

DATE: January 15, 1998

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In Re:

[Redacted]

Claimant

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Claims Case No. 97120901

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Collection of erroneous payments is neither against equity and good conscience nor contrary to the interests of the United States when a National Guard member who was experiencing problems with his pay account from the beginning of his tour of duty received erroneous payments during his tour.

### DECISION

[Redacted], a member of the Army National Guard, appeals the decision of the Defense Office of Hearings and Appeals (DOHA), which disallowed his request that the government waive the debt he incurred as a result of the erroneous payment of \$3,144.00 of pay and allowances that he received in June 1994 while on active duty.

### Background

The record shows that the member was called to active duty for special work at the National Guard Bureau from March through August 1994. According to the record, there were problems with the member's pay from the beginning of his tour. As a result, the member's check dated April 19, 1994, was recalled from the bank to settle casual payments he received on April 5, 1994, and on April 15, 1994. He still had a debt balance due for the casual payments, in the amount of \$1,115.04. DFAS withheld \$1,107.85 on his May 31, 1994, Leave and Earnings Statement (LES) and \$1,097.18 on his June 15, 1994, LES. He was then due an adjustment of \$1,089.99 for an over-collection. This was refunded on his July 20, 1994, LES. Both in May and June, the member questioned the local finance officer as to why withholdings were being made. In both instances, the finance officer made casual payments to the member in the amount of the withholdings stating that the refund would correct an error generated by DFAS due to problems in loading him into the pay system early in his active duty tour. The casual payments the member received in June, totaling \$3,144.00, were collected in August 1994. The member claims that holding these collections to within 30 days of the end of his tour of duty caused such enormous collections to be made that his ability to support basic needs such as food and shelter was severely impaired.

The administrative report states that the member was aware that discrepancies existed in his pay and this should have given him more reason to review his payments very carefully. DFAS contends that the member should have compared what he received and what he should normally receive. Since some of the payments were casual payments, he should have kept track of them and ensured they did not exceed his normal pay entitlement. DFAS determined that the member's failure to keep track of all payments he was receiving and compare the amount to his monthly entitlement makes him partially at fault in the matter, which statutorily precludes favorable waiver consideration.

The member contends that he could not have reasonably known that the two casual payments in June would constitute an overpayment. In the member's August 28, 1996, memorandum to DFAS-Denver, he states that the finance officer issued a casual payment to replace the collection he questioned without benefit of researching the issues or contacting DFAS to determine the validity of the collections. The member acknowledges that if the finance officer had properly researched these pay issues, it would have been determined that these were legitimate collections recouping prior casual payments.

Our Settlement Certificate denied the member's request for waiver concluding that he was partially at fault. We held that having received payments in excess of \$6,000 in June 1994, the member should have known that he was receiving pay in excess of his proper entitlement.

On appeal, the member restates his contention that there was an atmosphere of total confusion relative to the status of his military pay account during the entire time he was on active duty. He contends that the facts concerning this matter have consistently been ignored or misrepresented and questions how DoD determined that he reasonably should have known the June casual payments constituted an overpayment. The member does not provide a different set of facts for consideration but suggests the actions of the local finance officer constituted flagrant discrimination against a National Guardsman and were fraudulent. He relates the undue hardship caused by the collection of the entire \$3,144.00 in the last 45 days of his active duty tour.

### **Discussion**

Our waiver authority applicable to members of the National Guard, 32 U.S.C. § 716, applies to, among others, a claim against a member arising out of an erroneous payment of pay or allowances, the collection of which would be against equity and good conscience and not in the best interest of the United States. Waiver cannot be granted if there is any 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 member was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving more than his entitlement. See Standards for Waiver, 4 C.F.R. § 91.5(b) (1996); DOHA Claims Case No. 97062629 (July 17, 1997) and cases cited therein. 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 member is at least partially at fault. The member knew that there was a problem with his pay account from the beginning of his tour. Whether this knowledge was based on having been told by an appropriate official or on his reasonable expectation of his entitlements is of no consequence. During the period of time when DFAS was attempting to reconcile his account, the member should have been careful to compare what he expected to be paid with what he was receiving both through his paycheck and through casual payments. Until his account was fully reconciled, he could reasonably expect that the government would pay him any moneys due him and equally expect to have to repay any overpayments that might have been paid him. He had no legal right to keep overpayments which occurred while the problems were being reconciled, even though reconciliation apparently took until almost the end of his tour of duty. We acknowledge that the member might not have known at the time that the June casual payments were made that they were erroneous; however, for purposes of the waiver statute we must look at the totality of the circumstances of the member's pay account.

The Comptroller General's long-standing rule in this regard recognizes 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 in this case 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 Claims Case No. 97011409 (June 6, 1997).

The member's concerns about the conduct of DFAS's processing of his pay account should be addressed to DFAS. Additionally, a personal or family financial hardship is no basis for waiver. See DOHA Claims Case No. 97071007 (July 21, 1997) and cases therein.

### **Conclusion**

We affirm the Settlement Certificate.

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Michael D. Hipple

Chairman, Claims Appeals Board

\_\_\_\_/s/\_\_\_\_\_

Christine M. Kopocis

Member, Claims Appeals Board

\_\_\_\_/s/\_\_\_\_\_

Jean E. Smallin

Member, Claims Appeals Board