

This decision was affirmed by the DoD Deputy General Counsel (Fiscal) on December 28, 2000.

DATE: March 11, 1999

In Re:

[Redacted]

Claimant

Claims Case No. 99012022

CLAIMS APPEALS BOARD DECISION

DIGEST

A reserve member believed the active duty payments he received after release from active duty were a result of the pay problems he experienced prior to release, which he had repeatedly attempted to resolve with the Defense Finance and Accounting Service. Upon learning of his debt for the payments received after release, he continued his attempts to reconcile his prior pay problems. Under the waiver statute, the member is considered partially at fault for accepting the payments and not specifically questioning his entitlement to receive regular mid-month and end-of-month active duty pay for 6 months after release.

DECISION

This is in response to an appeal of our September 28, 1998, Settlement Certificate, DOHA Claim No. 98092206, which sustained the Defense Finance and Accounting Office's (DFAS) denial of a Department of Defense (DoD) member's application for waiver of a debt of \$22,635.93. ⁽¹⁾ The debt arose when the member received erroneous payments of active duty pay.

Background

The record indicates that the member was released from active duty on July 16, 1993. Although he was entitled to receive a final separation payment in the net amount of \$6,212.98, he did not receive a final separation payment.

However, the member continued to receive regular active duty pay from July 17, 1993, through January 31, 1994. The Settlement Certificate concluded that the member appropriately should keep the payments received through August 15, 1993, which were equal to the final separation owed him, and waived the \$185.57 overpayment. In question on appeal are the mid-month and end-of-month active duty payments deposited in his account after August 15. This debt was established in October 1996. Initial notification of the debt was mailed to a former address, so that it appears that the member was not made aware of this debt until 1997.

On appeal, the member discusses on-going correspondence with DFAS and the Army concerning pay problems, including what he defines as irregular postings of arrears from various state agencies in the fall of 1993. (2) We note that on the Application for Waiver, dated July 1998, the member stated that he believed that he had experienced pay oversights and errors since 1989 which he aggressively pursued, but had been verbally reassured that all payments made had been proper. He continued to request written affirmation that his pay record had been reconciled. It appears that because he never received a written statement from DFAS stating that this account had been reconciled before his release, he believed the current debt was a result of these unspecified pay problems. His application also states that his active duty payments stopped following separation, but acknowledges that federal and state tax deductions continued for more than 3 years without the issuance of W-2's. The correspondence provided in the record by the member does not state that he specifically questioned the direct deposit of active duty payments made after his discharge.

Discussion

Under 10 U.S.C. § 2774, this Office may waive claims of the United States against members or former service members only when 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 former member or anyone else having an interest in obtaining the waiver. A member is considered to be at least partially at fault and waiver is precluded when he receives a significant unexplained increase, or otherwise knows, or reasonably should know, that an erroneous payment has occurred and fails to make inquiries or bring the matter to the attention of the appropriate officials. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996); DOHA Claims Case No. 99010416 (February 18, 1999). In such circumstances, 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. 97011409 (June 6, 1997); *Dennis R. Nix--Reconsideration*, B-249371.2, April 30, 1993.

We understand that the member was frustrated with pay problems and the lack of written reconciliation from DFAS prior to his release from active duty. His turmoil was exacerbated by his not having received documentation regarding the payments that were being deposited to his account after his discharge. Even though the member in this case apparently believed he was owed pay after his release due to prior pay problems, the member does not provide evidence of an approximate amount he expected to be repaid. The current debt arose when the member continued to receive, for six months after his release from active duty, deposits that were the same dollar amount he had been receiving while on active duty and on the same mid-month and end-of-month paydays that active duty payments had been received. We believe that a reasonable person would make inquiries to verify the nature and amount of mid-month and end-of-month payments of a constant sum which continued for months after his release. Under the waiver statute, the member is considered partially at fault for accepting these payments and not questioning their nature. *See* DOHA Claims Case No. 99010416, *supra*. The member's lack of acknowledgment that the current debt was the result of active duty payments erroneously received after discharge does not affect his duty under the waiver statute. It is a long standing rule that a person who receives erroneous payments from the government does not acquire title to the money and has a duty to return the money when asked to do so. When a person, as the member is this case, is aware or should be aware that he is receiving overpayments, collection of the excess amounts is not against equity and good conscience and is in the best interest of the United States. *See* DOHA Claims Case No. 98040111 (July 8, 1998).

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 Settlement Certificate agreed with DFAS's recommendation to waive an additional \$185.57. The member's original debt of \$47,681.07 had previously been reduced to \$22,821.50, when the member was refunded the difference, which accounted for over-deductions for federal and state taxes from July 1993 through September 1996.
2. The record does not explain why arrears from state agencies would affect payments received from the Service. The member's Application for Waiver references repeated transfers among federal agencies and suggests that the member believed, perhaps as a result of these transfers, that he had experienced pay errors in the past.