

DATE: September 16, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 97081831

CLAIMS APPEALS BOARD DECISION

DIGEST

A member who received Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA) after his divorce remained unaware of the erroneous payments until an audit in January 1996 showed a discrepancy in his records. The member was informed in January of the possibility that he was receiving erroneous payments. Waiver of the debt of amounts paid after he became aware that the payments might be erroneous is denied because he did not acquire title to the money he received and is obligated to return it.

DECISION

This is in response to an appeal of Claim Settlement, DOHA Claim No. 97052005, May 21, 1997, which allowed in part and denied in part, waiver of a debt of a member arising from erroneous payments.

Background

[Redacted] was receiving Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA) at the with-dependent rate. When he learned of the ay 30, 1995, effective date of his divorce, he notified the petty officer in charge of administrative matters for his detachment who apparently made the changes on local records. The member was advised that no pay changes would occur incident to the divorce because he was supporting his children.

The overpayment was not discovered until January 16, 1996, when the Defense Finance and Accounting Office (DFAS) in Pearl Harbor conducted an audit and discovered the discrepancy in the records. The member was informed at that time that he might have been overpaid. After the audit was completed the member was informed that he had been erroneously paid \$9,529.21 during the period between May 30, 1995, and February 23, 1996.

In its administrative report, DFAS-Denver noted that upon change of his marital status, the member properly contacted the appropriate petty officer. Since it was reasonable for him to rely on the expertise of the administrative personnel to advise him of his entitlement, DFAS considered that he acted in good faith in accepting the payments he received through December 31, 1995. However, DFAS states that since the member became aware of the overpayment on or about January 16, 1996, he reasonably should have expected to refund any monies erroneously received after December 31, 1995. DFAS thus recommended, and our Office agreed, to waiver of \$7,486.64 and denial of waiver of \$2,042.57. The member appeals our Settlement Certificate, requesting full waiver or in the alternative, either increasing the amount of waiver to include the amounts paid until January 22, 1996 (the date he was notified of the possibility of an overpayment) or until February 19, 1996 (the date he was officially notified of the overpayment.)

Discussion

Section 2774 of title 10 of the United States Code provides authority for waiving claims for erroneous payment of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria are met by a finding that the claim arises from an administrative error with no indication of fraud, fault, misrepresentation or lack of good faith on the part of the member or any other person having an interest in obtaining the

waiver. 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; and DOHA Claims Case No. 97052730 (July 10, 1997). A service member who knew that he was receiving payment in error has the duty to retain such amounts for refund. A service member is not entitled to waiver as a matter of right whenever he receives an overpayment as a result of an administrative error. See DOHA Claims Case No. 97012103 (June 26, 1997).

In the Settlement Certificate, our adjudicators agreed the member acted in good faith in accepting the overpayment totaling \$7,486.64, which was paid prior to January 1996, since all the conditions necessary for waiver of that portion of the claim were met. We agree. On appeal, the member emphasizes that he was not aware of the possibility that he was being overpaid until January 22. The Settlement determination was based on the member's waiver request statement of May 1996 that he was notified "the week of 16 January 1996". We note that Item 21 of the August 1996 Waiver/Remission Application states the member was first notified by telephone on January 22, 1996. Because the member was paid twice a month, the date he first became aware is important considering the equitable nature of a waiver. Because he received notice a week after receiving his first January 1996 paycheck, waiver of the overpayment through January 15 is appropriate.

The member should have pursued the matter further after the January 22 notification and set aside the money to repay the debt. Thus, waiver of the amount received after his first January paycheck is denied.

Conclusion

We modify the Settlement Certificate to waive the erroneous overpayments made through January 15, 1996.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board