In Re:

[Redacted]

Claimant

)

March 25, 1999

Claims Case No. 99030812

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member is aware that he has received an overpayment, he does not acquire title to the excess amounts, and he has a duty to hold the money for eventual repayment. In such circumstances waiver is not proper under 10 U.S.C. § 2774.

DECISION

A former Navy member appeals the February 5, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98113019, which denied the service member's request for waiver of $14,877.85, resulting from the erroneous payment of a Selective Re-enlistment Bonus (SRB).[(1)]

Background

The record shows that on October 18, 1995, the member petitioned the Board of Correction of Naval Records (BCNR) to change his record to show that he "be able to reenlist as of 95MAR31 for 48 months with no loss of SRB." On August 6, 1996, the BCNR changed the member's record to show that he reenlisted on March 1, 1995, for 48 months which entitled the member to a zone "B" SRB. As a result of this action, the member was authorized a SRB in the total amount of $26,970. In his September 5, 1996, letter to the BCNR the member objected tothe action of the BCNR because he had asked for a correction to allow him to reenlist, not to reenlist him. On November 21, 1996, the member then initiated action to rescind the August 6th correction, which the BCNR approved on January 13, 1997. Meanwhile, as of October 1, 1996, the member had received three SRB payments totaling $16,181.20.

The Navy then initiated action to recover the erroneous SRB payments. The Navy first asked for a payment of $7,723.31. The member enclosed his June 30, 1997, check in that amount with a letter to a local disbursing officer specifically advising that the amount requested was incorrect because his actual indebtedness was about twice that amount. The member also requested verification of the correct indebtedness.

The member then received a letter from the Defense Finance and Accounting Service (DFAS) in Denver advising him that he owed $7,720.60. In his August 5, 1997, letter the member stated that he would stop payment on the first check he sent and make payment in the new amount requested. The member again stated that the actual amount of indebtedness was about twice the amount requested, and he requested confirmation of his actual indebtedness. The record also contains a copy of correspondence to his Congressional representative in which the member relates an additional written or verbal effort in October 1997 to clarify the amount of the indebtedness. On November 13, 1997, DFAS (Denver) advised the member that the debt originator (DFAS-Cleveland) had adjusted his debt from $7,685.85 to $14,877.85, and that it had applied his payment of $7,720.60 to the debt.

In his appeal, the member states that DOHA did not adequately consider some of the details involved. First, he points out that he told the BCNR not to make any payments to him well before any payments were made. Thus he disputes that the payments were "erroneous" because they were triggered by BCNR's refusal to correct an error it had made. Second,

he points out that he is not requesting waiver of the total $14,877.85, but only the balance of $7,157.25. Third, the member requests waiver of this amount because on more than three occasions he had advised either the Navy or DFAS-Denver that the amount of his indebtedness was greater than the amount they had claimed. Fourth, the member contends that neither DFAS nor the Navy has offered any documentary evidence indicating that either had followed up the member's report that they had understated the indebtedness, which is indicative of the fact that either one failed to act. Such inaction, the member contends, "is a statement by the government that, the government is willing to waive any claim to the amount of money involved." Fifth, the member states that DFAS-Denver pursued recovery on the balance of the indebtedness only after "another agency" had requested DFAS-Denver to recover the additional amount. Sixth, the member has to be "able to continue on with my life and be able to stop wondering" when or if the government would come after him for the additional amount.

Discussion

Preliminarily, we find that the payment of the SRB was erroneous; otherwise, we would have no jurisdiction to consider this matter further. Generally, a correction of a factual matter in a military or naval record under 10 U.S.C. § 1552 is final and conclusive on this Board. *See* DOHA Claims Case No. 96121102 (August 22, 1997), *aff'd on reconsideration*, DOHA Claims Case No. 97091101 (May 5, 1998). Even if the BCNR refused to rescind the August 1996 correction until the member formally applied for such relief, the BCNR's January 1997 action rescinded the August 1996 correction action. Thus, any SRB payments paid to the member were paid erroneously.

Also for purposes of this appeal, we accept the member's statement that on more than three occasions he had advised DFAS or the Navy that the amount they were claiming was insufficient. DFAS-Denver's 1998 administrative report to us states that the member had insisted in his June 30, 1997, letter that he believed that his indebtedness was understated. DFAS does not indicate how it followed up the member's report of the understatement of his debt between June and November 1997, and for purposes of this appeal we agree with the member that DFAS and the Navy failed to act quickly to verify the proper amount of the indebtedness. Finally, for purposes of this appeal, we will accept the member's contention that DFAS-Denver did not pursue the additional indebtedness until after DFAS-Cleveland reported it. But no matter how frustrating the Navy's and DFAS's inactions may have been, there is no basis to conclude that the government waived the balance of the indebtedness.

Under 10 U.S.C. § 2774, DOHA has the authority to waive collection of erroneous overpayments of pay or allowances to service members if collection would be against equity and good conscience and not in the best interest of the United States and if there is no indication of fraud, fault, misrepresentation, or lack of good faith. *See* Standards for Waiver, 4 C.F.R. § 91.5(b) (1996). The standard we employ to determine fault is whether a reasonably prudent person knew or should have known that he was receiving payments in excess of his entitlements. Our decisions indicate that waiver is not appropriate when the member is aware that he is being overpaid. *See* DOHA Claims Case No. 98040118 (July 6, 1998); DOHA Claims Case No. 97082535 (November 4, 1997). The member does not acquire title to the excess payments merely because the government made an administrative error, and the member has a duty to return the erroneous amounts to the government which resulted from the error when asked to do so. *See* DOHA Claims Case No. 98121616 (February 18, 1999); DOHA Claims Case No. 98040118, *supra;* and DOHA Claims Case No. 97082535, *supra. See also Master Sergeant Haywood A. Helms, USAF,* B-190565, Mar. 22, 1978.

The member cites no legal authority to support his theory that government inaction automatically results in a waiver of the debt. There is no such authority. DOHA gives considerable weight to DFAS or service recommendations on waiver of debts over $1,500 resulting from the erroneous overpayment of pay or allowances. But the Secretary of Defense delegated to DOHA, not to the Navy or to DFAS, the authority in 10 U.S.C. § 2774 to waive such debts over $1,500. It follows, therefore, that any action or lack of action by the Navy or DFAS cannot affect the discretion properly exercised by DOHA.

Additionally, the member essentially argues that the government is estopped from collecting the remaining debt. In an even more extreme situation where a Navy employee obtained erroneous oral and written advice from Navy employee relations officials, which the employee reasonably relied upon, the Supreme Court noted that the government cannot be estopped from denying benefits not otherwise permitted by law. *See OPM v. Richmond*, 496 U.S. 414 (1990); *reh'g denied,* 497 U.S. 1046 (1990). Here, in contrast, the matter involves a lack of action by the government and no evidence

of reasonable reliance.

Applying our prior decisions and those of the Comptroller General noted above, we have no basis to grant the relief requested. In this situation, the member knew that he was not entitled to any part of the SRB, and knew that he had to refund whatever he received. The Standards for Waiver do not permit waiver simply because the government made an administrative error even when the error is coupled with inaction in determining the true facts by government officials.

Conclusion

Except for the amount involved in this waiver application, we affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

1. The total of the erroneous payments received by the member was $16,181.20. The member refunded $7,720.60 and apparently received credit for an additional $1,303.35 deducted against the amount otherwise due to him when he terminated his service. On appeal, the applicant seeks waiver of the balance, $7,157.25, not the $14,877.85 noted in the Settlement Certificate.