

DATE: May 22, 1998

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In Re:

[Redacted]

Claimant

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Claims Case No. 98051311

## CLAIMS APPEALS BOARD DECISION

### DIGEST

When a former service member erroneously continues to receive active duty pay after retirement, his request to waive the debt of repayment of these amounts is denied because he does not acquire title to the money he receives and is obliged to return it.

### DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 98021704, March 30, 1998, which denied waiver under 10 U.S.C. § 2774 of \$1,803.36 of a service member's debt to the United States resulting from erroneous payments of active duty pay subsequent to the member's retirement made by the Navy.

#### Background

The record indicates that the service member was retired on November 30, 1996. His indebtedness occurred when active duty direct deposit payments were issued on December 13 and December 31 in the amounts of \$1,305.90 and \$1,305.89, respectively. Miscellaneous credits reduced the overpayment to \$1,803.36.

After his retirement, the member did not expect any payments from the government until January 1, 1997. When the member received the December 13 payment, which was similar to his active duty pay, he immediately notified the appropriate finance official of the error. He was informed that the Defense Finance and Accounting Service (DFAS) - Cleveland Center would audit his final pay and then deduct any erroneous payments from his retainer pay. The member's retainer pay was delayed by approximately 2 months, until February 1997. He did not earn sufficient pay and allowances to fully liquidate the debt. The DFAS - Denver Center and our Settlement Certificate denied the member's request for waiver stating that when a member knows he is receiving pay to which he is not entitled, he has a duty to set aside the erroneous funds for subsequent refund to the government. Under such circumstances, collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interest of the United States.

On appeal, the member requests waiver of his debt as a result of the administrative error and questions how he was supposed to know how much money to retain for eventual return to the government when even his former finance office was not aware of the exact amount. The member in essence contends that the Standards for Waiver require that an individual who owes a debt to the United States must be able to calculate an exact amount of the debt in order to be held responsible for retaining the overpayment for eventual return to the government.

#### Discussion

Under 10 U.S.C. § 2774, we may waive collection of erroneous payments of pay and allowances made to a member or former member if collection would be against equity and good conscience and not in the best interest of the United States. The statute further provides that waiver cannot be granted if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In the present case, the erroneous payments were

made as a result of administrative error and there is no indication of fraud, misrepresentation, or lack of good faith on the 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) (1997); and DOHA Claims Case No. 97011403 (April 18, 1997). We have consistently held that when a member knows or reasonably could be expected to know he is receiving pay in excess of his entitlement, he has a duty to retain such amounts for subsequent refund to the government even when the cause of the error or the exact amount of the erroneous payment has not been determined. See Anthony Sideris, B-259124, Feb. 23, 1995. 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); and DOHA Claims Case No. 97090810 (October 1, 1997).

The member knew he was not entitled to active duty pay after his retirement. Additionally, he acknowledges in his December 15, 1997, letter to the DFAS Waivers and Remissions Branch that he was fully aware that the government would seek repayment of erroneous payments. When a service member is preparing to retire, the member can approximate the amount of pay he should receive in retirement. The member in this case should have held a reasonable sum - at the minimum, subtracting the approximate retainer pay he anticipated from the overpayments received - for eventual return to the government. We appreciate his frustration with the administrative error that caused him to receive the December overpayments and delayed his retainer pay until later in February, but these are not basis for waiver. For purposes of waiver, the member is considered at least partially at fault in that he reasonably should not have expected to retain full active duty pay in December. The member did not acquire title to the overpayments he received and is obligated to return them.

### **Conclusion**

We affirm the Settlement Certificate.

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/s/

Michael D. Hipple

Chairman, Claims Appeals Board

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/s/

Christine M. Kopocis

Member, Claims Appeals Board

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/s/

Michael H. Leonard

Member, Claims Appeals Board