

DATE: March 29, 1999

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In Re:

[Redacted]

Claimant

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Claims Case No. 99021601

## CLAIMS APPEALS BOARD DECISION

### DIGEST

When a retired colonel subject to the limitations set forth in 5 U.S.C. § 5532 knows that the Defense Finance and Accounting Service has calculated his retired pay using the incorrect base civilian salary and receives an overpayment of retired pay, waiver of the erroneous payment may not be granted.

### DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) November 6, 1998, Settlement Certificate, DOHA Claim No. 98110206, which denied a service member's request for waiver of \$661.96 of a total debt of \$2,715.44. The debt is due to the government's failure to deduct the proper amounts in accordance with 5 U.S.C. § 5532.

### Background

The record indicates that the member retired from active duty in January 1995 and accepted a civilian position with the Department of Veterans Affairs (VA) in May 1995. As a retired officer, the member was subject to 5 U.S.C. § 5532.<sup>(1)</sup> His retired pay was properly reduced through January 4, 1997. When his civilian salary increased effective January 5, 1997, and January 4, 1998, his retired pay cap offset was not increased. As a result, he was overpaid \$2,715.44 from January 5, 1997, through February 28, 1998.

Our Settlement Certificate agreed with the recommendation of the Defense Finance and Accounting Service (DFAS) to waive \$2,053.48. This amount was the overpayment received during the period January 5, 1997, through January 3, 1998, when the member experienced several changes in his retired pay.<sup>(2)</sup> The overpayment received during the period January 4, 1998, through February 28, 1998, was not waived. The Settlement noted that the member's retired pay cap deduction as shown on the Retiree Account Statement he received actually decreased during this period, and the member was aware that any increase in his civilian salary would have an effect on his retired pay. The Settlement concluded that the member should have questioned the accuracy of his retired pay during this period of the overpayment and failed to do so.

On appeal the member states that he did question the accuracy of his retired pay during the period in question. He states that in early January 1998 he wrote to DFAS asking whether the Executive Level pay cap had been increased. The member noticed in DFAS's reply that the cap had been increased and that an incorrect base civilian salary was listed and would be used as the basis for his new retired pay computations. The record includes a copy of the member's January 30, 1998, letter to DFAS stating his correct civilian salary as of January 4, 1998.

### Discussion

Under 10 U.S.C. § 2774, we may waive a claim for an erroneous overpayment of pay or allowances if collection would

be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member. However, 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). Persons who receive excess payments acquire no rights to the money and are bound in equity and good conscience to make restitution. Moreover, the knowledge of such an overpayment carries with it the obligation to return that amount, or set aside an equivalent amount for refund to the government when the error is corrected. *See DOHA Claims Case No. 97011404* (April 4, 1997).

The Retiree Account Statement the member received in mid-January indicated an expected decrease in the retired pay cap offset and a corresponding increase in his retired pay. These actions were expected as the result of the Executive Level V pay cap increase effective January 1, 1998. DFAS's January 15, 1998, letter to the member states that the retired pay he was to receive on February 1 would be calculated using the new Executive Level V pay cap of \$110,700 and the base civilian salary of \$90,090.00. As a result of the incorrect base civilian salary, the member should have known that his retired pay for January would include an overpayment. The member's January 30, 1998, letter to DFAS states that his base civilian salary was \$94,287, not \$90,090.00. The member should have expected DFAS to recalculate his retired pay after he notified it of his correct base civilian salary. As a result of the member's January 30 letter, he should have anticipated a reduction in his retired pay and the need to return any overpayment received before the recalculation was performed.

### Conclusion

We affirm the Settlement Certificate.

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Michael D. Hipple

Chairman, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_

Christine M. Kopocis

Member, Claims Appeals Board

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Jean E. Smallin

Member, Claims Appeals Board

1. Section 5532 of title 5 of the United States Code contains two restrictions on the amount that retired service members may be paid in retired pay while employed as a Federal civilian employee. Section 5532(b), a codification of the Dual Compensation Act of 1964, contains a formula which reduces the amount a retired regular officer may be paid while serving as a civilian employee. The exempt amount is adjusted annually for cost of living. Section 5532(c), which has its roots in the Civil Service Reform Act of 1978, applies to all military members and generally provides a cap at the current rate of pay at level V of the Executive Schedule which the combination of retired pay and civilian salary cannot exceed. Section 5532 is generally referred to as the Dual Compensation Act.

2. The changes included two cost of living increases for retired pay and the start of VA disability compensation.