

DATE: August 10, 1998

In Re:

[Redacted]

Claims Case No. 98060117

CLAIMS APPEALS BOARD DECISION

DIGEST

A former service member received active duty pay for 9 months following his retirement. He is considered partially at fault for not questioning his entitlement to active duty pay during the 6 months following his retirement. Waiver is denied for this period as well as the 3 months following his notice of payments of active duty pay. The member did not acquire title to the money he received and is obligated to return it to the government.

DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 97111804, December 11, 1997, which denied waiver under 10 U.S.C. § 2774 of \$48,262.54 of a former member's debt to the United States resulting from payments he erroneously received after his retirement from the Army.

Background

The member retired from the Army effective July 1, 1995. Due to an administrative error, he continued to receive direct deposit mid-month and end-of-month active duty pay during the period July 1995 through March 1996 and erroneously received \$48,262.54.

The member's paperwork to place him in a retired status was not processed in July 1995 when he retired. The member notified his finance officer in January 1996 that he had not received W-2's for active duty pay and retired pay. It was at this time the error in his record was first identified. The member requested waiver of the resulting debt contending that he discovered the error and asked for the appropriate corrections to be made. He also explained the hardship that would be caused by his having to repay the government.

The waiver request was denied on the grounds that the member should have known that he was receiving erroneous payments of pay and allowances after his retirement and therefore was partially at fault. The member challenged the denial of his waiver request to the Defense Finance and Accounting Service (DFAS). The member took exception to what he calls a broad assumption that a service member has to look at his bank statements and verify the accuracy of payments before expending the funds. The member stated that he has never looked at a bank statement in twenty years and that there is no law or regulation requiring any service member or retired former member to review their bank statements. DFAS and our Settlement Certificate upheld the denial of the waiver request.

On appeal, the member reiterates that he made several attempts to correct the error once he was aware of erroneously receiving active duty pay. He requests that at least waiver be granted from January 1996 through March 1996, the period of overpayments following his call to his finance office.

Discussion

Section 2774 of title 10 of the United States Code provides authority for waiving claims for erroneous payment of pay and allowances to members or former members 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 any other person having an interest in obtaining the waiver. The standard employed to determine whether a person 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) (1996); DOHA Claims Case No. 97090810 (October 1, 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. See DOHA Claims Case No. 97011409 (June 6, 1997). 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).

In the present case, the erroneous payments were made as a result of administrative error which delayed the processing of the member's military pay account as final until February 1996 and continued his active duty pay through March 1996. There is no indication of fraud, misrepresentation, or lack of good faith on the member's part in that regard. As requested by the member, we will address the period of July 1995 through December 1995 separately from the period January 1996 through March 1996.

We are aware that the administrative error that caused the overpayments was identified in January 1996 because the member contacted his finance office; however, it is our view that the member should have been aware of and questioned payment of active duty pay closer to the date of his retirement in July 1995. Concerning the period between July 1995 and December 1995, the member is considered partially at fault for purposes of his waiver request because he did not question the overpayments received during this time. A reasonable person retiring from the service would be aware that he was not entitled to active duty pay and allowances after the date of his retirement and that his retired pay was anticipated to be in an amount less than his active duty pay had been. In this case, the member neither verified the direct deposit payments to his account following his retirement nor alerted his spouse (who he states handled his financial matters) to anticipate a change in deposits beginning in July.

From January 1996, once the member knew of the problems with his pay, he should have retained the erroneous overpayments to be refunded to the government. The member did not acquire title to the money he received and is obligated to return it. Where the member is aware of the overpayment, we believe 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.

Conclusion

We affirm the Settlement Certificate.

/s/ _____

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ _____

Michael H. Leonard

Member, Claims Appeals Board

/s/ _____

Christine M. Kopocis

Member, Claims Appeals Board