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The Deputy General Counsel (Fiscal), Department of Defense, reversed this decision on October 3, 2000.

April 28, 1999

In Re:

[Redacted]

Claimant

Claims Case No. 99041204

CLAIMS APPEALS BOARD DECISION

DIGEST

A member was involuntarily separated from the Army following an unjust officer evaluation report, and upon application to the Army Board of Correction of Military Records, he was reinstated on active duty. After reinstatement, finance officials mistakenly paid the member properly accrued back pay and allowances without offset for collection of separation pay and other payments he received at separation, which, upon reinstatement, became erroneous. The waiver of any net indebtedness that the member would have experienced upon offset of the back pay and allowances against payments made to him at separation is proper, but waiver of the value of the back pay and allowances is inappropriate because the member should have known that he cannot receive both the separation payments and his back pay and allowances for the same period of time.

DECISION

A member was involuntarily separated, and then reinstated to active duty after the Army Board for Correction of Military Records (ABCMR) corrected his record. Upon reinstatement, the Department of Defense erroneously paid the member back pay and allowances without offset against the amount paid to him for the separation allowance he received at separation, and failed to deduct for the value of the leave credited to his leave account. The member appeals the March 31, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 99010402, which granted in part (\$41,690.33), and denied in part (\$19,227.67), his application for a waiver of the indebtedness (\$59,746.50) which he owed to the government once his separation was invalidated.

Background

The member was involuntarily separated from the Army on November 29, 1996, due to an unjust officer evaluation report, and upon application to the ABCMR, he was reinstated on active duty on April 1, 1997. When he was separated, the member received a separation payment of \$52,717.50, plus \$7,029 for 60 days of lump-sum leave that the member had accrued. Upon reinstatement, the member erroneously received \$18,056.17 for properly accrued back pay and allowances without offset to recover the separation allowance and \$1,171.50, the value of the 10 days of leave that the member requested to be re-credited to his leave account.

Following the recommendation of the Defense Finance and Accounting Service (DFAS), DOHA waived the member's indebtedness which resulted from the invalidation of the separation except for \$18,056.17, an amount equal to the amount of the back pay, and \$1,171.50, the value of 10 days of leave which was credited to the member's leave account and is available for use.

On appeal, the member contends that it is against equity and good conscience and not in the best interest of the United States to collect the \$19,227.67 of the remaining indebtedness. He points out that there was extreme hardship, heartache, and psychological stress associated with being involuntarily separated and that no monetary value could offset such a hardship.

Discussion

Under 10 U.S.C. § 2774, the government may waive collection of erroneous overpayments of pay or allowances to a member 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.

DOHA's denial of the request to waive the portion of the debt related to the 10 days of leave is appropriate. Generally, an indebtedness resulting from erroneous payments of accrued leave resulting from an improper separation may be waived, but this rule does not extend to the 10 days that were credited to the member's leave account and are available for the member's use during current service. To do otherwise would permit the member an unfair windfall and result in excess entitlements. ⁽¹⁾ *See Major Terrence W. Alligood, USAR, B-239275, Feb. 19, 1991; aff'd B-239275.3, April 1, 1992.*

The portion of the debt attributable to back pay involves a well-established policy for applying the waiver statute in a way which equitably protects members who are restored to service after a record correction, but, unfortunately, it was followed by an administrative error in making the appropriate adjustments. In record correction cases where a member is restored to active duty, the member is credited with back pay and allowances for the period in which he is away from active duty, but this entitlement is offset by any amounts he received as a result of the separation which was later invalidated. The purpose of record correction and payments resulting therefrom is to restore the member to a position as near as possible to the position he would have been in if there had been no error. Therefore, the policy of the Comptroller General, and of this Office as his successor, is to consider waiver of the net amount of the debt which

remained outstanding after all necessary set offs and adjustments had been made to the member's pay account so as to prevent him from returning to active duty in debt. *See Chief Hospital Corpsman William R. Brown, USN (Ret.), B-270349, Dec. 17, 1996; 56 Comp. Gen. 587 (1977).*

The administrative error here involved the failure of finance officials to retain the back pay and allowances for offset against the invalidated separation payments. The member was not responsible for this mistake. But he should have recognized that he cannot keep the full amount of severance pay, and, at the same time, expect to be restored to active duty with pay and allowances for the period that he was away. When he received the back pay, he should have retained it for the eventual satisfaction of any debt that would naturally result from the invalidation of the separation, and he is at least partially at fault for his failure to do so. Accordingly, we see no reason to grant waiver relief beyond that which normally occurs in such back pay situations, *i.e.*, waiver of any net indebtedness after an offset of the back pay and allowances. A member does not acquire title to an excess payment merely because an administrative error occurred, and he has a duty to return the excess amount when asked to do so. *See Master Sergeant Haywood A. Helms, USAF, B-190565, Mar. 22, 1978.*

The member notes that his improper separation caused stress and hardship. We do not dispute his contention, but we must apply established precedents for granting or denying waiver. The member does not suggest that he suffered any financial hardship, but even if he had, personal or family financial hardship is no basis for waiver. *See DOHA Claims Case No. 98121616 (February 18, 1999).*

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. In effect, the member would be paid for the leave and still have it available for use.