

This decision was affirmed by the Deputy General Counsel (Fiscal), Department of Defense, on February 9, 2001.

DATE: October 29, 1998

In Re:

[Redacted]

Claimant

Claims Case No. 98072002

CLAIMS APPEALS BOARD DECISION

DIGEST

Waiver of overpayments of active duty pay and allotments received after discharge is denied. A reasonable person would know that deposits had been made in his bank account. Under the circumstances, collection is not against equity and good conscience.

DECISION

This is in response to an appeal of our July 1, 1998, Settlement Certificate, DOHA Claim No. 98051102, 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 his military service.

Background

The record shows that the member's total debt is \$7,200.45. The member was discharged on March 20, 1992, and he was entitled to receive a final separation payment in the amount of \$28,960.42. [\(U\)](#) He received \$30,916.08; this resulted in an overpayment of \$1,955.66. In addition, the member continued to receive payments as if he were on active duty through the mid-month June 1992 payday. He erroneously received pay and allowances through June 15, 1992, resulting in an overpayment totaling \$2,941.66. The member's allotments totaling \$767.71 per month were erroneously paid for the period March 1992 through May 1992, causing an overpayment of \$2,303.13. These allotments included: a

discretionary allotment, Army Assistance Fund allotment, an insurance allotment, and a bank account allotment.

The Service recommended waiver of a portion of the debt resulting from overpayments of final pay, the allotments for arch 1992, and the Army Assistance Fund allotment for the period April 1992 through May 1992. Our Settlement Certificate agreed to this partial waiver of \$2,725.37, and denied waiver of \$4,475.08 for the overpayments resulting from the erroneous payment of pay and allowances from March 31, 1992, through June 15, 1992, and the discretionary allotment, insurance allotment, and banking account allotment for the period April 1992 through May 1992. We determined that the member should have questioned his entitlement to receive active duty pay and the allotments after discharge.

On appeal, the member contends that he only received his separation pay and did not receive allotments or leave and earnings statements after discharge. He states that he had no reason to believe that the amount he was awarded upon discharge was erroneous.

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. *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 he was receiving payments to which she was not entitled. *See* Standards for Waiver, 4 C.F.R. § 91.5(b); 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 he is receiving pay in excess of his entitlement, he has a duty to retain such excess amounts for subsequent refund to the government. *See* DOHA Claims Case No. 98051107 (July 28, 1998).

We agree with the member that he had no reason to believe that the amount he was awarded upon discharge was erroneous. The overpayment of final separation pay has been waived. In dispute is the portion of the debt that has not been waived, *i.e.*, the active duty pay and allotments paid after his discharge. The member has provided no evidence to support his April 11, 1998, statement that he did not receive pay after discharge.

This Office bases decisions on the written record. The Defense Finance and Accounting Service (DFAS) has stated that the member was issued leave and earnings statements (LESSs) after March 20, 1992, and copies are in the record. The member has not provided clear and convincing evidence to the contrary. We realize, however, that it is possible that after discharge, the member did not receive the LESSs sent by DFAS. Even if the leave and earnings statements were not received by the member, however, his bank statements would reflect the payments of active duty pay and his insurance policy would also reflect the payments by the government. We note that the member should have been aware that the allotments (discretionary for his dependents, insurance, and banking) were being paid on his behalf, and that he was receiving mid-month and end-of-month active duty pay after his discharge. Under the circumstances, collection of the overpayments is not against equity and good conscience or contrary to the best interest 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. The member was entitled to a Special Separation Bonus in the gross amount of \$35,580.89, plus pay and allowances for March 1-20, minus deductions.