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In Re:

[Redacted]

Claimant

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April 15, 1999

Claims Case No. 99033117

## 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 November 16, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98111207, which denied the service member's request for waiver of \$2,261.01, resulting from the erroneous payment of active duty mid-month pay after retirement. [\(1\)](#)

### Background

The record shows that the member retired from the Navy on January 31, 1998, and he received a final payment of pay and allowances as of the end of January 1998. The member states that on February 12, 1998, DFAS deposited \$2,261.01 to the member's credit union account for active duty pay and allowances. In this appeal, the member produced a copy of a March 9, 1998, letter he sent to DFAS in which he questioned this payment. The member correctly points out that after payment of his final active duty pay and allowances, he did not expect any additional DFAS deposits to his account until receipt of his first retired pay deposit. On February 27, 1998, the member states that he did receive a deposit from DFAS which was consistent with the amount he expected to receive for retired pay. After numerous unsuccessful attempts to obtain a response to the March 9, 1998, letter, the member's spouse finally reached an official at DFAS by telephone who advised her that the payment was correct. The member was advised at a later date that the payment was erroneous.

### Discussion

For purposes of this appeal, we will assume that the member suspected an error and tried to verify his entitlement, as he explains.

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); and *Philip W. McNany*, B-198770, Nov. 13, 1980.

In this case, the member admittedly suspected an error. His spouse obtained a verbal assurance of the propriety of the

payment from a DFAS official, but, as the member admits, he was unable to articulate any basis for the payment in an amount closely approximating the amount he would have received for active duty pay and allowances at mid-month if he had remained on active duty. Our waiver application decisions have closely scrutinized such payments, and we have emphasized that any person who receives such a payment must be able to articulate a reasonable basis for expecting such a payment in the amount involved. *See* DOHA Claims Case Nos. 99012022 (March 11, 1999); 97102801 (November 6, 1997); 97012103 (June 26, 1997); and 97011409 (June 6, 1997). As these decisions explain, 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.

### **Conclusion**

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Carol A. Marchant

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Carol A. Marchant

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

1. The member's total indebtedness was \$2,328.77, but the Defense Finance and Accounting Service (DFAS) recommended, and our Office agreed, that \$67.76 of the member's debt which was based on miscalculation and overpayment of the member's final active duty pay and allowances prior to retirement, is waived. That amount is not in issue here.