

DATE: October 27, 1998

In Re:

[Redacted]

Claimant

)

Claims Case No. 98092212

CLAIMS APPEALS BOARD DECISION

DIGEST

A Service member is considered at least partially at fault if he/she knows or should know that a payment was erroneous and failed to set aside the overpayment for its eventual return to the government. A waiver request is denied under the circumstances.

DECISION

This is in response to an appeal of our June 15, 1998, Settlement Certificate, DOHA Claim No. 98020928, which denied a former military member's request for waiver of an indebtedness to the government. The debt arose from erroneous payments the member received incident to her military service.

Background

The record shows that the member was discharged on June 1, 1992⁽¹⁾ and that she was entitled to a Special Separation Bonus (SSB) in the gross amount of \$35,137.62 (or a net amount of \$29,286.72 after Federal withholding tax). In addition to the SSB, the member should have received a *net* amount of \$4,054.35 for other entitlements. Prior to discharge, the member received payments totaling \$28,743.38 (\$27,502.38 on March 31, 1992, and \$1,241 on May 1, 1992), including a premature partial payment of her SSB. As a result, she should have anticipated receiving a net amount significantly less than the \$29,156.23 she received upon discharge.

The employee stated that when she received the payment on March 31st she was told to keep it and that a separation check for the difference between this amount and the SSB due would be issued upon her discharge in June. On the day of discharge, there was confusion among the finance office staff as to the correct payment due the member. She received a payment of \$29,156.23 and, not knowing an exact amount due her but thinking this amount was "a bit much", she questioned the amount of the payment. She was assured by the staff in the finance office that the payment was correct. When she began receiving debt collection notices in 1993, she questioned the notices and was verbally told that the debt was canceled.

The Settlement Certificate denied the member's waiver request stating that collection of the overpayment would not be against equity and good conscience. We held that the member reasonably could not have believed that she was entitled to receive another payment in excess of \$29,000, and she should have pursued the matter further and retained the excess funds for subsequent refund to the government.

On appeal, the member contends that she did all that she could do under the circumstances to question the payment and therefore has met the criteria for waiver. She reiterates that she brought the matter of a possible overpayment to the personnel at the finance office where the check was given to her. The member also points out what she believes is an error in the computations in the Settlement Certificate.⁽²⁾

Discussion

Regarding the amount of the debt, the Settlement Certificate correctly states that the employee was overpaid a total of \$24,558.54. The calculations used in the member's appeal letter do not take into consideration the member's entitlements other than SSB.⁽³⁾ It is understandable that the member's focus has been on the SSB; however, upon discharge she was entitled to the balance of the SSB plus pay and allowances minus appropriate deductions. By June 1, the member had actually received payments of \$57,899.61, rather than the \$33,341.07 she was entitled to. Her resulting debt is \$24,558.54.

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. *See* 10 U.S.C. § 2774. The standard employed to determine whether a member was at fault in accepting an erroneous payment is whether, under the particular circumstances involved, a reasonable person should have been aware that she was receiving payments to which she was not entitled. *See* Standards for Waiver, 4 C.F.R. § 91.5(b)(1996); DOHA Claims Case No. 97090810 (October 1, 1997); and cases cited therein. We have consistently held that when a member knows or reasonably could be expected to know she is receiving pay in excess of her entitlement, she has a duty to retain such amounts for subsequent refund to the government.

The member in this case is at least partially at fault. The member acknowledges that although she did not know the exact amount to expect to receive upon her discharge, she doubted that the payment she received was accurate. As her appeal states, she reasonably expected to receive a gross payment around \$7,000. She received \$29,156.23, and knowing it was too much did question the amount. In addition to questioning the finance office staff as she did, the member should have retained the overpayment for subsequent refund. The record indicates that the member believes that she should not be penalized by having to refund the \$29,156.23 she received due to administrative error on the part of the finance office. We note that there is no legal authority which provides for a service member who *knowingly* receives an overpayment to benefit by keeping the overpayment. When a service member knows that there is a problem with her payments, she acquires no right to the erroneous payment. As a result, collection of the erroneous payment is neither against equity and good conscience nor contrary to the interest of the United States. *See* DOHA Claims Case No. 97102801 (November 6, 1997); and DOHA Claims Case No. 97011409 (June 6, 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 member originally was scheduled to be discharged in March 1992, but her discharge date was changed to June 1992.

2. The member subtracts the March 31st payments totaling \$27,502.38 from the gross SSB entitlement to calculate a balance due upon discharge of \$7,635.24. After deducting this sum from the June 1 payment of \$29,156.23, the member calculates her debt as \$21,602.99.
3. The member's appeal correctly states the gross amount of the SSB entitlement, but does not account for the \$5,850.90 in taxes due on this entitlement. The appeal also does not acknowledge the additional pay and allowances the member was entitled to upon discharge, nor the taxes or other deductions due.