

DATE: November 6, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 97102801

CLAIMS APPEALS BOARD DECISION

DIGEST

Upon separation in mid-September, a service member received appropriate separation pay. Subsequent payments of end-of-September and mid-October pay were erroneous. Service member should have questioned his entitlement to these payments and set aside the amounts for eventual return to the government. The service member is considered at fault for not questioning his entitlement. Waiver is denied.

DECISION

A former Staff Sergeant in the United States Army appeals the Settlement Certificate this Office issued on September 26, 1997, in DOHA Claims No. 97091712, in which we denied his application for waiver of an erroneous payment of pay and allowances totaling \$2,192.60. [\(1\)](#)

Background

The record indicates that the member was separated from the Army on September 16, 1994, and was paid through his separation on September 15, 1994, in the amount of \$960.28. After his separation, he received September end-of-month and October mid-month pay for a total

of \$2,192.60. The Settlement denied waiver of this amount stating that the member should have questioned his entitlement to receive these payments.

On appeal, the service member disputes our statement that he should have questioned his agency, stating that he called the Defense Finance and Accounting Office (DFAS) toll-free number to determine the nature of the debt after receiving notifications of the debt in January 1996 and subsequent months. He contends that because the overpayment was the result of an administrative error on the part of DFAS, DFAS violated its regulations by not automatically waiving the debt. In addition, he argues that a refund of \$467.94 in withholdings is due him for September and October 1994 and should be applied to his debt, and he questions the clothing allowance reflected in his Leave and Earnings Statement. Additionally, the service member seeks proration of his indebtedness if waiver is denied on appeal.

Discussion

We may grant waiver of a debt arising out of an erroneous payment of pay and allowances to service 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. See 10 U.S.C. § 2774 (1995). In the present case, the erroneous payment was made as a result of administrative error, and there is no indication of fraud, misrepresentation, or lack of good faith on the service member's part in that regard.

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); DOHA Claims Case No. 97013104 (March 20, 1997); and Jeffrey S. Hopf, B-260184, July 28, 1995. We have consistently held that when a

member knows or reasonably should know he is receiving pay in excess of his entitlement, he has a duty to retain such amounts for subsequent refund to the government.

In the present case, the service member is, at the least, partially at fault. After having received appropriate separation pay on September 15, he should have known that he was not entitled to receive end-of-September and mid-October payments. He should have questioned the payments when they were made. On appeal, the service member argues that he did question his agency; however, he questioned the debt notice, not the payments themselves. There is no evidence in the record that the service member questioned the payments in October 1994.

In any event, it is evident by the actions taken by the service member that he knew that there was a problem with the payments he received, and the Comptroller General's long-standing rules 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; and DOHA 97011409 (June 6, 1997). The service member's concerns about DFAS's processing of his debt and resulting miscommunications, as well as his question about the proper clothing allowance, should be addressed to DFAS. In any event, such problems do not automatically relieve the member of his debt nor mitigate his responsibility to repay the erroneous overpayment under the waiver statute.

A member is indebted for the gross amount of an erroneous overpayment. Although the member does not receive directly all monies which he is indebted to repay, the taxes and other amounts were withheld on his behalf, and this withholding does not reduce the amount of his indebtedness. See Charles R. Ryon, Sr., B-234731, June 19, 1989, and decisions cited therein. The service member should contact the Internal Revenue Service for information concerning adjustment of his tax liability as the result of making repayment of the overpayments he received. See Amadeo Martinez, Jr., B-261628, June 13, 1996, and decisions cited therein. If DFAS is able to directly recoup amounts withheld for the member, such as life insurance, Medicare, states taxes, or other benefits, then the amount of indebtedness owed by the member may be diminished accordingly. Finally, the member should contact DFAS with his request concerning his ability to repay the debt in installments.

Conclusion

We affirm the Settlement Certificate.

/s/

Christine M. Kopocis

Acting Chairman, Claims Appeals Board

/s/

Michael H. Leonard

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. Waiver was granted for an overpayment of \$140.53 which resulted from a miscalculation of pay during the period April 1994 through September 1994. Waiver of this amount is not in dispute in this appeal.