

July 28, 1998

In Re:

[Redacted]

Claimant

)

Claims Case No. 98051107

CLAIMS APPEALS BOARD DECISION

DIGEST

Under 10 U.S.C. § 2774, when a member is aware that he is receiving payments to which he is not entitled, he does not acquire title to those payments, and he has a duty to hold the money for eventual repayment. In such circumstances, waiver is not proper.

DECISION

This is response to an appeal of DOHA's Settlement Certificate, DOHA Claim No. 98011503, February 5, 1998, which denied in part the waiver request of a former Army member. The former member's debt arose when he was overpaid due to confusion caused by delay in the initiation of his active duty pay and when he continued to receive active duty pay after his discharge. Out of a total overpayment of \$6,635.26, we waived \$2,360.01 and denied waiver of \$3,602.42. An additional \$672.83 cannot be considered for waiver because it was not an erroneous payment.

Background

The former member states that he was on active duty from December 1984 until December 1987 and then entered the Reserves. He reentered active duty on October 2, 1991, and was discharged January 6, 1992. The member states that he did not begin to receive pay and allowances on a regular basis when he first reentered active duty, although it appears that he received retroactive payments in December 1991 and had also received two casual payments totaling \$1,646 and advance pay of \$672.83. The retroactive payments in December did not take into account the casual payments and the advance pay the member had received. The pay to which the member was entitled for January 1-6 was less than the amount of deductions which were required. Although the member was discharged on January 6, 1992, he received a deposit of \$611 to his bank account on mid-month payday in January. In February 1992, he began receiving deposits on mid-month and end-of-month paydays. Between February 1 and May 15, 1992, he received \$3602.42 in erroneous payments. Because of the delay and confusion surrounding his pay, the member believed that he was entitled to the \$611 he received on mid-month payday in January. When payments resumed in February, he suspected an error and attempted to have the payments stopped. He states that he set an amount aside for repayment. He indicates that he received notice of a debt in the amount of \$1,760.95. After he repaid that amount, he did not retain the balance of the amount he had set aside. After he received notice of the debt at issue here, he learned that the \$1,760.95 was for recoupment of an enlistment bonus for which he did not perform the required period of service and that he was still indebted for the overpayments which occurred prior to his discharge, the advance pay, and the erroneous payments he received after his discharge.

Due to the confusion concerning the member's pay, in the Settlement Certificate this Office waived the overpayments of \$2,360.01 which occurred prior to his discharge, plus the \$611 he received in mid-January. Waiver was denied for the \$3602.42 he received from mid-February through mid-May; the \$672.83 he received in advance pay cannot be considered for waiver because it was not an erroneous payment. The former member argues that his debt should be waived because it was the result of administrative error and because he acted properly in attempting to stop the erroneous payments he was receiving after his discharge.

Discussion

Under 10 U.S.C. § 2774, this Office may waive claims of the United States against members or former members of the United States only when collection would be against equity and good conscience and not in the best interest of the United States and there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member or anyone else having an interest in obtaining the waiver. If the member knew or should have known that he was receiving money to which he was not entitled, waiver is not appropriate. In such a situation the member does not acquire title to the money and has a duty to hold the overpayments for eventual repayment. See DOHA Claims Case No. 98040118 (July 6, 1998)⁽¹⁾; and Philip W. McNany, B-198770, Nov. 13, 1980. The fact that a debt occurred as a result of administrative error does not by itself entitle a member to waiver, particularly where the member is aware that he is receiving payments erroneously. See Master Sergeant Haywood A. Helms, USAF, B-190565, Mar. 22, 1978.

In the present case, waiver of the erroneous amounts the member received through mid-January 1996 was proper (except for the advance pay of \$ 672.83) because the member had not received pay on a regular basis since he returned to active duty and did not know how much to expect when he received retroactive pay in December. The \$2,360.01 which was waived is the net amount of the member's debt through mid-January--the amounts he received through that date (except for the \$672.83) minus his entitlements. Waiver is not proper for the \$3,602.42 the member received from mid-February through mid-May. The payments resumed on mid-month payday in February and occurred on normal military paydays. The member states that he was aware that those payments were erroneous and took steps to halt them. While we agree that the member acted properly, our prior decisions and those of the Comptroller General indicate that when a member knows he is receiving erroneous payments he does not acquire title to the money and has a duty to return it when asked to do so. See DOHA Claims Case No. 98040118, supra; and Philip W. McNany, supra. The former member states that after he repaid \$1,760, which he later learned was recoupment of a bonus for which he had not served the required amount of time, he believed that he had discharged his repayment duty. However, the record contains a memo which should have put him on notice that he would have to repay a bonus if he had received one, and we note that the amount he received between February and May was over twice the bonus amount. The advance pay of \$672.83 cannot be considered for waiver because it was correct when issued. See Steven G. Dodge, B-244977, Mar. 23, 1992.

Conclusion

We affirm the Settlement Certificate.

/s/ _____

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ _____

Michael H. Leonard

Member, Claims Appeals Board

/s/ _____

Jean E. Smallin

Member, Claims Appeals Board

1. The principles governing waiver under 5 U.S.C. § 5584 are the same as those for 10 U.S.C. § 2774.