
In Re:

[Redacted]

Claimant

)

Claims Case No. 98051810

CLAIMS APPEALS BOARD DECISION

DIGEST

Member who received overpayments when her pay was not reduced in accordance with her court-martial sentence is considered partially at fault and cannot have the debt waived under 10 U.S.C. § 2774.

DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 98033002, April 29, 1998, which denied waiver under 10 U.S.C. § 2774 of \$1,375.13⁽¹⁾ of a former member's debt to the United States resulting from erroneous payments received incident to her military service.

Background

The record indicates that the member was tried by a special court martial on December 1, 1993, and was awarded a bad conduct discharge, reduction in grade from an E-5 to an E-1, and forfeiture of 2/3 of her pay for a period of 6 months. On January 14, 1994, the convening authority approved and ordered executed a forfeiture of \$514 pay per month for six months and reduction to the grade of Private, E-1.⁽²⁾ Due to an administrative error, however, the Defense Finance and Accounting Service (DFAS) failed to reduce the member's pay. As a result, the member was overpaid \$1,375.13 from January 14, 1994, through March 30, 1994.

The Settlement Certificate denied waiver stating that the member was aware that the court-martial sentence included a reduction in grade and forfeiture of pay; and, therefore, should have questioned the accuracy of her pay. On appeal, the member states that following her court martial there was confusion as to her disposition, but on several occasions she did question her pay and allowances. She states that she was advised that nothing could be done until the convening authority approved the court-martial sentence. Additionally, she explains the hardship caused by having to pay the debt.

Decision

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 by the member or former member. See Standards for Waiver, 4 C.F.R. § 91.5(b). The standard employed to determine 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 Petty Officer Ricky Johnson, USN, B-256417, July 22, 1994.

In this case, the administrative report indicates that the member knew of the court-martial sentence which included a forfeiture of pay and reduction in grade. In our opinion, there is reasonable basis for DFAS's determination, as the member was on the distribution list to receive a copy of Special Court-Martial Order #2, dated January 14, 1994.

Additionally, the member acknowledges asking about her pay and allowances after the court-martial sentence. The member knew that there was a problem with her pay, and the long-standing practice in this regard has recognized that a person receiving money erroneously paid by a government agency or official acquires no right to the money. An individual who should have known or did in fact know that a payment was erroneous has a duty to set aside the overpayment for its eventual return to the government. The service member is at fault if she does otherwise. Therefore, collection of the erroneous payment is neither against equity and good conscience nor contrary to the interest of the United States. See Dennis R. Nix, B-249371.2, April 30, 1993; and DOHA Claims Case No. 97011409 (June 6, 1997). Also, financial hardship is not a basis for waiver. See DOHA Claims Case No. 97041401 (June 26, 1997).

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. The Settlement Certificate waived an additional \$607.74 the member owed the government as a result of having insufficient funds to cover allotments she received in March 1994.

2. The bad conduct discharge was not executed until appellate review was completed in 1995. See 10 U.S.C. §§ 860 and 871. The Army Discharge Board later granted clemency and granted partial relief by changing the type of discharge to General, Under Honorable Conditions.