible for waiver.

