

DATE: June 26, 1998

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In Re:

[Redacted]

Claimant

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Claims Case No. 98061501

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Debt of service member who was aware of receiving overpayments of active duty pay subsequent to his retirement may not be waived under 10 U.S.C. § 2774. The member is considered at fault under the waiver statute because he knew of the overpayments. The member did not acquire title to the money he received and is obligated to return it. His continued appeal of the calculation of his separation pay is a separate issue which does not affect the outcome of his waiver application.

### DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 98042007, May 29, 1998, which denied waiver under 10 U.S.C. § 2774 of \$9,276.95 of a former member's debt to the United States resulting from erroneous payments received incident to his military service.

### Background

Due to an administrative error, the member received erroneous payments of active duty pay and allowances after his discharge. The first month after his discharge, the member discovered that he was receiving direct deposits of what he refers to as "extra money". After discovering these deposits, he contacted the nearest military office which was the local Army National Guard, but did not contact the finance office at this last post. The deposits continued from April 1, 1992, through September 30, 1992. As a result, the member was overpaid \$10,148.05. Miscellaneous credits reduced the overpayment to \$9,276.95.

The record indicates that prior to the member's discharge, the member's commanding officer and the finance office at his post informed him that he would receive full separation pay (\$64,959.00) upon discharge. However, the member's March 9, 1992, transition orders stated he was entitled to one-half separation pay, citing 10 U.S.C. § 1174(b). The member was discharged on April 1, 1992, and received \$18,564.45. The member asked during his discharge about his separation pay entitlement. He was informed that the paperwork appeared to be correct, but that he could appeal the calculation.

Believing that he was entitled to full separation pay, the member appealed and enlisted the support of his congressional representatives concerning his appeal. When he contacted the Army National Guard office in May 1992 after discovering the deposits of active duty pay, he states that he was advised to let his congressional request resolve the matter. The administrative report from the Defense Finance and Accounting Service (DFAS) found no evidence that the member notified his congressional representatives specifically of the "extra money" problem. He apparently applied to the Army Board for Correction of Military Records concerning his separation pay entitlement. In 1996, the member received a fact sheet from DFAS which stated that he was due full separation pay and, after offsetting his debt from the erroneous payments of active duty pay, was owed \$3,774.94. Subsequently, in January 1997, DFAS informed the member and his representatives that the U.S. Army Reserve Personnel Center, Transition Assistance Management Program had reviewed the member's entitlement to separation pay. It was determined that the member is only entitled to

one-half separation pay because he is able to reenlist, according to the reentry code on his DD Form 214. Full separation pay is authorized for members who are fully qualified for retention but who are involuntarily separated and denied reenlistment.

Our Settlement Certificate discusses only the erroneous payment of active duty pay and is silent as to the amount of separation pay to which the member is entitled.<sup>(1)</sup> The Settlement Certificate denied the member's waiver request stating that the member knew he was receiving pay to which he was not entitled. On appeal, the member disputes the statement in the Settlement Certificate that "there is no indication that he was led to believe that he was entitled to retain the erroneous funds." The member calls our attention to the 1996 fact sheet which states he was entitled to the money.

### **Discussion**

We may grant waiver of a debt arising out of an 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, provided there is no 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. 97013101 (March 20, 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. 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 October 1992. There is no indication of fraud, misrepresentation, or lack of good faith on the member's part in that regard. The service member, however, readily admits that he was aware that he was receiving payments after his discharge which he questioned to authorities. DFAS reported that the payments were nearly identical to the active duty pay he had been receiving prior to his discharge.

Additionally, even though he believed he was entitled to full separation pay, in May 1992 when he discovered the overpayments, he knew that it was the Army's position that he received all the pay he was entitled to at discharge. During the months that the member received the erroneous payments, he had no reason to believe that the Service had reconsidered its decision and decided to increase his entitlement. Because the payments for those months thus were at least questionable, the member should have held them for repayment. The member in this case should have set aside the funds until their specific origin and validity was determined. See DOHA Claims Case No. 97011403 (April 18, 1997) and DOHA Claims Case No. 97090810 (October 1, 1997). The overpayments occurred in 1992, and it was not until 1996 that the member received the fact sheet he refers to in his appeal. 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 interests of the United States.

### **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. This Board decision also focuses on the member's application for waiver of the erroneous payment of active duty pay. We do not have the information necessary to review his entitlement to separation pay. If the member believes his discharge papers contain an error which caused him to be inappropriately denied separation pay, he could continue to pursue his claim and could file for a correction of his military record.