

DATE: May 6, 1998

In Re:

[Redacted]

Claimant

Claims Case No. 98042306

CLAIMS APPEALS BOARD DECISION

DIGEST

When a National Guard member is aware that he has received erroneous payments, he cannot reasonably expect to retain the overpayments, but must set them aside for eventual repayment when the error is corrected.

DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate DOHA Claim No. 98022608, dated February 27, 1998, which denied waiver under 10 U.S.C. § 2774 of a portion of a National Guard member's debt to the United States resulting from erroneous payments of pay and allowances.

Background

The record indicates that the member believed he would remain on active duty until the end of August 1997. On August 21, 1997, he was notified that he had been separated effective July 31, 1997. The member received direct deposit system payments of \$1,655.16 dated August 15, 1997, and \$1,655.14 dated August 31, 1997. He also received a \$900 allotment on August 31, 1997; however, credits due of \$266.93 reduced the overpayment to \$3,943.37. The error was discovered by DoD in October 1997.

The Settlement Certificate found that the member acted in good faith in accepting the August 15 overpayment of active duty pay and this portion of the debt was waived. The remainder of the debt, \$2,288.21, was not waived after a finding that the member should have questioned his entitlement to receive the savings allotment and end-of-month pay for August 1997 once he was notified on August 21 of his separation effective July 31.

On appeal, the member provides evidence that he did question his entitlement to end-of-month pay and the allotment that was going to his mortgage institution. There is also evidence that he initiated a pay inquiry to the pay office and evaluation of his status. The employee was told on August 22, 1997, by National Guard Headquarters that his requested paperwork to cut off these payments was submitted too late by the personnel office; it was after the date and time for the closing of all pay actions for August to the Defense Finance and Accounting Service (DFAS). As a result of his actions and conversations with National Guard officials, however, the member acknowledges that he did not expect the end of month payment.

Discussion

Under 32 U.S.C. § 716⁽¹⁾, 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 is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. See Standards for Waiver, 4 C.F.R. § 91.5(b). The long-standing rule recognizes that persons receiving money erroneously paid by a government agency or official acquire no right to the money. When a member is aware that a payment was erroneous, he cannot expect to retain the money. Rather he has a duty to set aside the money for eventual return to the government. In such a situation, collection is not against equity and good conscience and is in the best interest of the United States. See DOHA

Claims Case No. 97031009 (July 18, 1997) and DOHA Claims Case No. 97120901 (January 15, 1998).

In the present situation, the member acknowledges that he immediately questioned his entitlement to end-of-month pay and the allotment for August. He correctly raised this question on August 21 when he was told that his separation was effective July 31 and the next day when he went to the National Guard headquarters. While we appreciate the member's diligence in questioning his entitlements and attempting to ensure that he would not receive erroneous payments for August, and recognize the administrative process that did not permit his attempts to eliminate the end-of-month payments, these are not bases for approval of waiver. Waiver is precluded because he was aware that the payments were erroneous and thus had a duty to set the overpayments aside for repayment.

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. Previous actions in this case were taken under 10 U.S.C. § 2774, the waiver statute applicable to members of the Uniformed Services; but it appears that 32 U.S.C. § 716 is more appropriate for the waiver of a debt of this National Guard member. We note that the Standards for Waiver in 4 C.F.R. Part 91 apply to both statutes, as well as to 5 U.S.C. § 5884, the waiver statute applicable to civilian employees.