

March 12, 1998

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In Re:

[Redacted]

Claimant

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Claims Case No. 98020428

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Over two months after discharge, a former National Guard member received an unexplained payment by direct deposit to her bank account. Waiver under 32 U.S.C. § 716 is precluded since the member is partially at fault for receiving payment in excess of her entitlement without bringing the matter to the attention of the proper authorities. Because a reasonable person would verify her bank balance, stated lack of knowledge of the deposit does not provide a basis for waiver.

### DECISION

This is in response to an appeal of DOHA's Settlement Certificate, DOHA Claim No. 97110601, November 26, 1997, which denied in part the waiver request of a former National Guard member. The debt arose when she received an overpayment for active duty served in August 1995 and an unexplained payment in February 1996, over two months after her discharge.

#### Background

The member served on active duty from August 7-16, 1995. For that duty she was entitled to \$483.09, but was paid \$664.73, an overpayment of \$181.64. Although she was discharged on December 18, 1995, \$549.61 was deposited in her bank account on February 23, 1996. We waived repayment of the \$181.64 on the grounds that the member may not have been aware of the exact amount to which she was entitled and therefore may not have been aware that she was overpaid at that time. We denied waiver of repayment for the \$549.61 she received in February 1996 because she had been discharged for over two months when the money was deposited and should have been aware that she had received a payment that was at least questionable. The member states that she was not aware of the deposit to her account until she received a W-2 in early 1997. She also questions the fact that the debt is the gross amount of the overpayment rather than the net amount which was sent to her bank.

#### Discussion

Under 32 U.S.C. § 716, we may waive a claim of the United States against a member or former member of the National Guard for erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. Waiver cannot be granted if there exists any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. The standard we employ in determining whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving more than his entitlement. See Susan J. Carroll, B-252672, Sept. 20, 1993; Petty Officer First Class Patrick K. Reedy, USN (Retired), B-257862, Jan. 17, 1995. In both those cases, the member received an unexplained deposit to his bank account after discharge. In both cases, the Comptroller General said that a reasonable person would have been aware of the deposit to his account and therefore the member was partially at fault when he received money to which he was not entitled without questioning it.

When a member is overpaid, the correct amount of the debt is the gross amount of the overpayment rather than the net amount. This is because the amounts withheld for federal and state income tax withholding and other authorized

deductions are paid to the Internal Revenue Service and other entities on behalf of the member. DOHA and the Comptroller General have held that if the Defense Finance and Accounting Service cannot retrieve such amounts on behalf of the member, the member is responsible for them. See DOHA Claims Case No. 97050502 (July 23, 1997).

In the present situation, the member received a direct deposit to her bank account over two months after she was discharged. As stated in the Settlement Certificate, the member should have questioned her receipt of an unexplained payment after discharge and held it for return to the government.<sup>(1)</sup> The member states that she was unaware of the deposit until she received a W-2 for the payment in early 1997. Since a reasonable person would have been aware of her correct bank balance and would therefore have been aware of the unexplained payment, the member is partially at fault in the matter, and waiver is precluded. See Susan J. Carroll, B-252672, supra; Petty Officer Patrick K. Reedy, B-257862, supra. She is responsible for the gross amount paid to her. See DOHA Claims Case No. 97050502, supra.

### **Conclusion**

We affirm the Settlement Certificate.

/s/

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Michael D. Hipple

Chairman, Claims Appeals Board

/s/

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Christine M. Kopocis

Member, Claims Appeals Board

/s/

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Jean E. Smallin

Member, Claims Appeals Board

1. While the member calls our attention to phone calls she made to financial authorities in February 1996, she states elsewhere that she made the calls because she had not received a W-2 in January 1996.