
In Re:

[Redacted]

Claimant

)

DATE: August 21, 1998

Claims Case No. 98081701

CLAIMS APPEALS BOARD DECISION

DIGEST

The waiver of a former service member's debt for the erroneous overpayment of pay and allowances under 10 U.S.C. § 2774 is not appropriate when the member is partially at fault for the error. While the Army was at fault for overpaying the member and not discovering the error for 13 months, the service member could have discovered the error shortly after it was made by reviewing the next periodic bank statement involving the account to which her active duty pay and allowance entitlements were deposited and reconciling the deposits made in the account with the amounts she and her spouse expected to receive.

DECISION

A former service member appeals the Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98052607, July 20, 1998, which affirmed the Defense Finance and Accounting Service's (DFAS) denial of waiver for the erroneous payment of \$1,212 of active duty pay in December 1991.

Background

The record indicates that an erroneous payment of \$1,212 was deposited to the service member's bank account on December 30, 1991. This amount was in addition to \$649 deposited on December 15, 1991, and \$678 also deposited on December 30, 1991. The record indicates that the member should have expected a deposit of \$1,327.95 as the net amount of her pay for the month (\$649 and \$678); \$.95 was carried over to the following month.

The service member left active duty in the summer of 1992, and in late January 1993, she received notice that she had been erroneously overpaid by \$1,212 in December 1991. In a 1994 inquiry through her Congressional representative, the member stated that she always monitored her Leave and Earnings Statements (LES), and that the \$1,212 deposit did not appear on any of them. She explained that in December 1991, her husband was a Reservist who by that time had been deployed to the Persian Gulf for about four months. She stated that her husband, an E-6 with over 16 years for pay purposes, had experienced difficulty establishing routine payments of pay. Accordingly, she did not think it unusual to see erratic deposits of large amounts to the subject bank account on which she was the primary owner. The member argues that she had no reason to look for an error in her account in December 1991, and it was not her normal practice to check for extra money if it did not appear on her LES. She contends that the government waited two years before alerting her to the problem, and that while she could have easily repaid the debt at the time she left the service, she was now in a difficult financial position.

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 be 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. 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).

There is no indication of fraud, misrepresentation, or lack of good faith on the member's part, but to prevail on this appeal, the member must be without fault. While the erroneous payment resulted from an administrative error which was not discovered until 13 months after receipt, the member cannot prevail because she was at least partially at fault.

The member admitted that she did not normally check for extra money unless it was contained on her LES, but a reasonable person in these circumstances would have checked more than her LES. The receipt of an LES is no guarantee that the net amount due under the LES was deposited to one's account. A reasonable person will verify that the net amount of money due under the LES is deposited to the bank account before they expend or withdraw funds based on the net amount due. At a minimum, a reasonable person will check the bank's periodic (normally monthly) statement to verify that the correct net amount due under any LES was deposited. And in this case, because of her husband's erratic pay situation, the service member had a greater incentive to check her bank statement. The member should have coordinated with her husband to determine the amounts he had expected to receive and to compare such amounts against the amounts actually deposited or received. While the average military family may not know the exact amount, usually such a family is aware of the approximate amount of military compensation due to it and it will verify that such amounts are received.

If the member had examined the bank statement following December 1991, she would have found the usual deposits for her pay and allowances for December 1991, plus amounts presumably deposited for her husband. If it was demonstrated in 1993 that the \$1,212 payment was an erroneous payment on the member's account, then the member's husband was still due a substantial amount of active duty pay. There is no indication in any of the service member's correspondence that the member's husband filed a claim for unpaid military compensation once the member became aware of the \$1,212 debt. The copy of the bank statement from the period that the member provided also contained a notation suggesting that the \$1,212 involved the member's account ("ARMY ACTIVE"), while another large deposit for \$6,799, which the member indicates involved her husband's pay, had a much different notation ("FT MCPN"). In totality, a reasonable person exercising due diligence would have had sufficient information to alert her to the erroneous nature of the \$1,212 deposit shortly after it was made.

The member points out that repayment will be a financial hardship for her and her family; however, financial hardship does not provide a basis for waiver. See DOHA Claims Case No. 97090809 (September 23, 1997); DOHA Claims Case No. 97041401 (June 26, 1997); DOHA Claims Case No. 97032501 (June 9, 1997); and Petty Officer Patrick K. Reedy, USN (Retired), B-257862, Jan. 17, 1995. The member can request of DFAS that she be allowed to repay the debt over an extended period of time. DFAS has authority to make such determinations in accordance with the relevant regulations.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board