

June 25, 1998

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In Re

[Redacted]

Claimant

Claims Case No. 98033023

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## CLAIMS APPEALS BOARD DECISION

### DIGEST

A member received pay and allowances while in confinement. Waiver under 10 U.S.C. § 2774 is not appropriate since he knew or should have known that he was receiving amounts to which he was not entitled.

### DECISION

This is in response to an appeal of DOHA's Settlement Certificate, DOHA Claim No. 97072108 (February 17, 1998), which denied the request of a former Air Force member for waiver of erroneous payments of pay and allowances he received while in confinement.

#### Background

The record indicates that the member was in confinement from November 25, 1995, through March 4, 1996, when he was discharged. Although he was in a non-pay status, he continued to receive pay and allowances through direct deposit to his bank account. The total amount of erroneous payments received (including tax withholding and life insurance premiums) was \$7,348.99. The Defense Finance and Accounting Service (DFAS) was not aware of the full extent of the debt at the time of his discharge, and therefore he was only required to repay \$1,170.78 at that time. DFAS discovered the debt balance of \$6,178.21 (\$7,348.99 minus \$1,170.78) and notified the former member in July 1996. The member states that he was not receiving leave and earnings statements or bank statements during his incarceration and that his mother was handling his affairs under a power of attorney.

#### Discussion

Under 10 U.S.C. § 2774, we may waive a claim of the United States against a member or former member of the uniformed services 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 or former member was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving more than his entitlement. See Jeffrey S. Hopf, B-260184, July, 28, 1995; Petty Officer First Class Patrick K. Reedy, USN (Retired), B-257862, Jan. 17, 1995; Petty Officer Ricky Johnson, USN, B-256417, July 22, 1994.

In the case before us, the member was not receiving leave and earnings statements or bank statements, but his mother, who was acting on his behalf and taking care of his affairs, was aware that pay was being deposited in his account. The member knew or should have known that she was paying his obligations from those deposits. The member states that it was reasonable for him to believe that he was properly in receipt of pay while in confinement because his mother was advised by his superiors that payment was correct. However, DFAS points out that the member was in confinement earlier in 1995<sup>(1)</sup> and did not receive pay during that period except for the first few days before the fact of his

confinement had been entered in the computer system. The member therefore should have known that payment during the second period of confinement was at least questionable, and repayment of the amounts erroneously paid is not against equity and good conscience.

The fact that the member's mother received erroneous information from his superiors does not provide a basis for waiver, since the government is not liable for the erroneous or negligent acts of its officers, agents, or employees, See Petty Officer John R. Blaylock, USN, 60 Comp. Gen. 257 (1981).

**Conclusion**

We affirm the Settlement Certificate.

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

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. May 19, 1995, to August 16, 1995.